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Productivity Commission

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Arrangements

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Publications enquiries

Media and Publications, phone: (03) 9653 2244 or email: maps@pc.gov.au

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).



Australian Government
Productivity Commission

Canberra Office

Level 2, 15 Moore Street
Canberra City ACT 2600
GPO Box 1428
Canberra City ACT 2600

Telephone 02 6240 3200
Facsimile 02 6240 3399

Melbourne Office

Telephone 03 9653 2100

www.pc.gov.au

□ 5 September 2014

The Hon Joe Hockey
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

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

Yours sincerely

Dr Warren Mundy
Presiding Commissioner

Angela MacRae
Commissioner

Terms of reference

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

Background

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

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

Scope of the Inquiry

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

In particular, the Commission should have regard to:

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

-
- (a) the supply of law graduates and barriers to entering the legal services market
 - (b) information asymmetry
 - (c) other issues of market failure
 - (d) the structure of the legal profession in State and Territory jurisdictions
 - (e) legal professional rules and practices
 - (f) court practices and procedures
 - (g) models of billing practices
 - (h) the application of taxation laws to legal services expenditure, and
 - (i) other features of the legal services market which drive costs
4. whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issues in dispute
 5. the impact of the costs of accessing justice services, and securing legal representation, on the effectiveness of these services, including analysis of:
 - (a) the ability of disadvantaged parties, including persons for whom English is a second language, to effectively self-represent, and
 - (b) the extent to which considerable resource disparity impacts on the effectiveness of the adversarial system and court processes
 6. the economic and social impact of the costs of accessing justice services, and securing legal representation
 7. the impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions, including analysis of discovery and case management processes
 8. alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, in both metropolitan areas and regional and remote communities, and the costs and benefits of these, including analysis of the extent to which the following could contribute to addressing cost pressures:
 - (a) early intervention measures
 - (b) models of alternative dispute resolution
 - (c) litigation funding
 - (d) different models of legal aid assistance
 - (e) specialist courts or alternative processes, such as community conferencing
 - (f) use of technology, and
 - (g) expedited procedures

-
9. reforms in Australian jurisdictions and overseas which have been effective at lowering the costs of accessing justice services, securing legal representation and promoting equality in the justice system, and
 10. data collection across the justice system that would enable better measurement and evaluation of cost drivers and the effectiveness of measures to contain these.

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

David Bradbury
Assistant Treasurer

[Received 21 June 2013]

Contents

The Commission's report is in two volumes. **This volume contains the overview, recommendations, summary of the Commission's main proposals and chapters 1 to 17.** Volume 2 contains chapters 18 to 25, appendix A and references. Below is the table of contents for both volumes. Appendices B to K are referred to in the chapters but are not included in the report. They are available from the Commission's website (www.pc.gov.au).

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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
AIIA	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

CL SIS	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

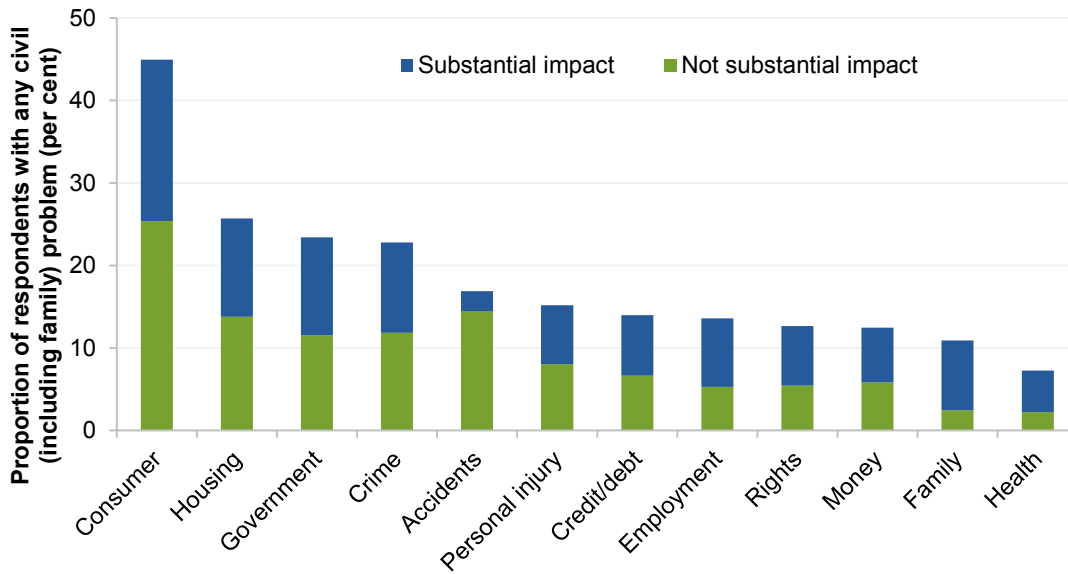
Civil disputes span a wide range of areas and involve a variety of parties, or as Professor Dame Hazel Genn puts it, 'comprise a rag-bag of matters and participants':

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).

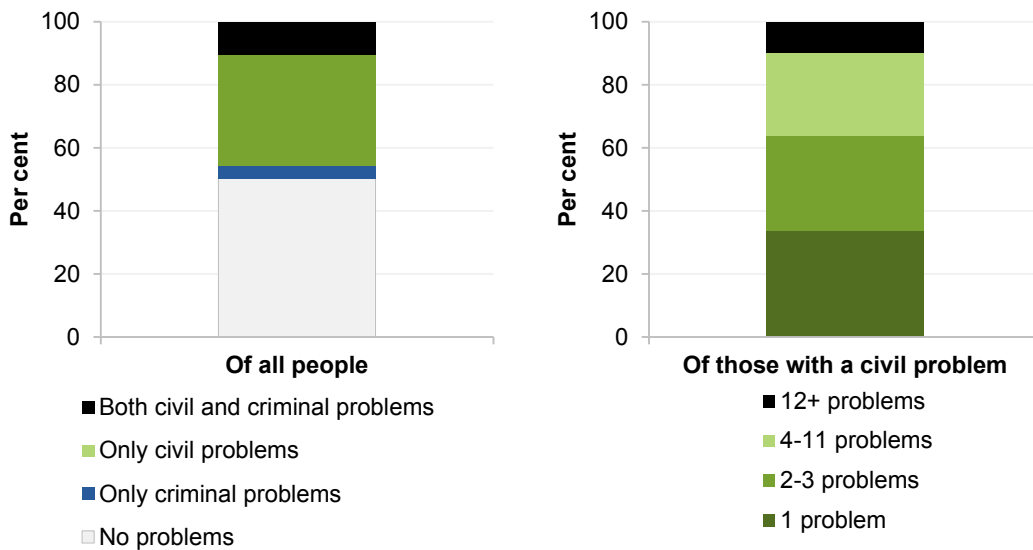
Legal problems were also concentrated among a minority of respondents (figure 2). Of those who experienced at least one civil problem, around 10 per cent accounted for more than half of those legal problems.

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

	Ombudsmen and complaint bodies	Tribunals	Civil courts	
Number of institutions/providers	71 Ombudsmen and complaint bodies <ul style="list-style-type: none"> National: 22 States/territories: 49 	58 Tribunals <ul style="list-style-type: none"> Commonwealth: 11 States/territories general: 4 States/territories specialist: 43 	43 Courts <ul style="list-style-type: none"> Commonwealth: 4 States/territories general: 21 States/territories specialist: 18 	
Nature of service	<ul style="list-style-type: none"> Receive and resolve complaints Conduct inquiries into individual or systemic cases 	<ul style="list-style-type: none"> Administrative review Civil dispute resolution Binding decision 	<ul style="list-style-type: none"> Judicial dispute resolution Binding decision Some courts provide 'in-house' alternative dispute resolution services 	
Volume of matters	Total 542 000 complaints (arising from 3 709 000 contacts) <ul style="list-style-type: none"> National: 277 000 States/territories: 265 000 	Total 395 000 <ul style="list-style-type: none"> Commonwealth: 71 000 States/territories general: 194 000 States/territories specialist: 130 000 	Total 673 393 <ul style="list-style-type: none"> Magistrates: 420 144 District: 28 214 Supreme: 28 309 Probate: 65 787 Federal: 5 277 Family: 33 120 Federal Circuit: 92 542 	
Costs for disputant	No costs	<ul style="list-style-type: none"> Tribunal fees Expert fees Cost of attendance If represented - lawyers' fees 	<ul style="list-style-type: none"> Court fees Lawyers' fees Counsel fees Expert fees Cost of attendance Risk of adverse costs award 	
Funding arrangements	Cwlth	\$232 million	\$244 million	\$309 million
	States	\$136 million	\$264 million	\$517 million
	Industry	\$113 million	--	--

^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.

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

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- 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

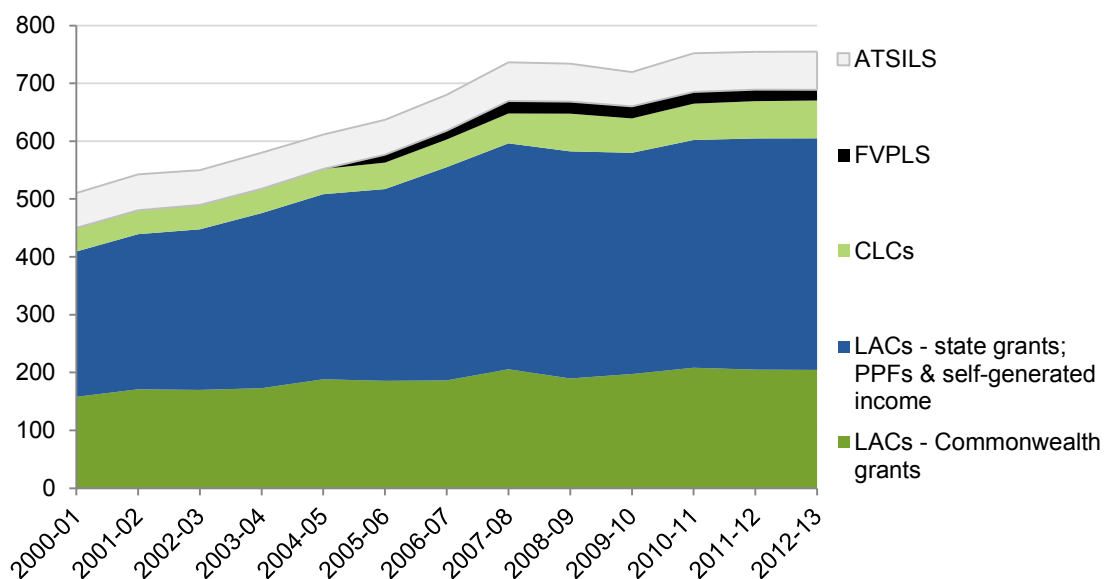
	Legal aid commissions (LACs)	Community legal centres (CLCs)	Aboriginal and Torres Strait Islander legal services (ATSILS)	Family violence prevention legal services (FVPLS)	
Where are they located?	<p>8 LACs</p> <ul style="list-style-type: none"> In all states and territories Metropolitan, regional and remote services including regional offices 	<p>200 CLCs</p> <ul style="list-style-type: none"> In all states and territories Mainly in metropolitan and regional areas 	<p>8 ATSILS</p> <ul style="list-style-type: none"> One in each state, two in the NT; ACT serviced by NSW Majority of outlets in regional and remote areas 	<p>14 FVPLS</p> <ul style="list-style-type: none"> In all states and territories except ACT and Tasmania Service 31 high need regional, rural and remote areas 	
What are their objectives?	<ul style="list-style-type: none"> Provide access to assistance for the vulnerable and disadvantaged Provide the community with improved access to justice and legal remedies 	<p>Contribute to access to legal assistance services for vulnerable and disadvantaged members of the community and/or those whose interests should be protected as a matter of public interest</p>	<p>Deliver legal assistance and related services to Aboriginal and Torres Strait Islander people</p>	<p>Provide legal services and assistance to Aboriginal and Torres Strait Islander victims of family violence and sexual assault</p>	
Who do they target?	<ul style="list-style-type: none"> State and territory communities Focus on vulnerable and disadvantaged people 	<ul style="list-style-type: none"> Local communities (with outreach), except specialist CLCs who service their state/territory community Those who do not qualify for legal aid focusing on the vulnerable and disadvantaged 	<p>Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person</p>	<p>Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person, who is a victim of family violence or a child at risk of family violence and in need of protection</p>	
What are their funding arrangements?	Commonwealth	\$212.6 m	\$36.7 m	\$68.2 m	\$19.1 m
	State & territory ^a	\$366.5 m	\$30.9 m	--	--
	Other ^b	\$30.4 m	\$22.0 m	--	--
		National Partnership Agreement (NPA) and funding administered by the state and territory governments	Funding administered by LACs in most states except SA where provided through the Attorney-General's Department (SA). NT and ACT administered by the Australian Government	Funding administered by the Australian Government	Funding administered by the Australian Government

^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.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
Consumers lack information		
<i>People lack knowledge about whether and what action to take</i>		
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.
<i>It is hard to shop around for legal services</i>		
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.
<i>Consumer redress options need to be more effective</i>		
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.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
Big potential gains from early and informal solutions		
<i>Ombudsmen provide a low cost, informal pathway</i>		
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.
<i>Alternative dispute resolution can be effective, but not for all</i>		
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.
<i>Informal resolution processes need to be improved for family disputes</i>		
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		
<i>Tribunals have been accused of 'creeping legalism'</i>		
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.
<i>Court processes have been improved but reforms have been uneven</i>		
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.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
<i>The system is adversarial, so there is little incentive to cooperate</i>		
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.
<i>Not all parties are on an equal footing</i>		
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.
<i>Prices do not always reflect the balance of private and public benefits</i>		
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'		
<i>Unbundling legal services would help</i>		
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.
<i>Limited licences can also play a role</i>		
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.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
<i>Private sources of funding are important</i>		
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		
<i>An overarching vision is required and should be reflected in eligibility principles</i>		
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.
<i>A more systematic approach for allocating funding is needed</i>		
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 services will be better targeted to areas of need and the funding model will be able to adapt to changing needs.
	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)	
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.
<i>Interim funding is required to fill service gaps</i>		
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.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
<i>Getting better value for money from legal assistance</i>		
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.
<i>Some separation of funding for civil and criminal matters is required</i>		
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.

1 What is this inquiry about?

Australia's civil justice system provides individuals, families, businesses and governments with a variety of means to resolve their disputes, including courts, tribunals, ombudsmen, and alternative forms of dispute resolution.

The importance of the system is reflected in both the volume and the subject of civil claims. There were around 2 million finalised civil disputes in the year ending 30 June 2012 covering relationships, child protection, human rights, education, employment, money, debt, injury, health, housing, and dealings with government.

In addition to economic and administrative matters, the civil justice system protects a wide range of human rights, for example, those that address violence and other abuse perpetrated against women and children. For the purposes of this report, action to protect such rights is regarded as a dispute between the person whose rights are at risk, and the government, individual or entity seeking to interfere with those rights.

Access to the civil justice system is not only important for parties to a dispute, but for the community as a whole. As Professor Dame Hazel Genn observed, a well-functioning civil justice system underpins social cohesion and economic activity:

... the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. (2010, p. 3)

Reflecting its importance, a succession of reports has grappled with how best to improve the functioning of the civil justice system.² Some of these reports have been broad-ranging, while others focused on a single issue or a narrow set of issues. Justice Sackville, a former Federal Court Judge, lamented that:

At almost any given time in Australia, there is an inquiry under way into access to justice or consideration is being given to the latest report on the subject. (2011, p. 231)

Despite the many reviews and efforts by courts, governments and others to improve access to justice, concerns remain. The Queensland Public Interest Law Clearing House (sub. DR247) suggested that this is partly due to good recommendations remaining unimplemented. Chief Justice Wayne Martin of Western Australia recently said that:

² See for example: AGD (2009); AJAC (1994); ARLC (2000); Senate Legal and Constitutional Affairs References Committee (2009); Senate Legal and Constitutional References Committee (2004); and VLRC (2008).

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. (Martin 2012a, p. 3)

While many concerns focus on costs — including costs to parties of accessing services and securing legal representation, and costs to governments of providing services — an accessible civil justice system should also provide dispute resolution processes that are widely available, well understood and timely. But here too there are concerns about failings in the system.

It is against this backdrop that the Australian Government asked the Commission to undertake a broad-ranging 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. The Commission has been requested to make recommendations to improve access to the civil justice system and equity of representation including, but not limited to, the funding of legal assistance services. The full terms of reference are reproduced at the front of this report.

The terms of reference include a number of key concepts, which set the scope and boundaries of this inquiry. These key concepts are explored in the following sections.

1.1 What is '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)

The phrase is often used as an unobjectionable, all encompassing, worthy aim or ideal. For example, Sir Jack Jacob said:

We must enable legal disputes, conflicts and complaints which inevitably arise in society to be resolved in an orderly way according to the justice of the case, as to promote harmony and peace in society, lest they fester and breed discontent and disturbance. In truth, the phrase itself, 'access to justice', is a profound and powerful expression of a social need which is imperative, urgent and more widespread than is generally acknowledged. (Genn 1997, p. 168, citing Jacob 1978, p. 417)

Ultimately, access to justice is defined by its two elements — access and justice. 'Access' is the ability to approach or make use of something. It is independent of need. In this context, access requires that people are able to approach and use the justice system to resolve their disputes. Barriers that could inhibit access include:

- costs and delays associated with accessing the system
- complexity of the system and the law which underpins it

-
- an absence of mechanisms to enforce rights in certain circumstances.

Barriers to access can also arise from the traits of those seeking access, including their personal resources, capabilities and perceptions about the system. As the Law Council of Australia said:

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)

‘Justice’ is what people are seeking access to. But the term resists easy definition. Justice Sackville (2013), reflecting on the continuing philosophical quest to define justice, concluded that justice can be easier to recognise than to define.

Justice typically denotes the administration of the law according to prescribed and accepted principles. It follows that access to justice implies that all individuals have a fair opportunity for their rights to be determined according to these principles (box 1.1).

Importantly, access to justice is no guarantee of a successful *outcome* from the process. As the Australian Law Reform Commission (ALRC) emphasised in its report *Managing Justice: a Review of the Federal Civil Justice System*:

Access to *justice* can only ever mean, in broad institutional and systemic terms, relatively equitable access to the legal process. Access to the system is no guarantee of a successful outcome from the process, and thus is no guarantee of litigant satisfaction in all cases. (2000, p. 90)

The Commission’s view is that a just outcome is likely to be associated with fair and transparent processes — confidence in the integrity of the process instils confidence in the outcome reached. For example, the ALRC (2000, p. 91) argued that a justice system that overemphasises cost, speed and efficiency at the expense of fair, open, dignified and careful processes, may not deliver ‘true justice’.

A number of participants stressed the central role of the courts in upholding justice. For example, the Law Society of WA said:

The courts are a central pillar of the third arm of government in Australia’s constitutional democracy. Courts uphold the rule of law and maintain a system of good government, trade, investment, commerce, personal and contractual relationships and many other aspects of our society and personal lives. ... Put simply, courts are the backstop. If they are not accessible, then they are not effective as a way of enforcing legal rights. If they are not effective, then people will not have regard to what the views of courts are, or what a person’s legal rights may be, knowing that such rights cannot be enforced by them in any event. If this occurs, it is a breakdown of the rule of law. (trans., pp. 488–9)

Box 1.1 Access to justice — many definitions

Definitions of access to justice touch on a number of elements. One such element relates to ‘who’ should be able to access justice:

There is perhaps no more fundamental question in the whole machinery of civil justice than that of ‘access to justice’. This is a concept, which although highly emotional, even evocative, envisages that justice should not be the privilege of the few but should be brought within the reach of all citizens in society and should be made available to all of them on the basis of equality, equity and fairness. (Jacob 1982, pp. 60–61)

A second element relates to ‘what’ is being accessed. It is generally agreed that individuals should have access to the legal system to resolve their civil disputes — both in principle, and at a practical level:

... the concept is most clearly articulated as concerning the link between a person’s formal right to seek justice and the person’s effective access to the legal system or legal remedies. (Law Council of Australia, sub. 96, p. 27)

To the enthusiastic reformers of the late 1960s and the 1970s, the principle of ‘access to justice’ ... implied that affirmative steps had to be taken to give practical content to the law’s guarantee of formal equality before the law. (Sackville 2002, p. 20)

However, views on what constitutes the ‘system’ can differ:

The term ‘access to justice’ means different things to different people. For some, the subject centralises the issue of overcoming the procedural barriers within the court system itself. (Schetzer, Mullins and Buonamano 2002, p. 65)

It is now well accepted that access to justice does not involve only enhanced access to the formal processes of civil courts. There is a range of well utilised informal, dispute resolution options available for federal civil disputes, with agencies also generally educating the community about dispute resolution and dispute prevention. (ALRC 2000, p. 90)

... in line with new waves of reforms to establish a variety of preventative and early intervention strategies, the concept of access to justice has successively extended beyond access to the formal justice system to additionally include access to legal information and education, non-court-based dispute resolution and law reform. (Coumarelos et al. 2012, p. 207)

Some consider that access to justice extends to the capabilities of individuals to deal with their disputes:

Access to justice should include resilience: reinforcing and enhancing the capacity of people to resolve disputes themselves. (AGD 2009, p. 2)

A further element relates to the distinction between access to processes, and outcomes from those processes:

At its most basic it is about access to procedures for making rights effective through state-sponsored public and fair dispute resolution processes. It implies equal access to authoritative enforceable rulings and outcomes that reflect the merits of the case in light of relevant legal principles. It does not imply that laws are necessarily just, but that individuals have a fair opportunity for their rights to be determined according to the prevailing promulgated rules. (Genn 2010, p. 115)

While courts are the central pillars of the justice system, alternatives to court-based dispute resolution are important supporting pillars. Knowledge of what might happen if a dispute ends up in court prompts people to resolve their disputes in other ways. Well-functioning courts thereby promote justice outside the courtroom by making recourse to the courts a credible prospect.

For the purposes of this inquiry, improving ‘access to justice’ in the context of civil dispute resolution means making it easier for people to resolve their disputes according to law by improving the capacity and capability of the justice system, and overcoming barriers to accessing the system. The ‘system’ includes formal and informal institutions and processes, as well as information and advice.

Is ‘equality before the law’ the same as ‘access to justice’?

While the terms ‘equality before the law’ and ‘access to justice’ are sometimes used interchangeably, equality before the law has a more universal meaning. It is generally associated with being treated with formal or procedural equality according to existing law.

The procedural aspect of the rule of law, often referred to as equality before the law, requires everyone to be treated equally according to whatever law exists ... Equality before the law is a requirement for general application of law to all, but not for legal uniformity or the absence of classifications. It makes no particular claims about what the content of law should be. (The Laws of Australia 2012, sec. 21.10.280)

Some argue that safeguarding equality before the law requires addressing barriers to accessing justice.

The goal of equality before the law is that all Australians have equal access to legal advice and representation and to the courts and tribunals that decide disputes. Essentially this means that any barriers which prevent people from enforcing their rights should be removed. It also implies that the institutions that define and uphold the law are not biased against particular groups within the community. (AJAC 1994, p. 27)

Equality before the law and access to justice begin to take on a similar complexion as both are concerned with overcoming barriers. For the purposes of this report, the Commission considers that access to justice incorporates equality before the law.

Access to justice — the ideal and the reality

Access to justice represents a powerful ideal. As Justice Sackville said:

The implicit promise contained in the catchphrase [access to justice] is that the law and the legal system are capable of achieving the goal of access to justice, if not in the short term then ultimately. The implication is that a just society will be prepared to find the resources required to achieve the goal of access to justice. (2011, p. 232, citing Sackville 2004, p. 86)

Resources available to the civil justice system and its users are limited. Hence, efforts to improve access to justice involve tradeoffs. The metaphor of the justice system as a motor vehicle is often used (Martin 2012a). Should the ‘Rolls Royce’ system be traded for a more efficient vehicle? Should alternative ways to fund the fuel be explored, or should the focus be on improving the car’s fuel efficiency?

Given limited resources, it is important to understand the nature of any tradeoff. For example, if more resources were dedicated to improving access to justice, *by how much* are barriers reduced? Does this make society as a whole better off?

Notwithstanding significant calls for greater resources, the nature of possible tradeoffs in this sector are poorly understood. In part, this reflects the dearth of outcomes-based data (chapter 25), but also the conceptual difficulties associated with measuring improvements in access to justice. Justice Sackville characterised the challenge in this way:

The problem is that there has never been, and it is unlikely that there ever will be, a measurable baseline against which to determine success or failure in eliminating or reducing the well-documented barriers to access to justice. ... Is it possible to assess the extent of the improvements? Can ‘legal needs’ ever be fully satisfied? Given that resources are limited, what should be the priorities? Who should determine the priorities? (2011, p. 14)

The following chapter looks at the relationship between access to justice, legal needs and unmet need. Chapter 4 examines the role of a well-functioning civil justice system in making society as a whole better off by promoting effective and efficient economic, social and environmental outcomes.

1.2 What is ‘Australia’s system of civil dispute resolution’?

The Commission has been asked to examine Australia’s system of *civil* dispute resolution, and to do so requires a working definition of what the system covers.

A dispute can be thought of as an escalated disagreement — parties are unwilling and/or unable to resolve the disagreement among themselves, so they seek access to the dispute resolution system. The legal encyclopaedia *The Laws of Australia* states that a ‘dispute’ refers to:

... overt and contested claims between two or more parties over differing interests, principles and processes. A dispute arises when a perceived wrong or injury has been voiced to another who is believed to be responsible and capable of providing a remedy, and the claim is rejected. (The Laws of Australia 2010, sec. 13.1.10 citing Felstiner et al. 1981)

The simplest way to understand what falls within the civil dispute resolution system is to think about what falls outside — civil disputes are not concerned with criminal actions nor transactional services such as conveyancing or the preparation of contracts and wills.

Civil disputes concern the rights and responsibilities of private individuals, businesses and governments. They generally involve one party seeking remedial action from a wrongdoing party. For example, a person in a property dispute with his or her local council must bring an action of his or her own accord; the state will not intervene to do it. In contrast, criminal acts involve prosecution and punishment by the state for particular

offences that are deemed to be against the community. However, the police bring some civil matters to the courts, mainly in the area of protection against violence.

More formally, a ‘private civil action’ is defined as:

An action brought in civil law by a party or a number of parties, dealing with the private rights of the citizens. Private civil actions are distinguished from criminal law actions and other actions governed by public law which deal with offences against society as a whole. For example, actions for trespass and negligence are civil in nature whereas prosecutions for murder and rape are criminal actions. (Lexis Nexis 2011)

As noted, in the *Ontario Civil Legal Needs Project*, civil legal needs are not less important than criminal legal needs:

It is important to address the myth that civil legal needs, because they are diverse, are somehow less important to people or have less impact on society than criminal legal needs. Disputes over custody of children, wrongful dismissal, eviction from housing, powers of attorney, or consumer debt may affect individuals, families, and communities in deep and lasting ways. (2010, pp. 9–10)

Disputes covered by this inquiry include those between individuals and businesses (individual-to-individual, individual-to-business, and business-to-business), and those between individuals/businesses and governments and their instrumentalities. Businesses should be taken broadly to include not-for-profit organisations and sole traders. For the purposes of this inquiry, the Commission is less concerned with disputes between well-resourced parties, such as large companies and governments, unless features of these disputes affect the system more broadly.

The confluence of civil and criminal matters

While the terms of reference clearly direct the Commission to consider the workings of the civil system, the distinction between civil actions and criminal prosecutions is not always clear. Former High Court Chief Justice Murray Gleeson (2006) argued that the dividing line is becoming increasingly blurred.

While it may be easy to identify the difference at the extremes — criminal process aims to punish; civil process aims to compensate — there is a large and increasing grey area in between. For example, civil penalty provisions are increasingly used as a regulatory enforcement option in competition and environmental law. Other civil proceedings seek to restrain actions or alter government decisions, whilst property proceedings in the family law jurisdiction seek to allocate property between parties and provide for children.

The interplay between civil and criminal law seems most apparent in the area of family law. A person who inflicts family violence may be subject to a protection order and/or to criminal prosecution (under state or territory criminal law, or federal criminal law) (ALRC and NSWLRC 2010). Physical and sexual assault are clear examples; they are family

violence for the purpose of obtaining a protection order, and they are crimes in all jurisdictions.

Mental health law also traverses the criminal and civil systems (McSherry 2008; Wood et al. 2011). Mental health issues can also be an underlying cause of matters that manifest themselves in the civil justice system.

The Law Council of Australia contended that the criminal and civil justice systems are inextricably linked rather than divided by blurry lines, as ‘decisions and shocks occurring in one system affect the other’ (sub. DR266, p. 4). Examples of interactions between the systems provided by the Council include:

- the capacity of the courts to hear civil law matters is restricted by the need to ensure prompt hearing of criminal matters
- property, consumer and family law disputes can often take on a different dimension, particularly where criminal behaviour or violence is alleged
- changes to court processes, including altered listing systems, immediately impact on the availability of judicial resources for criminal matters and vice versa
- legal aid commissions, community legal centres and Aboriginal and Torres Strait Islander legal services allocate their finite resources between the jurisdictions
- many lawyers, especially those in regional areas, work in both the civil and criminal spheres — possible changes to work practices, including staffing, business and administrative structures, cannot be assessed without recognising the impact on criminal law practices (sub. 96, p. 26).

However, as the Commission noted in its draft report, these interactions largely reflect the competition for resources between civil and criminal matters. The Commission limits its consideration of the criminal justice system to exploring the resourcing interactions between the criminal and civil justice systems.

Not just courts — tribunals, ombudsmen, alternative dispute resolution, information and advice

Australia’s civil justice system offers various avenues and mechanisms to prevent and resolve disputes. For the purposes of this report, the Commission uses the terms ‘civil justice system’ or ‘civil dispute resolution system’ to refer to the full array of judicial, administrative review, and community and court-based alternative dispute resolution services across states, territories and the Commonwealth. This extends to information and advice, and the use of government and industry ombudsmen (which deal with complaints in areas such as banking and telecommunications).

1.3 The Commission's approach

The Commission's recommendations seek to improve access to justice by increasing the capability and capacity of the civil justice system, and minimising barriers to accessing the system. As discussed in chapter 4, the justice system needs to provide a range of formal and informal, fair, transparent and proportionate options to prevent and resolve disputes. Improving access also requires increasing the capabilities of people seeking to access the system.

Consistent with the terms of reference and its own legislation, the Commission has examined the system of civil dispute resolution afresh, drawing on the many past reviews of access to justice where appropriate. Importantly, this inquiry takes a system-wide perspective; or in other words, 'attempts to fit the various parts of the access to justice jigsaw together', something that is considered to have been lacking (Sackville 2011, p. 16).

The Commission has not reviewed the merits of decisions made by individual courts, tribunals and ombudsmen.

The Commission's assessment of current arrangements and the proposed reform recommendations are predicated on improving the wellbeing of the community as a whole. It takes into account users (and potential users) of the civil justice system, providers of services, and taxpayers. The Commission's approach is set out in more detail in chapter 4.

As noted throughout this report, data are limited on almost every aspect of the civil justice system. Consequently, the Commission has been unable to undertake many of the formal analyses (including cost-benefit analyses) that it would ordinarily undertake around funding recommendations. Nevertheless, where such recommendations have been made, the Commission is satisfied that it has relied on the best information available and that recommendations are robust. The lack of data and how it might be addressed going forward is discussed at length in chapter 25.

In preparing this report, the Commission actively sought input from various stakeholders (appendix A).

- After receiving its terms of reference on 21 June 2013, the Commission released an issues paper on 16 September 2013 inviting public submissions and highlighting particular matters on which it sought information.
- The Commission consulted a range of interested parties to obtain an overview of the central issues, including a number of initial visits with key parties. During a visit to the United Kingdom, the Presiding Commissioner took the opportunity to discuss the operation of justice systems within that jurisdiction and the reforms being undertaken.
- To gain a better understanding of some of the main issues, the Commission also held roundtable discussions with key participants on the topics of legal assistance services, alternative dispute resolution, the legal profession, self-represented litigants and court processes.

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- A draft report was released on 8 April 2014. It contained the Commission’s analysis, findings and draft recommendations at that time, as well as requests for feedback on particular issues. Stakeholders were once again invited to provide formal public submissions.
 - During June 2014, the Commission held public hearings to allow participants to respond to the proposals in the draft report. Hearings were held in Canberra, Sydney, Adelaide, Perth, Melbourne, Hobart, Darwin and Brisbane. There were 98 presentations over 11 hearing days, with transcripts of proceedings published on the inquiry website.
 - There were 334 submissions received (154 pre-draft and 180 post-draft). Submissions were published on the inquiry website.

2 Understanding and measuring legal need

Key points

- 'Legal need' occurs when an individual cannot resolve a problem by his or her own means and a legal remedy to the problem exists. Unmet need is defined as a situation where a person is unaware that they have a legal right, or where they would like to defend a right, but do not because they cannot access legal services for various reasons, such as those services being too slow, too expensive or unavailable.
- Legal problems are widespread. The *Legal Australia-Wide (LAW) Survey* indicates that around half of respondents experienced one or more legal problems over a 12-month period. A survey conducted by the Australia Institute found that around a third of survey respondents experienced a civil legal problem in the previous five years.
- The four most prevalent types of legal problem identified in the *LAW Survey* were disputes about consumer, crime, housing and government issues. Aboriginal and Torres Strait Islander people are more likely to face legal problems in relation to rights, government and health, while those with a main language other than English are more likely to experience legal problems in health matters, but less so in many other problem types.
- The *LAW Survey* indicated that the most common ways of finalising legal problems were via 'agreement with the other side', via the decisions or actions of other agencies (such as government agencies), and 'not pursuing the matter further'.
- Of those with a civil (including family) legal problem, about half said that at least one of their legal problems had a 'severe' or moderate impact on their everyday life; about a quarter also had a criminal legal problem; and multiple legal problems were common — around 10 per cent of respondents accounted for more than half of the number of legal problems.
- There is strong, qualitative evidence to indicate unmet legal need in different areas of law and amongst different groups in society. However, quantifying unmet legal need is difficult and necessarily involves contestable methodological judgments. Australian data has not been collected with the express purpose of measuring unmet legal need. The Commission has developed a transparent methodology using the most comprehensive data available, which indicate more than 15 per cent of the population has some form of unmet legal need that relates to a dispute described as having a moderate or severe impact on everyday life.
- The unmet legal need usually resulted from consulting an inappropriate, non-legal adviser to resolve a legal problem. This suggests that better directing parties to appropriate informal dispute resolution mechanisms, such as (but not limited to) ombudsmen and government agencies, could facilitate the resolution of many disputes and potentially reduce this proportion to less than five per cent.
- While there is very limited information about the legal needs of business, the available evidence suggests that the amount of unmet legal need is small.

Understanding the legal needs of Australians is critical to understanding what problems or barriers (if any) they face when they seek to access the civil justice system. But what is legal need and how can it be measured?

This chapter explores what legal need is, how it relates to ‘access to justice’, and ways in which it can be measured (sections 2.1 and 2.2). Section 2.3 looks at how individuals and businesses experience legal need based on a range of different surveys. Section 2.4 discusses the concentration and the characteristics of those most likely to experience legal problems. How Australians resolve legal problems, and the extent of unmet legal need, is examined in section 2.5.

2.1 What is legal need?

Understanding the nature and extent of legal need is both an important and challenging first step in considering the accessibility of the civil dispute resolution system.

As Genn and Patterson observed, the concept of legal need is subjective in nature:

... concepts such as ‘the unmet need for legal services’ or even the question of what is a ‘legal problem’ do not lend themselves to easy analysis ... In fact, the prevailing orthodoxy is probably that both of them are subjective in nature and are not open to objective verification. ... to assert that one has a need for legal services is not to make a statement of fact as to make a subjective value judgement. Necessarily, such judgements are open to challenge. No amount of fieldwork, therefore, could establish the ‘true’ extent of the need for legal services. (2001, pp. 3–4)

People can have problems for which a legal remedy exists. These are called ‘justiciable problems’. Genn’s *Paths to Justice* defined a justiciable event as:

... a matter experienced by a respondent which raises legal issues, whether or not it was recognised by the respondent as being ‘legal’ and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system. (1999, p. 12)

But, as noted by Dignan, just because someone has a ‘justiciable problem’ does not mean that they will necessarily seek the assistance of a lawyer, a mediator, or the courts:

A ‘legal problem’ refers to a situation in which knowledge of, or use of legal services could be expected to lead to better outcomes and improved welfare for the citizen, compared to what would be expected to occur if such services were not used and/or the citizen lacked knowledge of his or her legal rights. (2004, p. ix)

Civil justice problems can be dealt with in any number of ways — people can resolve some problems themselves, seek the advice of others with relevant expertise but who do not have legal training, or seek formal legal assistance. As Currie points out, the concept of ‘need’ in civil justice is more complex than in criminal justice because of the many possible responses.

Unlike being charged with a criminal offence, civil justice problems may be dealt with in a variety of ways. ... This variety of circumstances is what makes defining unmet need precisely so

difficult. It is not as simple as in criminal justice matters where one can be said to have a legal problem if he or she is arrested and must appear in court to answer the charge. (Currie 2007, p. 3)

Dignan defined 'legal needs' as the legal problems that people cannot resolve effectively by their own means. It is based on the view that if a person finds a satisfactory non-legal solution then they cannot be said to have been denied access to legal services (and so takes out of the equation problems that may have a legal dimension but are resolved another way). As Dignan said 'legal need is really only of interest insofar as it generates a need for legal services' (2004, p. viii), but determining what is a 'satisfactory non-legal' solution, like the concept of legal need itself, is necessarily subjective and gives rise to its own difficulties (section 2.5).

Context is also important in any assessment of legal need. How legal problems are handled typically reflects the nature and importance of the problems, including their expected impact. Some legal issues have little or no impact on people's lives and may not be important for people to resolve, while others can be highly disruptive to people's lives. For example, being unable to resolve a low-value consumer dispute (and choosing not to pursue the matter further) is likely to have less of an impact than being unable to resolve a dispute relating to employment or health matters.

Unmet legal needs can escalate so that they become disruptive to the day-to-day lives of people. For example, if someone ignored or failed to understand the terms and conditions of a lease agreement, then failing to resolve the dispute could eventually result in the person's eviction and render them homeless.

Johnsen (1999) suggested that the second condition that defines legal need is that the resolution of the problem should lead to the improved welfare of the individual. The degree of seriousness (or adverse impact) of a justiciable problem is therefore important when thinking about legal need.

But determining what is 'serious', and what is not, is again far from straightforward as perceptions of seriousness differ, and the impact that a legal problem has on somebody's day-to-day life can be difficult to assess, particularly if there are other issues that are also affecting their wellbeing.

The Commission defines 'legal need' as problems for which a legal remedy exists that parties cannot resolve effectively by their own means. It excludes problems for which parties have sourced appropriate solutions, which may be outside the formal legal system, or that parties have for good reasons chosen not to resolve. Consistent with the premise that the resolution of a problem should be welfare enhancing, and the Commission's intention to focus on areas which are likely to generate the greatest benefits for the community (chapter 4), the Commission focuses on legal problems that have, or are likely

to have, a moderate or severe impact on a person's everyday life, or on the routine operations or profitability of a business.³

What then is 'unmet legal need'?

Having defined legal need, arriving at a definition of unmet legal need is more straightforward. The Hughes Royal Commission on Legal Services in Scotland said:

When we speak of unmet need we are concerned about instances where a citizen is unaware that he has a legal right, or where he would prefer to assert or defend a right but fails to do so for want of legal services of adequate quality or supply. (Genn and Paterson 2001, p. 5)

The Commission defines 'unmet legal need' as legal need that has either gone unaddressed or has been addressed based on inappropriate advice.

2.2 How can legal need be measured?

There are relatively few measures of legal need in Australia. One potential measure is the use of legal services, which provides insights into expressed legal need and the pathways people take to resolve legal problems. However, information on legal services use only provides a partial picture of legal need — it fails to capture those who are dissuaded from seeking assistance and those who are unaware that their problem has a legal dimension (Coumarelos et al. 2012; Currie 2007). As Currie said:

Need is frequently treated as synonymous with expressed demand. However, demand is only one type of unmet need that appears in the form of people queuing up at a service agency requesting assistance. ... People with problems deserving of assistance may not seek assistance, or if they do, may not find effective assistance. Consequently, demand is not a valid and reliable measure of need. (2007, p. 2)

In an attempt to better understand unmet legal need, studies of legal need have been developed and undertaken in a number of countries — including the United States, England, Wales, Scotland, Ireland, New Zealand and Australia (Pleasence, Balmer and Sandefur 2013). These studies measure the incidence of justiciable problems that arise in everyday life and gather information about the actions (or inaction) that people take when they have a problem with a potential legal remedy. As Coumarelos et al. said:

Such surveys have examined the prevalence of different types of legal problems, the actions people take to resolve these problems and the outcomes they achieve. By building a picture of the nature of legal problems and the pathways to their resolution, these surveys have aimed to inform, and ultimately enhance, the provision of legal services and access to justice. (2012, p. 1)

³ A broader discussion of frameworks around legal need is discussed comprehensively in Curran and Noone (2007).

In the context of a legal need survey, a set of problems for which a remedy exists in civil law is defined, and the frequency with which such problems occur is measured. Legal need surveys often recognise that legal solutions may not always be the most appropriate route to solving legal problems, and so make provisions for a range of remedies to legal problems to be examined.

2.3 How many Australians experience legal need?

Two national surveys of legal need have been undertaken across Australia — the *Legal Australia-Wide (LAW) Survey* and a survey by the Australia Institute. Both surveys show that legal problems are widespread. Another study, which examines legal need among Aboriginal and Torres Strait Islander people, is also being conducted, and some early results are available. Other, more localised surveys have also been conducted, which focus on particular jurisdictions.

The Legal Australia-Wide Survey

The *LAW Survey* conducted by the Law and Justice Foundation of NSW found that during 2008, 50 per cent of respondents experienced one or more legal problems in the previous 12 months. The survey covered criminal as well as civil (including family) law problems, but excluded events with legal implications that did not result in problems or disputes, such as purchasing or selling a house or making a will without any problems (box 2.1).

Box 2.1 **About the LAW Survey**

The *LAW Survey* involved 20 716 telephone interviews with household residents aged 15 years or over across Australia. Within each state/territory, quota controls were used to achieve a demographic profile in the sample that reflected the population profile. The survey was administered between January and November 2008.

Respondents were asked about their experience of a total of 129 specific types of ‘legal’ problems that were categorised into 12 broad problem groups — accidents, consumer, credit/debt, crime, employment, family, government, health, housing, money, personal injury and rights; as well as allowing the option for respondents to nominate any other legal problem that they may have had. The survey assessed:

- the prevalence of legal problems
- the nature of legal problems
- the strategies used in response to legal problems
- the advice received for legal problems
- the finalisation of legal problems
- the outcomes of legal problems.

Problems were categorised into two groups based on their level of severity — substantial problems (those problems identified by respondents as having a severe or moderate impact on everyday life) and minor problems (those problems with a slight or no impact).

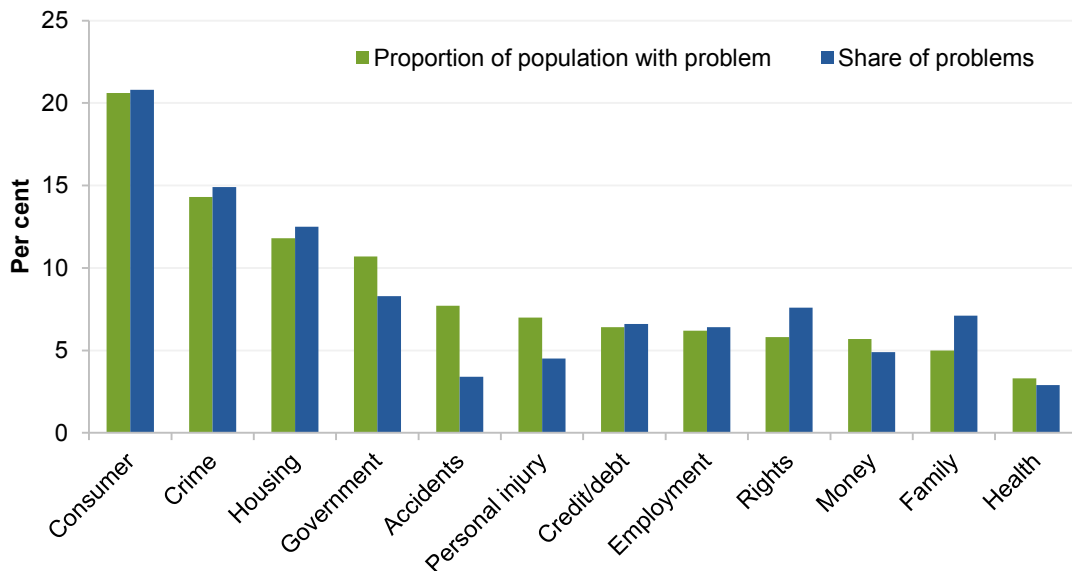
Source: Coumarelos et al. (2012).

Disputes, severity and disputants

The four most common legal problem groups were the consumer, crime, housing and government problem groups (figure 2.1).

Just over half (55 per cent) of the legal problems examined were reported by respondents as having either a moderate or severe impact on their everyday life. The *LAW Survey* examined five types of adverse consequences of legal problems and found that considerable proportions of legal problems resulted in income loss or financial strain (29 per cent), stress-related illness (20 per cent) and physical ill health (19 per cent) (Coumarelos et al. 2012).

Figure 2.1 **Composition of legal problems faced by Australians, and share of total legal problems^a**
2008



^a Consumer (problems relating to goods and services, financial institutions, utilities and telecommunications providers); Crime (offender or victim); Housing (neighbours, rental agreements, loans); Government (fines, payments/allowances); Rights (including non-work related discrimination due to age, race, gender, religion and disability, and unfair treatment by police); Family (children and relationships); Credit/debt (being a guarantor, threats from creditors, credit ratings, repayments of money owed, bankruptcy); Employment (unfair dismissal, redundancy, pay and condition, discrimination, harassment, victimisation or mistreatment); Money (business investment, wills/estates); Personal injury; Accidents; Health (including mental health, long term illness or disability and clinical negligence).

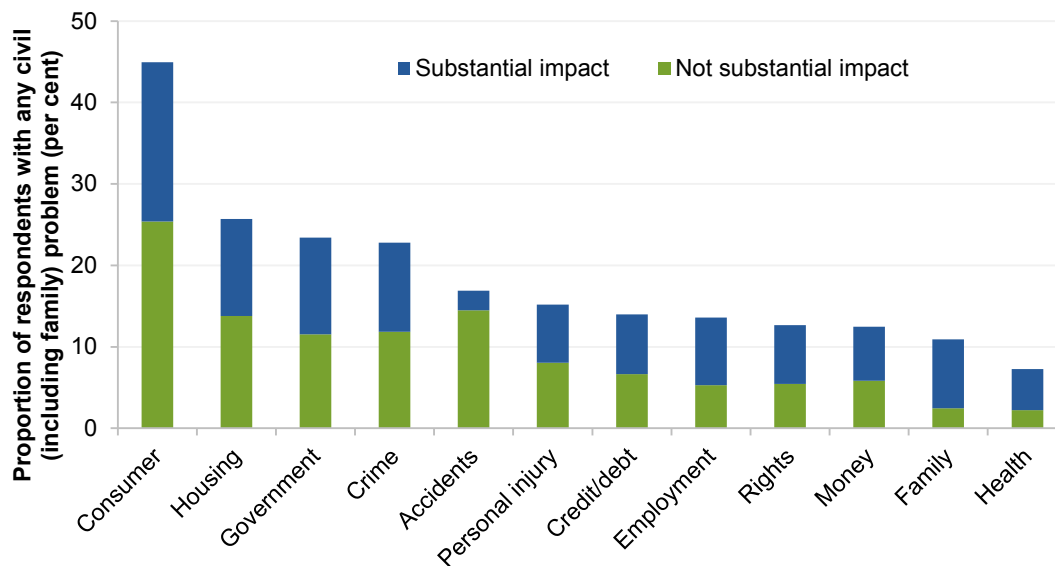
Data source: Coumarelos et al. (2012).

Analysis of the *LAW Survey* data undertaken by the Commission found that of the more than 10 000 respondents to the survey who had a legal problem, less than 8 per cent had *only* criminal problems. Excluding those with only criminal problems, of those remaining 77 per cent did not have *any* criminal problems and 23 per cent had both criminal and civil (including family) problems.

Of the sample with either only civil (including family) matters or both civil and criminal matters, 57 per cent said they had a substantial problem — that is, problems described as having a moderate or severe impact on everyday life.

Some problems were more likely to be reported as substantial (family, health and employment) than others (accidents, consumer and government) (figure 2.2).

Figure 2.2 Prevalence of legal problems and severity^a
 Proportions of respondents with any civil (including family) problem



^a Where respondents have more than one instance of the same problem, the most severe impact is reported. 'Substantial' is defined as problems reported by respondents as having a 'moderate' or 'severe' impact on everyday life. Criminal problems are included for those respondents that also had civil (including family) problems. Definitions of the problem categories are provided in the note to figure 2.1.

Source: Commission estimates based on unpublished *LAW Survey* data.

For non-criminal substantial matters, the most common disputes were with employers, telecommunications companies, and present or former spouses/partners (table 2.1).

Table 2.1 Top 10 categories of disputants^a – substantial civil, including family, legal problems

<i>Other side to the dispute</i>	<i>Per cent of problems (weighted)</i>
Employer/boss/supervisor	9.8
Telecommunications company	9.5
Spouse/partner or ex-spouse/partner	9.2
Government department/agency	8.1
Neighbour	7.6
Local council/government	5.8
Other business person/organisation	4.4
Other relative	4.3
Health or welfare person/organisation	4.3
Bank/building society/credit union	4.1

^a The top 10 categories account for 67 per cent of disputes — there were an additional 15 categories of less than 4 per cent each that are not reported in the table. See question A1 of the *LAW Survey* for details of possible responses.

Source: Commission estimates based on unpublished *LAW Survey* data.

Australia Institute survey

A more recent, albeit more contained survey of legal problems was conducted by the Australia Institute. The survey looked at non-criminal legal matters amongst 1001 adult Australians in 2009, and found that around one in three survey respondents had experienced a civil legal problem in the previous five years (Denniss, Fear and Millane 2012). The most commonly reported legal problems were:

- being treated unfairly by a business, including banks, phone companies, tradesmen, and retail outlets (12 per cent)
- a dispute with a tenant, real estate agent or neighbour (8 per cent)
- a dispute with an employer over pay, conditions, workplace safety or overtime (7 per cent)
- divorce, a dispute over child custody or support payments, or arguing with family members over inheritance (5 per cent).

One in four respondents said they had sought legal advice for their legal problem.

The results of the Australia Institute survey are quite different to that of the *LAW Survey* — particularly in respect to the incidence of legal problems. The difference can largely be explained by differences in survey methodology and scope, with the *LAW Survey* asking about a wider range of problems and allowing more open-ended responses.

The Indigenous Legal Needs Project

Researchers from James Cook University are currently undertaking the *Indigenous Legal Needs Project* (ILNP), a national study of Indigenous civil and family law needs. When complete, the ILNP will cover 32 remote, regional and urban Indigenous communities in the Northern Territory, Victoria, Queensland and Western Australia, in addition to earlier work already conducted in New South Wales (sub. 105). In contrast to the surveys above, the ILNP is not designed to quantify how frequently individuals experience legal need, but rather seeks to qualitatively identify particular legal needs in different Indigenous communities.

In the three jurisdictions where analysis of ILNP has been completed (Northern Territory, New South Wales and Victoria), legal needs were identified in the following areas:

- child protection — governments' handling of child removal
- tenancy — including disputes over repair and maintenance, rent, overcrowding and eviction
- discrimination — mostly in the services sector such as in health care and police, or in shops
- social security — problems with underpayments or overpayments

-
- credit, debt, and consumer law issues — including problems related to mobile phone contracts and car purchases and repairs
 - neighbourhoods — disputes related mostly to noise, fences or boundaries and animals
 - victims' compensation and wills — issues in relation to wills mainly revolved around superannuation, burial and child custody arrangements (sub. 105).

Some other recent surveys of legal problems

There have been other surveys of legal problems, which often focus on particular jurisdictions and local areas. These include:

- A 2009 study at the West Heidelberg Community Legal Service, which found that the most common problems experienced were in relation to employment and housing, family and relationships, income, and navigating the legal system. It also found that a higher number of problems were experienced if individuals also had problems involving family violence and criminal charges (sub. DR186, p. 2).
- A 2009 evaluation of community legal centres (CLCs) in Western Australia, which surveyed CLCs, Legal Aid WA, and participating community service agencies to identify the top five priority areas of unmet legal need 'requiring urgent attention'. The most common responses included matters related to family law, domestic violence, court and tribunal representation and employment law. Less prevalent responses included matters about consumer and contract law, housing and homelessness, discrimination law, child protection, as well as problems faced by Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities, young people and people with mental illness (Kadmos 2009).
- A 2012 report commissioned by the National Association of Community Legal Centres, which examined indicators associated with legal need at a local government area level. It identified legal need in many areas with both high and low levels of relative disadvantage (Judith Stubbs and Associates 2012).

Individuals whose legal needs are not well measured

While legal problems are often measured by surveys, the legal needs of those who are difficult to find or contact can be hard to capture via survey methodology. The Australia Institute and *LAW Survey* relied on internet and phone responses respectively when collecting information, and while efforts can be made to ensure the results are broadly representative of the general population, these methodologies leave some groups out of scope of the survey. For example, Legal Aid NSW noted:

While the LAW Survey is a valuable evidence source, it was not designed to target disadvantaged people and did not survey people without landlines, homeless people and people in prisons and institutions. (sub. DR189, p. 5)

Accordingly, it is difficult to get a precise sense of the legal problems amongst these groups. The Commission received a number of submissions during the inquiry process, both from prisoners and their legal representatives (for example, Smart, sub. 147; Prisoners' Legal Service Inc., sub. 82), which expressed concerns about the legal needs of prisoners. Other submissions also expressed concerns about the legal needs of those in mental health institutions. Thus, there is anecdotal evidence to suggest there are additional groups of people who have legal need, but little data on prevalence or severity at a national level.⁴

Legal needs of businesses

There are relatively few sources of information around the legal needs of businesses.

One source is a survey examining disputes and dispute resolution of small businesses, commissioned by the then Department of Innovation, Industry, Science and Research (DIISR 2010). The survey found that 20 per cent of small businesses had experienced some form of dispute during the five years prior to June 2010. Of these, around half (9 per cent of businesses) had a dispute where they had taken legal action, involved a third party or considered legal action (termed a 'severe' dispute). Of those with severe disputes, 65 per cent of disputes were about payment for goods and services, and 30 per cent of disputes related to contracts (excluding payments, retail tenancy and franchising issues).

The *LAW Survey* focused on individuals, but provided information about the other party to the dispute; finding that around a third of disputes involved a business as the other party (Coumarelos et al. 2012). This may indicate that disputes with businesses are fairly common, and so businesses themselves have some legal need. However, the *LAW Survey* cannot be used to identify disputes that occur between businesses, as opposed to disputes between individuals and businesses.

Beyond surveys, it was suggested by the Australian Small Business Commissioner that the growing number of matters brought to small business commissioners across Australia could be an indicator of (existing and increasing) legal need (trans., p. 52). While many jurisdictions have small business commissioners, only the Victorian Small Business Commissioner (VSBC) has been in operation for a sufficient period of time to determine some sense of whether legal need has been increasing.

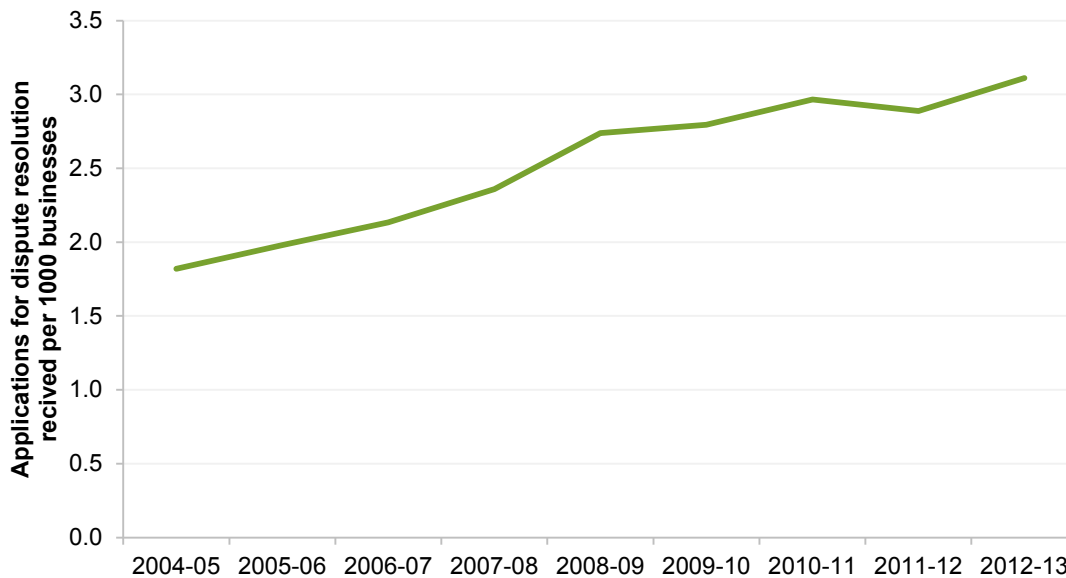
Figure 2.3 shows the number of applications for dispute resolution submitted to the VSBC per thousand small businesses in Victoria, from 2004-05 to 2012-13. Over that period, the number of applications grew at around 9 per cent per year, while the number of small businesses grew at about 2 per cent per year. While this could represent a growing legal

⁴ However, some research has been done at a more regional level. For example, the Law and Justice Foundation of NSW has examined the legal needs of prisoners and the homeless in NSW (see Grunseit, Forell and McCarron (2008) and Forell, McCarron and Shetzer (2005)).

need amongst small businesses, it could also represent a growing awareness of the VSBC and the services it offers.

Figure 2.3 **Applications for dispute resolution received by the Victorian Small Business Commissioner**

Applications per thousand Victorian small businesses^a



^a Businesses that have fewer than 20 employees and where the main trading location is in Victoria.

Data sources: Commission estimates based on Victorian Small Business Commissioner annual reports (various); ABS (*Counts of Australian Businesses*, Cat. No. 8165.0, various editions).

Legal need changes over time

Legal need surveys can provide a snapshot of legal disputes faced by individuals for a given point in time, but unless they are repeated regularly, it is difficult to observe how changes to people, businesses, economic and social activities, and the law can affect legal need. While the *LAW Survey* is the most comprehensive and wide-ranging survey of legal need in Australia, it has not been repeated since 2008, and so does not capture a number of relevant developments, including:

- changes to legislation in 2010 that affected the rights of consumers (the Australian Consumer Law)
- multiple changes to legislation between 2009 and 2012 that changed the regulation of consumer credit law (the *National Consumer Credit Protection Act 2009* (Cth) and later amendments)
- the introduction in 2012 of a new Telecommunications Consumer Protections Code by the Australian Communications and Media Authority (ACMA 2013)

-
- a greater usage of mobile telecommunications devices, and use of telecommunication services for data (ACMA 2014) — of interest, given that telecommunications disputes were one of the most prevalent forms of legal dispute
 - an increasing proportion of the population living in rented accommodation (ABS 2014), and so being subject to laws and regulations around tenancy
 - changes to workplace relations law, including the commencement of the *Fair Work Act 2009* (Cth) — which made changes to unfair dismissal laws, the rules governing negotiation over enterprise bargaining, and the introduction of the Small Business Fair Dismissal Code
 - changes to national employment standards and awards at the beginning of 2010
 - a greater concern about privacy and personal data security — for example, the Office of the Australian Information Commissioner stated that ‘a third of Australians reported a privacy problem in [2013]’, and that the office had experienced an increase in the number of privacy complaints (OAIC 2014)
 - the implementation of the National Disability Insurance Scheme (NDIS), which may lead to additional legal need around disputes of eligibility (Legal Aid NSW, sub. 68; Law Council of Australia, sub. 96; Australian Lawyers Alliance, sub 107; Australian Centre for Disability Law, trans., p. 258).

Changes to legislation, regulation, entitlements and lifestyle can all contribute to changes in legal need. This serves to highlight the need for regular reappraisal of the legal needs of individuals and businesses, which is discussed in greater detail in chapter 25.

2.4 What are the patterns and characteristics of those who experience legal problems?

Multiple legal problems are common — around 22 per cent of respondents to the *LAW Survey* said they had experienced three or more legal problems during the previous year. Legal problems are also concentrated among a minority of respondents — 9 per cent accounted for 65 per cent of legal problems reported (Coumarelos et al. 2012).

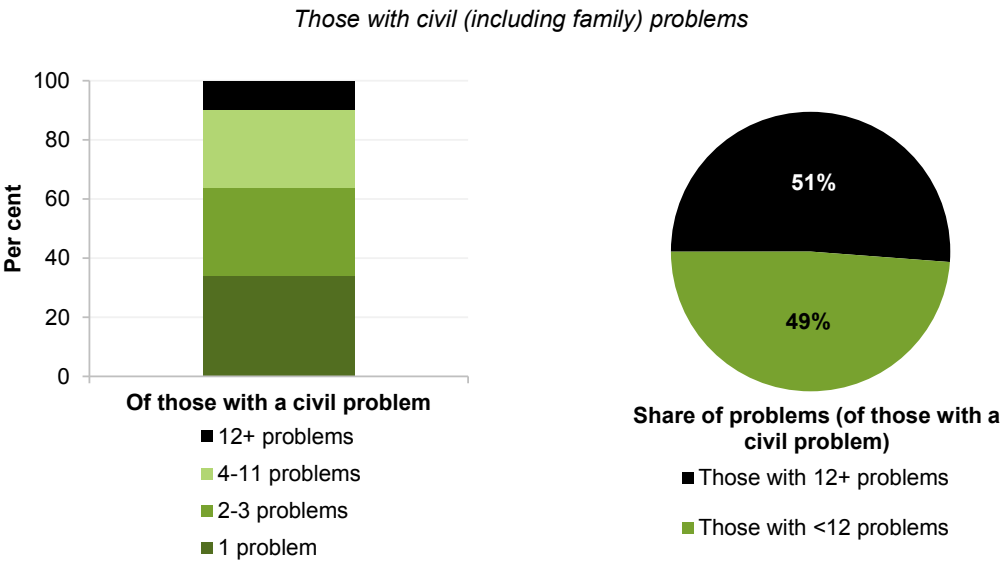
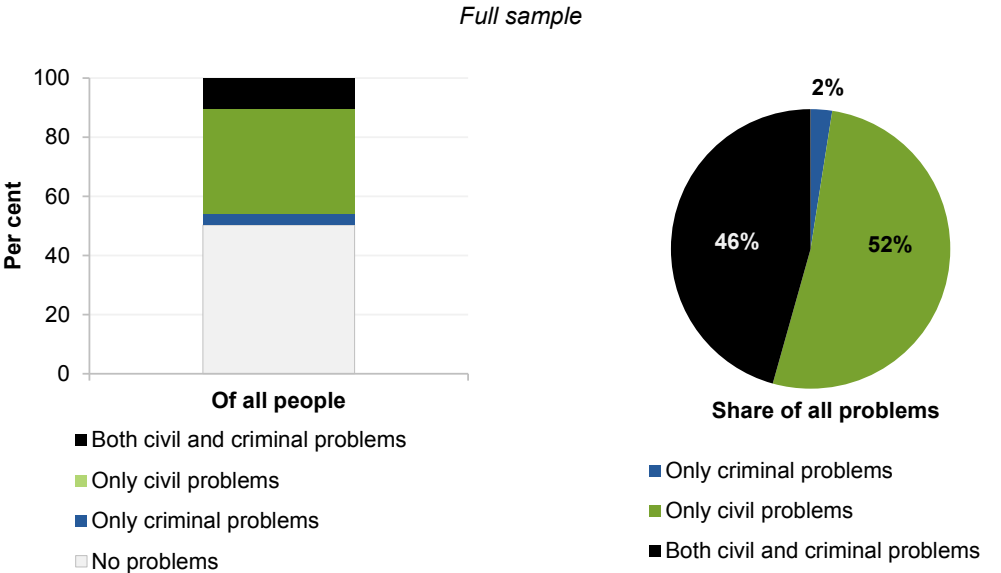
The *LAW Survey* examined the characteristics associated with individuals experiencing multiple legal problems. It found that those with a disability, those in single parent families, the unemployed, Indigenous Australians, women, those aged between 15 and 64 years old, and those living in regional areas were more likely to experience multiple legal problems.⁵ These results include all problem types, spanning both criminal and civil (Coumarelos et al. 2012).

⁵ In addition, those with a year 12 certificate (relative to those with post-school qualifications) were found to be less likely to have multiple legal problems.

Problems are also more concentrated amongst those that also have a criminal dispute. Those with both civil and criminal problems account for around 10 per cent of the population, but they account for around 46 per cent of all legal problems. Those with both civil and criminal problems have close to 11 problems on average (approximately 8 of them civil), while those with civil problems alone have just under 4 problems on average.

Excluding from the *LAW Survey* sample those respondents that *only* had criminal problems, the Commission found that around 10 per cent of respondents — those with 12 or more legal problems — accounted for around half of the legal problems (figure 2.4).

Figure 2.4 The composition and concentration of legal problems^a



^a Civil problems include family problems.

Source: Commission estimates based on unpublished *LAW Survey* data.

The *LAW Survey* also found that legal problems tend to cluster in three combinations:

- ‘consumer, crime, government and housing’ problems
- ‘economic and family’ issues — credit and debt, family and money problems
- ‘rights and injury/health’ issues — employment, health, personal injury and rights problems (Coumarelos et al. 2012).

Some demographic groups were also more likely to experience particular legal problems:

- women were more likely (relative to men) to have health-related problems, but less likely to have credit/debt or personal injury problems
- accidents, crime, personal injury and rights problems peaked between 15-24 years of age while credit/debt peaked at 25-34 years and family problems peaked between 25-44 years of age
- Aboriginal and Torres Strait Islander people were more likely to have problems in the categories of government, health, and rights
- people with disabilities were more likely to have a legal problem (relative to those who do not have a disability)
- single parents and the unemployed were more likely to experience legal problems in many different problem types but especially in credit and debt, where both groups were twice as likely to experience a problem (relative to other family types, and those that are employed or not in the labour force, respectively)
- single parents were also far more likely to experience family problems relative to other family groups
- those living in disadvantaged housing⁶ were more likely to have legal problems, especially in the categories of ‘credit/debt’ and ‘health’
- those whose main language was other than English (treated as an indicator of cultural and linguistic diversity) were more likely to have legal problems in the category of health, but less likely to have legal problems overall
- those whose main income was a government payment were more likely to experience family, government, health and rights problems (Coumarelos et al. 2012).

Looking across the jurisdictions, people living in South Australia and Victoria were slightly less likely to experience a legal problem compared to other jurisdictions. Those in the Northern Territory and Western Australia were slightly more likely to experience a problem, with no significant difference between the other states and the ACT.

The incidence and causes of clustered, multiple and substantial legal problems are many and varied. They are discussed in greater detail in appendix B.

⁶ Defined as being homeless, living in emergency or basic accommodation (such as a refuge, shelter, boarding house, caravan park, tent, motor vehicle, shed or barn), living with relatives or friends due to having nowhere else to live, or living in public housing.

2.5 To what extent is there unmet legal need?

There is strong, qualitative evidence to indicate that there is unmet legal need in several different areas of law and amongst different groups of society. The Commission has received a number of submissions to this effect throughout the inquiry, including:

As demonstrated by various recent reports, unmet legal need is concentrated among the most vulnerable and disadvantaged people in the community, including the disabled, unemployed, single parents, Indigenous Australians, those on welfare and those living in [rural, regional and remote] areas. (Law Council of Australia, sub. 96, p. 60)

When the legal need of 1.6 million people with potentially multiple legal problems (demand) is compared with the available supply of legal assistance services, the extent of unmet legal need and the limitations of existing access to justice arrangements becomes apparent. (Legal Aid NSW, sub. 68, p. 20)

Having regard to our experience as the largest legal service provider in Central Australia, and recent research on legal need in the Northern Territory, we consider that the level of unmet legal need in Central Australia is high, particularly in relation to issues around housing, social security, victims compensation, debt and consumer law, and family law and child protection. ... [T]here is also considerable unmet legal need generally in remote communities in Central Australia. (Central Australian Aboriginal Legal Aid Service Inc., sub. 89, p. 14.)

There is high unmet legal need for environmental and planning law assistance in South Australia. (Environmental Defenders Office (SA) Inc., sub. DR299, p. 2)

There is a significant level of unmet legal need amongst disadvantaged women who experience family violence and relationship breakdown. (Women's Legal Service Victoria, sub. 33, p. 8)

However, attempting to *quantify* unmet legal need in a consistent manner is much more difficult. Both definitions and data are necessary to identify legal need and to determine, based on the course of action chosen, whether that need is met or unmet. Such a determination is complicated and highly subjective:

Constructing a definitive measure that quantifies unmet legal need is difficult, and, to date, there is no agreed-upon measure, despite a few proposed measures. ... The difficulty in quantifying unmet legal need largely reflects the complexity in defining all situations which constitute legal problems, and the subjectivity in determining the precise outcomes that would constitute satisfactory resolution of each specific problem. (Coumarelos et al. 2012, p. 5)

The right sort of data for analysing unmet need is also important. Survey data that encompasses the legal needs of the broader population is necessary to obtain the 'whole picture':

Although expressed legal need can be estimated using survey methodology, it can also be measured through the collection of data on the use of legal services. Such data can build an invaluable picture of the demographic groups that access particular legal services, the nature of their expressed legal needs, the pathways they follow and the outcomes they achieve (e.g. Scott, Eyland, Gray, Zhou & Coumarelos 2004). However, such data cannot estimate legal need that is expressed outside the legal system or the level of unmet legal need in the

community. Unmet legal need can be measured only via survey methodology. (Coumarelos et al. 2012, p. 4)

It is for these reasons that the Commission has used *LAW Survey* data in its attempts to quantify unmet legal need as it represents the most comprehensive source of data of legal need and actions taken to address that need. The Commission has had to bring together this particular data source with the many aspects of unmet legal need discussed above in order to arrive at a working definition of unmet legal need for the purposes of its analysis.

Towards a working definition of unmet legal need

It is necessary to understand how people respond to legal problems when evaluating unmet legal need. Responses to disputes or problems are likely to be shaped by:

- their personal capabilities and perceptions (including perceptions about the costs of taking action)
- the availability of information and advice and knowledge of where advice and assistance can be sought
- the effect of the problem on their everyday lives.

The *LAW Survey* indicates that the nature of the legal problem strongly influenced the response to it. Australians experiencing money and family problems were most likely to take action, while those experiencing personal injury, crime, accidents and family problems were most likely to seek advice when taking action. Those experiencing substantial legal problems were more likely to take a greater number of different types of actions and were more likely to seek advice.

The *LAW Survey* found that there was no ‘rush to law’. The most common ways of finalising legal problems were:

- via agreement with the other side (30 per cent)
- the respondent not pursuing the matter further (30 per cent)
- via the decisions or actions of other agencies, such as government bodies, insurance companies or the police (15 per cent) (Coumarelos et al. 2012).

Legal advisers were used in around 24 per cent of substantial non-criminal legal problems, but the assistance of a legal adviser was sought in less than one tenth of minor legal problems.

The Commission found that the most common responses for not taking any action or seeking advice (for substantial non-criminal matters), was that ‘it would make no difference’ and ‘it was too stressful’ (table 2.2).

Table 2.2 Reasons for taking no action or advice for substantial civil, including family, matters

<i>Reason for no action or advice^a</i>	<i>Proportion of responses (per cent)</i>
Make no difference	54
Too stressful	46
Would take too long	40
Problem resolved quickly	40
Cost too much	39
Bigger problems	35
Didn't know what to do	32
Didn't need information/advice	30
Not very important	25
Damage relationship with other side	24
Your fault or no dispute	24
Other reason	16

^a Respondents can nominate more than one reason.

Source: Commission estimates based on unpublished *LAW Survey* data.

A lack of action in and of itself does not equate with unmet need. Indeed, it could represent a completely rational response where pursuing action would not be welfare enhancing — but it is often unclear whether individuals have a strong enough grasp of the law and their circumstances to make such a judgment. As the Law and Justice Foundation of NSW stated:

Other commonly cited reasons for inaction, if taken at face value, suggest that inaction may have been sensible and may not necessarily indicate unmet legal need:

- The problem was trivial or unimportant.
- Nothing could be done, or taking action would make no difference.
- There was no dispute, or the respondent was at fault.
- It was too early to act, or the problem was likely to be resolved without the respondent needing to do anything ...

Where such beliefs correctly mirror reality, inaction may be appropriate. Reasons such as ‘nothing could be done’ or ‘it would make no difference’ may sometimes accurately reflect failings within the justice system and institutions of remedy (see Genn 1999; Pleasence 2006; Sandefur 2009). However, a few authors have argued that such beliefs are ultimately based on the respondent’s legal knowledge. Given that there appear to be extensive gaps in the general public’s legal knowledge, lay judgements about the seriousness of problems, the possible legal solutions and the likely outcomes of certain resolution strategies will sometimes be erroneous (Balmer et al. 2010; Buck et al. 2008; Genn 1999; Pleasence 2006). Thus, legal needs surveys suggest that, while inaction in response to legal problems is not always a matter for concern, it is likely to be a matter of concern in many cases. (Coumarelos et al. 2012, p. 32)

For example, respondents nominated the reason ‘it wasn’t very important’ for 25 per cent of substantial civil (including family) legal problems where they took no action. This

seems at odds with declaring the problem as having a ‘moderate or severe impact on everyday life’. That said, it may be the case that the reasons given are imprecise or that the problem had a considerable effect for a short time but not in the longer term, and that looking at the combination of reasons for not taking action may provide a better picture for understanding the decisions made.⁷

Also, in some cases, pursuing action is not always possible, such as where the other party to the dispute cannot be identified. Similarly, ‘taking action’ might not always result in legal needs being met — for example, someone seeking the advice of their doctor regarding legal problems that do not have a medical dimension. Even consulting a legal adviser does not always lead to legal needs being resolved.

While the Commission has been asked to examine the extent of unmet legal need, it recognises that doing so necessarily involves some judgments, including about whether the wellbeing of an individual is enhanced by their course of action (or lack of action). The Commission sought to estimate unmet need by looking at problems or disputes that are ‘substantial’ in nature — those that had a moderate or severe impact on everyday life — and where there was a failure to get legal or other appropriate advice to resolve the problem (box 2.2).

While a precise measure of unmet legal need (based on whether ‘appropriate’ advice was sought) cannot be estimated from survey data alone, arriving at an indicative estimate of unmet need is possible. However this requires making contestable, subjective value judgments. The Commission has been asked to provide an estimate of unmet need and has been transparent in the methodology (and associated value judgments) it has used to devise an indicative estimate.

Most legal problems are not substantial in nature, and as such were not considered to have unmet need. The cost of resolving an insubstantial problem may be greater than the impact of the problem itself, as their resolution may not be welfare-enhancing. While some problems identified as insubstantial may turn out to be substantial in the longer term, including all insubstantial problems would also be misleading. The Commission considers excluding them is the best approach given the nature of the estimate sought.

Another judgment that is necessary is whether those people expressing satisfaction with the outcome of their problem have unmet legal need, as indicated in the definition suggested by Dignan (2004). While people may understand that a problem could have substantial impact upon their lives, the substantial nature of the problem may mean that they cannot evaluate what a fair outcome is. For example, an individual may feel that a fair outcome is one that is in their favour rather than what may be a fair outcome under the law. Some may even have failed to resolve the problem without realising it.

⁷ Respondents are able to nominate multiple responses for not taking action. For example, two-thirds of those that said ‘it wasn’t very important’ also nominated that action would make no difference, and nearly half (45 per cent) nominated that they ‘had bigger problems’.

Box 2.2 Estimating unmet need — how to define cases of unmet need

For the purpose of estimating unmet need, the Commission defined cases of unmet need where people:

- had not taken action in response to a *substantial* legal problem because it was too stressful, would take too long, had bigger problems, cost too much, didn't know what to do; or
- had taken action in response to a *substantial* legal problem by only seeking advice from advisers in a non-related field (such as advice from a doctor about a consumer dispute).

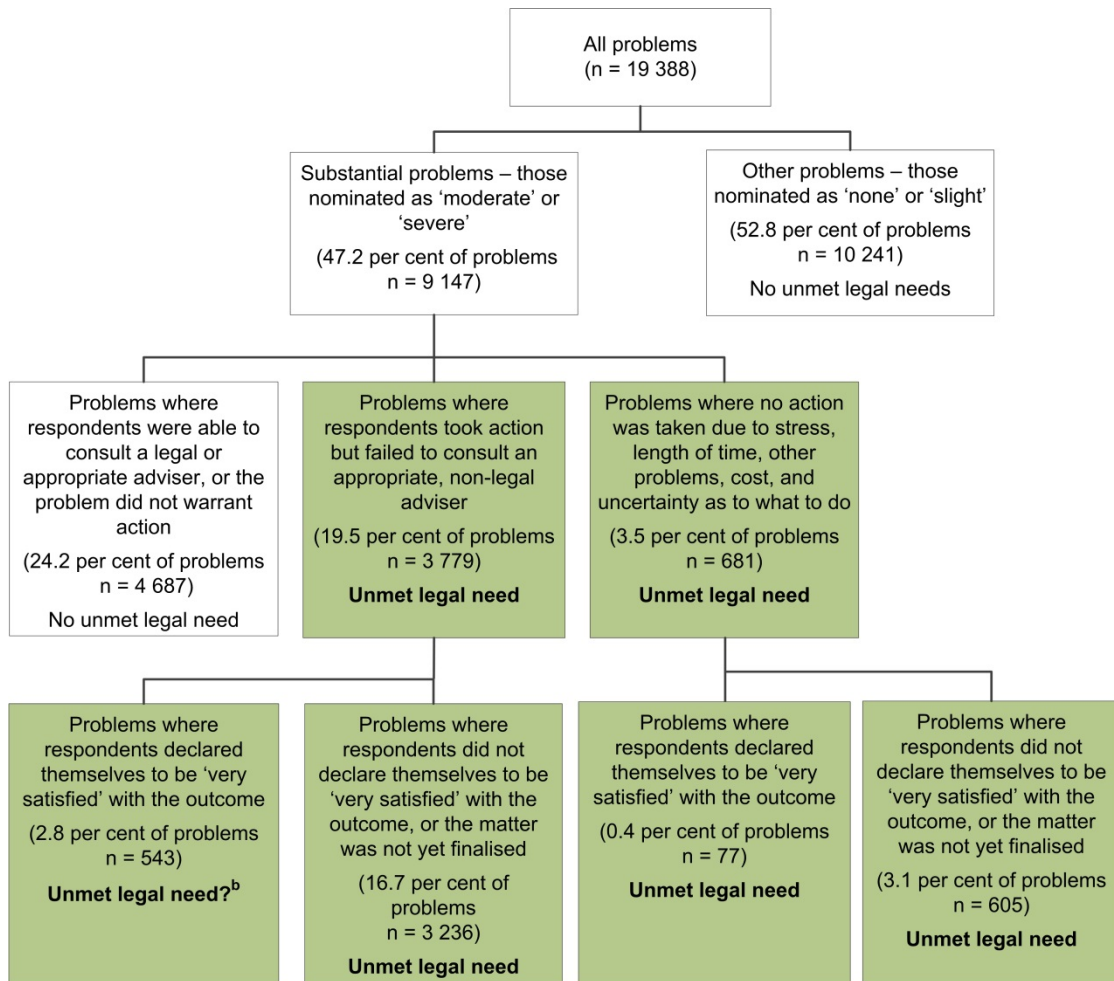
The Commission's selected appropriate advisers, based on the type of problem, are set out below.

Selected appropriate advisers by problem type

<i>Problem type</i>	<i>Appropriate adviser(s) in addition to lawyers</i>
Accidents	Insurance companies and the police
Consumer	Ombudsmen and department of fair trading (or equivalent)
Credit	Financial advisers
Crime	Police
Employment	Unions, supervisors, employment agencies
Family	Family relationship services, and child welfare authority/ department of child safety/children/communities/families/human services in cases relating to children
Government	Government (including ombudsmen)
Health	Doctors
Housing	Government (including ombudsmen)
Money	Financial advisers
Personal injury	Doctors
Rights	Educational institutions, and teachers in the case of bullying

For these reasons, substantial problems that have been resolved without appropriate advice are defined as having unmet legal need, but are separately identified where respondents declared themselves to be 'very satisfied' with the outcome. Of those with substantial problems with unmet legal need, consulting an inappropriate adviser occurred far more frequently compared to taking no action for reasons of cost or being unsure what to do (figure 2.5).

Figure 2.5 Identifying unmet legal need^a



^a Weighted numbers of problems are presented – rounding may mean that groups do not sum to totals. Recall that the definition of a substantial problem is one that had a 'moderate or severe impact on everyday life' (box 2.1). Where information on severity of problems is lacking, they have been counted as substantial. ^b Whether some problems in this group constitute unmet need is discussed in greater detail in box 2.4.

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

Recalling the observation made by Genn and Patterson (2001), measures of legal need (and hence unmet legal need) involve subjective value judgments. Such judgments are open to challenge (box 2.3), and different judgments about the relevant set of problems to consider or what constitutes appropriate advice would yield different estimates of unmet need:

- taking into account minor (in addition to substantial) legal problems would increase the estimated level of unmet need
- allowing for the possibility that legal advice does not necessarily satisfy legal need — such as in cases where good advice is given, but not followed — would increase the estimated level of unmet need

-
- conversely, judgments that all advice is appropriate advice would reduce the estimated level of unmet need.

The Commission explores these and other judgments that affect estimates of legal need in box 2.4.

Box 2.3 **Objections to the definition of unmet legal need**

The Law Council of Australia and the Law and Justice Foundation of NSW were amongst the few participants that raised strong objections with the Commission's approach to measuring unmet legal need. The Law Council of Australia's concerns were based around the use of 'substantial problems':

The Law Council considers that persons experiencing three or more legal problems are highly likely to equate these problems as a whole to have a significant impact on their lives. It is misleading to suggest that a single legal problem must be "substantial" before it is considered worth addressing. ... It also ignores ... that unresolved legal problems (including those considered slight or less important) can and often do exacerbate into much more significant problems later on, particularly in the cases of debt, business disputes, credit and consumer matters, crime, housing and other issues. (sub. DR266, p. 14)

While unmet legal need can occur from minor problems, the Commission has chosen not to focus on these problems on the grounds that taking action to resolve small matters may not necessarily be in the best interests of the individual, as the cost of resolution may exceed the benefit.

The Law and Justice Foundation of NSW expressed strong reservations about using the *LAW Survey* data to measure unmet legal need, objecting both to the definition used and the use of the data source itself for this purpose. The Foundation agreed with the Law Council of Australia that minor problems could constitute unmet legal need, and further that:

- legal advisers may not always provide quality advice, and even when provided it may not be acted upon
- inappropriate advisers may well address unmet legal need
- there is no consideration of satisfaction of the respondent (Law and Justice Foundation of NSW, pers. comms., 15 July 2014 and 28 August 2014)

These concerns again highlight the subjective nature of defining unmet need:

... [W]hile the *LAW Survey* aimed to measure the prevalence of legal need, it did not aim to provide precise estimates of the extent to which the legal need experienced was adequately addressed or remained 'unmet'. We feel that it is not possible, using *LAW Survey* data or other similar legal needs surveys, to provide accurate estimates of unmet legal need with confidence. Such surveys are broad brush instruments only, and do not contain sufficient detail to determine unequivocally whether the legal need has been met. ... (Law and Justice Foundation of NSW, pers. comm., 28 August 2014)

The Commission considers that the *LAW Survey* is presently the most appropriate data source to quantify unmet legal need, and that an estimate is both important and necessary to advise on the broad scale and scope of unmet legal need in Australia. But the Commission agrees that it is important to recognise that such an indicative estimate is highly assumption-driven and that different stakeholders may have different views on what constitutes unmet legal need, and the important factors associated with such. Nor should such a figure derived from survey data be the only piece of evidence considered when making policy in relation to unmet legal need.

**Box 2.4 Is every instance of reported need really unmet legal need?
Is every instance of unmet legal need the same?**

The *LAW Survey* data provide quantitative evidence around the disputes that people face and the actions taken to resolve them, but there is little information more broadly about the qualitative nature of the disputes. It could be the case that some problems and disputes identified are not truly legal problems in nature. For example, a large proportion of the ‘housing’ disputes are in relation to a question about problems with neighbours ‘about things like fences, trees, noise, litter or pets’, which may not have a legal dimension.

There is also a question as to whether the unmet need identified is truly unmet. While those consulting the ‘wrong’ adviser are less likely to receive help in a number of areas — including ‘court/tribunal proceedings or preparation’, ‘formal mediation, conciliation or dispute resolution sessions’, ‘negotiating with the other side’, ‘talking to or writing to another professional or agency’, ‘legal documents such as letters, complaints or agreements’, and ‘other paperwork’ — relative to those that consult the ‘appropriate’ adviser, they still may feel that they have received sufficient assistance.

It is particularly difficult to classify unmet need amongst those that did not seek advice for substantial problems, but handled the problem without formal advice and declared the outcome to be ‘mostly’ in their favour. Of the 3795 substantial problems where an appropriate adviser was not consulted, around 340 of these (2 per cent of all problems) had an outcome considered by the individual to have been ‘mostly in their favour’, and was often characterised as being finalised by direct agreement with the other party, or with the other party doing what the individual wanted (including not pursuing the matter further).

However, given that these are ‘substantial’ problems, the individual may not understand the full extent of their problem, nor be able to evaluate a fair outcome without using an appropriate adviser. Indeed, if the problem has not been resolved properly, then they may still have unmet legal need.

It is also difficult to establish whether some cases of unmet legal need are more severe than others. For example, one individual’s substantial instance of a problem could be more severe than that of another’s, but the data can only show that they are both ‘substantial’. Also, someone may have two legal problems that are both evaluated as substantial, yet one could be more severe than the other.

Unmet need by type of problem

The legal problem areas with the highest level of unmet legal need (based on the Commission’s definition) are consumer problems, government problems, crime problems and housing problems (table 2.3). Most unmet need in these areas results from respondents taking action to resolve a problem by consulting an inappropriate adviser.⁸ There is also a sizable minority of cases where there is unmet need due to lack of action, for those reasons discussed above. (Some additional discussion around the scale and type of unmet legal need identified is presented in box 2.4.)

⁸ Note that if a respondent approached an inappropriate adviser who directed them to an appropriate adviser, then this was not counted as unmet legal need.

Table 2.3 Unmet need by problem type^a

<i>Problem type</i>	<i>Unmet need due to no action for specific reasons^b</i>	<i>Unmet need by failing to consult an appropriate adviser</i>	<i>Total unmet need</i>	<i>Share of all instances of unmet need</i>	<i>Share of problems</i>	<i>Share of unmet need less share of problems</i>
	no. problems	no. problems	no. problems	%	%	ppts ^c
Accidents	16	65	82	1.8	6.9	-5.1
Consumer	150	1 127	1 277	28.6	21.4	7.2
Credit/debt	49	252	301	6.7	5.2	1.5
Crime	102	348	450	10.1	15.3	-5.2
Employment	61	320	381	8.5	6.1	2.4
Family	21	251	272	6.1	5.7	0.4
Government	75	513	588	13.2	9.8	3.4
Health	49	67	116	2.6	2.8	-0.2
Housing	52	332	384	8.6	10.5	-1.9
Money	17	164	182	4.1	5.3	-1.2
Personal injury	14	76	91	2.0	5.9	-3.9
Rights	75	263	337	7.6	5.0	2.6
TOTAL	681	3 779	4 460			

^a Columns and rows may not sum to total due to rounding and weighting of responses. ^b That is, took no action because it was 'too stressful', 'would take too long', 'cost too much', or 'didn't know what to do'.

^c Percentage points.

Source: Commission estimates based on unpublished *LAW Survey* data.

Some problem types are more likely to result in unmet need than others. The far-right column in table 2.3 shows the 'disproportionality' between the incidence of particular types of legal problems and the incidence of unmet legal need. For example, consumer problems appear disproportionately susceptible to unmet need as they comprise 21.4 per cent of problems, but comprise 28.6 per cent of problems with unmet legal need. In contrast, accident problems are less susceptible to unmet need; comprising 6.9 per cent of problems, but only 1.8 per cent of the instances of unmet need.

Unmet need by person

The *LAW Survey* data do not easily lend themselves to translating the proportion of *problems* with unmet legal need to proportion of the *population* with unmet legal need. While respondents to the survey nominated all the problems that they perceived they had, additional information on how they resolved those problems was only collected for the three most serious types of problem. It could be the case that the other problems not examined in more detail have unmet need, and thus an estimate of unmet legal need for the population could be too low.

That said, many respondents with more than three problems have been identified as having unmet legal need in the Commission's analysis based on those problems where their actions are detailed. Issues around definitions are more likely to be a greater source of error than those problems not considered in greater detail within the survey. However, this serves to illustrate how estimates of unmet legal need should be considered with caution.

Based on the *LAW Survey* data, the Commission estimates that around 17 per cent of the population or just over a third of those with any legal problem experienced some form of unmet legal need. Excluding those with only criminal problems makes little difference to these proportions.

FINDING 2.1

Estimating unmet legal need is very difficult and necessarily involves contestable value judgments. Australian data have not been collected with the express purpose of measuring unmet legal need. However, the Commission has developed a transparent methodology using the most comprehensive data available. The Commission's analysis suggests that more than 15 per cent of the population have some form of unmet legal need that related to a dispute that they considered to have a moderate or severe impact on everyday life.

Amongst those with any civil (including family) problem, Commission analysis based on the *LAW Survey* data has identified some characteristics that are associated with having any number of instances of unmet legal need:

- women are more likely to experience unmet legal need relative to men
- those on means-tested government payments are more likely to experience unmet legal need (relative to those not receiving such payments)
- Indigenous Australians are more likely to experience unmet legal need (relative to non-Indigenous Australians)
- those with unmet legal need are more likely to have a disability (relative to those without a disability)
- those with unmet legal need are more likely to be unemployed⁹ (relative to employed)
- those whose main language was other than English were more likely to experience unmet legal need relative to those whose main language was English
- those who had both criminal and civil (including family) problems are more likely to experience unmet legal need compared to those that had civil (including family) problems alone

⁹ This is still true even when the employment class of legal problems (which is heavily correlated with unemployment) is omitted from the analysis.

-
- those who live in disadvantaged housing were more likely to experience unmet legal need
 - single parent status, education and remoteness do not seem to be important in explaining unmet legal need — but more research is necessary in this field to confirm this.¹⁰

Informal pathways for addressing some unmet legal need

While many of the problems reported in the *LAW Survey* can be defined as unmet legal need, many of them, such as consumer and government problems, lend themselves to resolution through informal dispute resolution mechanisms such as alternative dispute resolution (ADR), ombudsmen, and with the assistance of government agencies. To illustrate this point, the Commission looked at unmet need for each of the dispute types with a view to identifying the informal dispute resolution mechanisms that could be employed (box 2.5).

While unmet legal need occurs in a variety of problem types, and affects different demographics, many of these disputes have some informal dispute resolution option available. However, the data indicate that use of these informal mechanisms is often limited. For example, the *LAW Survey* indicated that only 2 per cent of problems were finalised via an ‘ombudsman or complaint handling body’ (Coumarelos et al. 2012, p. 140).

¹⁰ The *LAW Survey* also found that remoteness was not associated with having a legal problem in general (Coumarelos et al. 2012), but other studies have found that remoteness was a barrier to accessing justice, such as Coverdale (2011). This may suggest that remoteness is a barrier in accessing justice for particular areas, but not necessarily in general, or that the survey methodology led to an under-representation of those in remote areas because it was phone-based.

Box 2.5 Informal dispute resolution mechanisms for addressing unmet need

Informal dispute resolution mechanisms exist for many of the identified instances of unmet legal need. Some of the more common problems and informal dispute resolution pathways include:

- the Australian Competition and Consumer Commission, industry ombudsmen and offices of fair trading for consumer problems (the most common unmet legal need)
- government ombudsmen, at both the federal and state level, for many government-related problems
- government agencies, which offer an avenue to resolve disputes around neighbours and public housing, and tribunals and the Financial Ombudsman Service, which offer a mechanism to resolve mortgage issues relating to private housing
- the Fair Work Ombudsman, which offers informal dispute resolution for many employment problems in most jurisdictions
- in the first instance, the Child Support Agency and family dispute resolution (FDR) practitioners represent a pathway to resolve many family issues. Indeed, these mechanisms are considered to be preferable to more formal means of resolving disputes in most instances, given that parties to parenting disputes are generally under an obligation to attend FDR before lodging a court application (chapter 24)
- ‘rights’ based problems (which include discrimination and harassment) can be addressed through the human rights commissions at the federal and state level
- the Credit Ombudsman Service, which can be used to resolve many disputes about credit and debt problems.

In addition, there are tribunals that people with legal problems can use to try to resolve their disputes. Tribunals can involve costs, though these can be less than the costs of seeking redress through the court system (chapter 10). A more detailed discussion around the problem types with unmet legal need, and the informal dispute resolution mechanisms likely to be useful in resolving the relevant disputes is provided in appendix B.

How much unmet need could be met by the pathways discussed above?

Assuming that unmet need can be addressed by informal mechanisms in this way, the next question is how much unmet legal need would then be left? Making this assumption includes a number of prerequisites: namely that there are no other barriers, such as a lack of capabilities, or other factors such as location, to gaining access to the informal pathways, and that the pathways themselves have the capacity to meet the additional demand.

Based on a ‘best-case’ scenario — where unmet need can be satisfied by these informal mechanisms — the proportion of the population with any civil (including family) problem and unmet legal need is reduced from 17 per cent to less than 5 per cent. While it should be recognised that this is based on an optimistic interpretation of the effectiveness and resources of informal pathways (and the ability for those with unmet legal need to use them), it does indicate that informal pathways could play a significant role in reducing the

incidence of unmet legal need. (Appendix B details the different proportions of problems that could be solved through a range of the informal dispute resolutions.)

FINDING 2.2

Informal dispute resolution mechanisms (including, but not limited to, ombudsmen and government agencies) could be better employed to address a significant share of unmet legal need. On an optimistic interpretation of the effectiveness of these informal mechanisms, the proportion of the population with identified unmet legal need could potentially reduce from more than 15 per cent to less than 5 per cent.

Some stakeholders have suggested that these assumptions are too optimistic and unrealistic, especially for particular groups of people who may experience greater difficulties than the general population. These groups include those with poor literacy and English-speaking skills, those with low educational attainment, and those suffering from cognitive or mental health impairment (Legal Aid NSW, sub. DR189). The Northern Territory Legal Aid Commission (sub. DR255) also highlighted that informal services may not be available outside metropolitan areas. This underscores the importance of ensuring that these processes are accessible to all (chapter 9). Even then, some may need assistance to connect to these services (chapters 5 and 24).

While some of these groups are associated with a higher risk of unmet legal need, there are many others that still have unmet legal need, and for whom informal mechanisms may effectively resolve that need. Other participants, including ombudsmen themselves, felt that informal mechanisms could be used more effectively to meet unmet demand:

The [Public Transport Ombudsman] agrees with the Commission's draft finding that informal dispute resolution mechanisms such as ombudsmen could be better employed to address a significant share of unmet legal need in the community. (sub. DR223, p. 3)

The LIV ... considers that inexpensive, fast and easily-accessible means of dispute resolution should be promoted to the general public. (Law Institute of Victoria, sub. DR221, p. 2)

... I endorse the key point in the draft report that ombudsman potentially provide an appropriate mechanism to meet significant unmet legal need. ... The ombudsman model has proved to work across government and industry as an access to justice mechanism. (Telecommunications Industry Ombudsman, trans., pp. 831–832)

Unmet need of businesses

An analysis of unmet demand for dispute resolution mechanisms was carried out in the Small Business Dispute Resolution Survey (DIISR 2010). This analysis looked at whether firms were satisfied with the available dispute resolution mechanisms available to them (rather than the outcomes themselves), and whether the firm felt that more mechanisms were needed.

In the survey, unmet demand was defined as partially or fully unmet demand, based on whether firms felt satisfied with their available dispute resolution mechanisms, and whether they felt more mechanisms were needed.¹¹ Based on this methodology, less than 1 per cent of firms had fully unmet demand, while close to another 3 per cent had partially unmet demand. Compared with individuals, the incidence of unmet legal need amongst small businesses appears to be much lower. (The different combinations and incidence of satisfaction and demand by small business for dispute resolution mechanisms is reproduced in appendix B.)

Some participants, however, have suggested that there is substantial unmet need amongst small businesses. For example, the Small Business Development Corporation (SBDC) of WA stated:

In the [Small Business Development Corporation's] opinion, there is a substantial level of unmet legal need amongst small businesses, particularly as anecdotal evidence suggests many small business operators are seeking advice from inappropriate sources when trying to navigate legal problems. (sub. DR240, p. 3)

The lack of information around legal needs of businesses and resolution of legal disputes makes it impossible to determine unmet legal need. Better information is needed to determine unmet legal need amongst businesses; the details of which are examined in chapter 25 and appendix J.

More information on the informal dispute resolution mechanisms is presented in chapter 8 (alternative dispute resolution) and chapter 9 (ombudsmen), while initiatives to improve the public's ability to navigate the legal system are explored in chapter 5. The next chapter addresses accessibility of the civil legal system in detail.

¹¹ This is different to the discussion about individuals earlier in the chapter, which specifically addressed satisfaction with the outcome of disputes.

3 How accessible is the civil justice system?

Key points

- Barriers that deter or frustrate parties attempting to resolve their legal disputes include financial costs, a lack of timeliness, and difficulties in understanding and navigating a complex legal system.
- Individuals who do not act on a legal problem due to concerns about costs, time or complexity tend to be dissatisfied with the outcome.
- The financial costs of accessing justice vary greatly between the various avenues for dispute resolution.
 - Informal dispute resolution processes, such as ombudsmen, are available at little or no cost to disputants.
 - While evidence of the financial costs of alternative dispute resolution is limited, what is available suggests that early settlement provides parties with significant cost savings.
 - Tribunals are relatively inexpensive in many cases. However, out-of-pocket expenses are much higher in tribunal matters involving legal representation.
 - Courts are normally the most expensive avenue, with costs increasing in superior courts and for disputes that progress further through court proceedings.
 - Financial barriers can lead to parties not acting on their legal problems, not seeking professional assistance, or withdrawing or settling their cases.
- The timeliness of dispute resolution has remained the same or improved in most jurisdictions over the past decade.
 - However, improvements in timeliness have not been universally realised, and more recently appear to have deteriorated in some courts.
 - While ombudsmen appear to resolve matters quickly, there is less evidence to support the notion that tribunals offer timely resolution of disputes.
 - Magistrates' courts and the Federal Circuit Court provide significantly faster outcomes than their superior court counterparts, in part because of differences in the complexity of matters being dealt with.
- There is a strong consensus that the civil justice system is complex and difficult to navigate.
 - Sources of complexity identified include: the law itself; court processes, procedures and forms; the conduct of lawyers; and a lack of knowledge among disputants of the available avenues for dispute resolution.

Parties can face a number of barriers when attempting to resolve their legal disputes. While the financial costs of taking legal action receive the bulk of attention, this is just one of

several barriers individuals and businesses face. Delays in obtaining an outcome, and difficulties in understanding and navigating a complex legal system, can also frustrate a party's access to justice.

These barriers can prevent individuals and businesses from taking action to resolve their legal problems, and there is some evidence to suggest many are worse off for their inaction. The Commission estimates, based on unpublished *Legal Australia-Wide Survey (LAW Survey)* data, that individuals were ultimately dissatisfied with the outcome in almost 60 per cent of substantial legal problems where no action was taken.

Understanding where these barriers arise in the civil system is fundamental for informing and targeting reform. While the notion is simple, the task is not. Just as the nature of disputes and avenues for resolving disputes vary, so too do the barriers faced by parties. Indeed, there appear to have been very few attempts to measure the magnitude of barriers to accessing justice in Australia.

This chapter examines the financial costs associated with various stages in the dispute resolution process, and how costs can influence a disputant's decisions (section 3.1). It then discusses the timeliness of the civil justice system and the impact of delays on parties (section 3.2). Finally, section 3.3 analyses the complexity of the system, particularly its effect on the capability of parties to respond to legal problems and seek assistance.

3.1 How much does it cost to resolve civil disputes?

There are widely held views that accessing justice through the civil legal system is beyond the financial reach of 'ordinary' Australians. A recent survey by the Australia Institute found that 83 per cent of respondents believed that only the very wealthy can afford to protect their legal rights (Denniss, Fear and Millane 2012). When commenting on their own circumstances, less than half of the respondents to the survey said that they could afford a good lawyer if they had a serious legal issue.

The costs of seeking resolution through the courts are seen as particularly prohibitive. The Queensland Public Interest Law Clearing House (QPILCH) observed:

The issue of costs is a clear barrier to effective access, particularly to access the courts ... Failure to access the courts is not limited to the very poor, but is also difficult for many wage earners. The increasing cost of litigating a dispute, including the cost of legal assistance and any potential cost orders made against unsuccessful parties, creates a significant barrier to access to justice, particularly at the superior court level. (sub. 58, p. 3)

Out-of-pocket legal expenses are not the only financial costs that can be incurred by parties in disputes. A study of disputes involving small businesses found that other costs, such as the opportunity cost of time and effort, were generally considered by businesses to be larger than their out-of-pocket expenses (DIISR 2010).

International comparisons also suggest that Australia's civil justice system is relatively expensive to access. On the World Justice Project's *Rule of Law Index* in 2014, Australia ranked 53rd out of 99 countries for the affordability of its civil justice system. This placed Australia 25th among OECD countries surveyed for the index, ahead of only Japan, the United States and Mexico (World Justice Project 2014).

That said, actual evidence in the form of comprehensive estimates of litigation costs in Australia is elusive. In estimating the financial costs of accessing the civil justice system, the Commission has had to draw on a variety of sources, including past studies and data provided by government agencies and other participants in this inquiry. With the assistance of the South Australian courts, the Commission has also conducted a survey of court users (appendix C).

Basic initial legal advice can be free ...

Individuals seeking basic legal advice have several options. They can contact one of the many freely provided telephone advice lines (chapter 5). All legal aid commissions provide one-off free legal advice sessions, generally lasting for around 20 minutes. While this does not allow for detailed advice about complex matters, lawyers can provide basic advice, provide a referral where appropriate and in some cases can assist with completing forms.

Similarly, many lawyers in the private sector will undertake an initial consultation of up to 30 minutes free of charge. For example, all law firms participating in the Law Institute of Victoria's referral service agree to provide a free 30 minute enquiry interview (Law Institute of Victoria 2014). Individuals can use this interview to determine with a solicitor the nature of the legal issue, discuss the available options and receive an estimate of the costs of proceeding with the matter.

... but those who require ongoing assistance will face significant costs

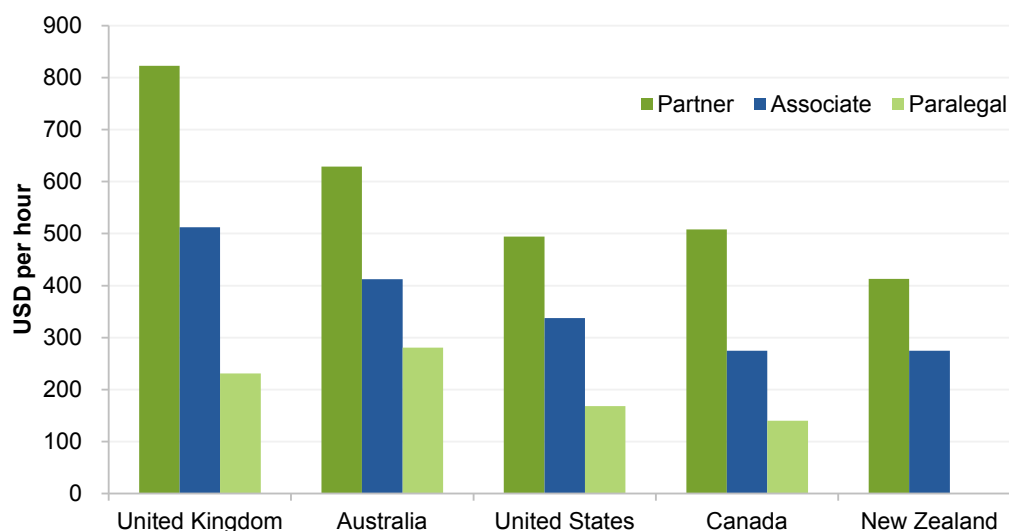
Beyond these basic information services, free or highly subsidised legal assistance is generally only available to those experiencing significant disadvantage (chapter 21). The majority of people who obtain professional legal services do so from lawyers in the private market.

Solicitors generally charge their clients on a time basis (chapter 6). Hourly rates vary depending on the location and seniority of the lawyer. Some evidence suggests that partners typically charge more than \$600 per hour, while associates charge around \$400 per hour (figure 3.1). Similar estimates of solicitor's hourly rates in the private market were provided to the Commission during its hearing process, ranging from around \$350 to \$600 an hour (trans., p. 31, 159).

To put this in perspective, the average full time employee in Australia earns around \$34 per hour (ABS 2012). As one senior lawyer remarked in the course of this inquiry, 'I

couldn't afford my own services'. Hourly billing rates in Australia also appear to be higher than in similar countries, with the exception of the United Kingdom (figure 3.1).

Figure 3.1 International comparison of median billing rates^a
By country and type of legal professional, 2011-12 US dollars per hour



^a Sample sizes were 362 for partners, 657 for associates and 182 for paralegals for United Kingdom; 60, 57 and 14 for Australia; 15 898, 16 409 and 7119 for the United States; 640, 715 and 650 for Canada. Sample sizes were 11 and 31 for partners and associates in New Zealand, with no data collected for paralegals.

Data source: TyMetrix (2013).

However, hourly rates are not an ideal measure of the costs of accessing justice. While clients may be billed on an hourly basis, they are ultimately seeking to resolve their disputes. As such, they are more likely to be concerned with the total cost of achieving a legal outcome, rather than the hourly rates charged by lawyers. Measuring legal costs incurred per dispute may be a more appropriate way to assess the financial costs of accessing justice.

Beyond receiving legal advice, the costs of resolving a legal problem will depend on the avenues that are used to address the problem, such as ombudsmen, tribunals or courts.

Ombudsmen can provide low or no cost resolution of some disputes

One relatively low-cost avenue for resolving some disputes is through ombudsmen (chapter 9). Many common disputes, such as those with telecommunications providers, banks and some government agencies, can be dealt with in this way. Complainants generally face no direct costs, with government (taxpayers) and industry meeting the costs

of the service. The informal nature of the complaints process is structured so that individuals do not require legal advice or representation and so can avoid private legal fees.

Tribunals can resolve disputes at a low cost ...

Tribunals are generally intended to provide a low-cost informal alternative to courts and have been assigned jurisdiction to hear a range of civil disputes, including consumer, tenancy and building matters. Some tribunals discourage or limit the use of legal representation in order to achieve this (chapter 10). Where parties self-represent, out-of-pocket costs are typically contained to those that individuals or businesses incur in preparing their own case, along with application fees.

In low value disputes, these direct, out-of-pocket expenses tend to be relatively small. A study of the cost to small business disputants in the Victorian Civil and Administrative Tribunal (VCAT) found that average direct costs were less than \$200 in disputes under \$5 000 (VSBC 2014). However, when accounting for the indirect costs of these lower value disputes — such as the cost of staff time and attending hearings — the average total cost to disputants was around \$1000.

... but are more expensive for disputes of greater value and complexity

Although tribunals primarily deal with small disputes and encourage self-representation, some deal with larger, more complex disputes. The VCAT study revealed that the costs of resolving these disputes can be much higher (VSBC 2014). Parties involved in high value disputes in tribunals appear to use professional representation much more frequently — in 70 per cent of disputes over \$20 000 in VCAT — adding considerably to the cost of resolving disputes (table 3.1). The indirect costs to small businesses also tend to be higher for larger disputes.

When account was taken of staff time, travel and other expenses, overall costs were in the order of \$9000 for disputes between \$10 000 and \$20 000, and \$25 000 for disputes over \$20 000.

In other tribunals, legal representation is common, or even encouraged. For example, the Dust Diseases Tribunal of New South Wales hears quite complex cases and so parties are typically represented by a solicitor or barrister (Dust Diseases Tribunal NSW 2012). Similarly, disputes under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) involving Comcare — usually resolved in the Administrative Appeals Tribunal (AAT) — often involve representation. These types of cases can involve large compensation amounts and require testimony from expert medical witnesses. Legal costs in these cases often resemble amounts incurred in court proceedings.

Table 3.1 Legal costs in some tribunals when legal representation is used

In 2012-13 dollars

<i>Tribunal</i>	<i>Year</i>	<i>Party</i>	<i>Sample size</i>	<i>Mean</i>	<i>Median</i> ^b
Dust Diseases Tribunal NSW ^a	2006	Plaintiff	52	\$43 094	na
	2007	Plaintiff	37	\$48 356	na
VCAT	2013	Small business	58	\$8 180	\$2 789
AAT (SRC Act matters)	2013	Comcare	25	\$55 205	\$44 894
	2013	Applicant	11	\$19 655	\$14 941

^a Converted to 2012-13 dollars using price deflators from ABS (2013a). ^b na denotes not available.

Sources: Productivity Commission estimates using data from NSW Government (2007), the Victorian Small Business Commissioner (2014), and data supplied by Comcare on SRC Act matters in the AAT.

Litigation in the courts tends to be the most expensive ...

Litigation in courts is generally the most expensive means for private parties to resolve their disputes. Costs incurred in litigation can include fees paid to solicitors, court fees and disbursements (such as fees to barristers and expert witnesses). Previous studies have found that the average costs of litigation vary between courts, and tend to be higher in superior jurisdictions (Matruglio 1999a; Worthington and Baker 1993).

The costs of litigation can also vary within the same court. The distribution of costs across cases is skewed, with a ‘long tail’ comprised of a few cases that are very expensive (Matruglio 1999a, 1999b; Worthington and Baker 1993). The tail appears to be longer and more pronounced in superior jurisdictions where protracted and expensive disputes are more common.

To obtain more up-to-date estimates of the legal costs incurred by parties in court-based disputes, the Commission has drawn on a number of sources, including data from:

- a major insurance company, outlining legal costs in compulsory third party (CTP) claims in 2009 and 2010 in various jurisdictions
- the Senior Master’s (Funds in Court) Office of the Supreme Court of Victoria, detailing the costs of cases involving serious personal injury in Victoria’s Supreme Court in 2009 and 2010
- the survey of court users in South Australia conducted by the Commission
- the NSW Costs Assessment Scheme, detailing amounts contained in original costs assessment applications by clients (client–practitioner), practitioners (practitioner–client), and by parties where costs orders have been made (party–party).

The findings from more recent data obtained by the Commission (table 3.2) support similar conclusions to those found in existing literature, with legal costs higher, on average, in superior courts, and the distribution of costs exhibiting a long tail of particularly expensive cases — evidenced by the median cost typically being much lower than the mean cost.

Table 3.2 Estimates of average legal costs
From various sources, in 2012-13 dollars^{a,b}

<i>Source</i>	<i>Year</i>	<i>Description</i>	<i>Sample size</i>	<i>Mean</i>	<i>Median</i>
Various jurisdictions (CTP claims)	2009	Plaintiff	2 697	\$28 060	na
	2009	Defendant	2 697	\$16 613	na
	2010	Plaintiff	2 714	\$24 812	na
	2010	Defendant	2 714	\$15 815	na
Supreme Court of Victoria	2009	Plaintiff	82	\$60 671	na
	2010	Plaintiff	48	\$59 340	na
SA Magistrates Court	2013	na	30	\$9 701	\$5 000
SA Supreme and District Courts	2013	na	13	\$166 141	\$50 000
NSW Costs Assessment Scheme	2012	Client–prac	248	\$50 322	\$15 531
	2012	Prac–client	464	\$29 772	\$12 539
	2012	Party–party	714	\$84 418	\$41 432
	2013	Client–prac	275	\$58 556	\$21 132
	2013	Prac–client	504	\$45 047	\$15 640
	2013	Party–party	728	\$89 456	\$37 455

^a Converted to 2012-13 dollars using price deflators from ABS (2013a). ^b na denotes not available.

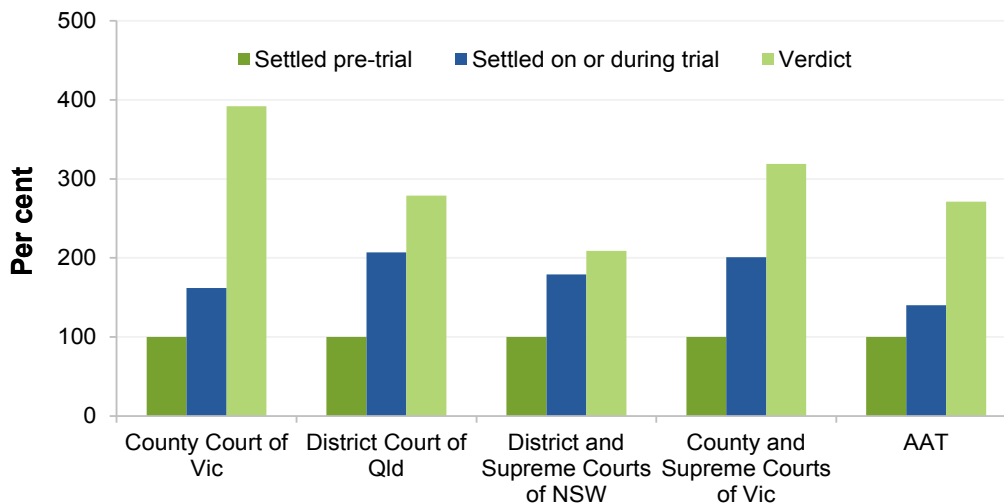
Sources: Productivity Commission estimates using CTP claims data supplied by a major insurer, data from serious personal injury cases supplied by the Senior Master's (Funds in Court) Office of the Supreme Court of Victoria, survey data collected by the Commission in the South Australian courts (appendix C), and data from costs assessment applications supplied by the NSW Costs Assessment Scheme.

... and costs grow as cases progress

Studies have identified a number of factors that increase costs in litigation. One factor that has been consistently shown to strongly determine legal costs is the stage of litigation at which a case is resolved. In one study, legal costs were 50 to 200 per cent higher in cases that settled during trial — and almost 400 per cent greater in cases that went to verdict — when compared to cases that settled before trial (Williams and Williams 1994). These findings were echoed in Worthington and Baker (1993) and Fry (1999), which also found that settling before trial significantly reduces costs. The available evidence suggests that similar growth in costs occurs in tribunal matters as they progress (figure 3.2).

Figure 3.2 **Estimated growth in legal costs as cases progress^a**

As a percentage of pre-trial costs, from various data sources



^a For matters in the AAT, cases were classed as resolved by withdrawal, settlement or went to hearing.

Data sources: Productivity Commission estimates using data from Worthington and Baker (1993), Williams and Williams (1994), and data supplied by Comcare on SRC matters in the AAT.

In addition to stage of disposal, the number of court events has been found to significantly influence costs (Fry 1999; Worthington and Baker 1993). Some inquiry participants put forth a similar point:

... legal costs substantially increase in matters involving numerous interlocutory processes within the same proceeding. (Law Council of Australia, sub. DR167, p. 11)

These findings underscore the cost savings of resolving disputes early and of effective case management processes (chapters 8 and 11).

The Law Council of Australia (sub. DR167) also suggested that costs are higher in matters where the other side is a self-represented litigant. However, there does not appear to be empirical data in the existing literature that supports this view — indeed, Fry (1999) found no evidence that a lack of representation by one side increased the costs of litigation.

How do costs compare with the amounts at stake?

The terms of reference for this inquiry ask the Commission to analyse whether the costs charged for accessing the civil justice system and for legal representation are generally proportionate to the issues in dispute. Disproportionate costs are frequently cited as a potential barrier to accessing justice. As Dennis (2005) has previously argued, a rational

individual may have little reason to access a dispute resolution process where the cost of doing so substantially erodes the value of any compensation received.

A number of submissions to this inquiry have argued that legal costs can be disproportionate to the amounts in dispute:

In the [Small Business Development Corporation's] experience, the cost of seeking legal advice would be too great in relation to the value of the dispute for many small businesses. (SBDC, sub. 76, p. 9)

... the cost of protracted litigation in the Federal Family Law Courts is beyond the capacity of the average family law litigant. It is the experience of Legal Aid NSW that the costs can be disproportionate to the issues at stake. (Legal Aid NSW, sub. 68, p. 31)

There is no proportionality regarding the financial costs of dispute resolution to the matters at stake. Rather, financial costs of dispute resolution are proportional to the relative strength and bargaining power of the parties ... (QPILCH, sub. 58, p. 12)

The available evidence on the relative size of legal costs to the amount in dispute is mixed, ranging from 12 per cent to 74 per cent for applicants (table 3.3). Further, a concern for the principle of proportionality is that the complexity of a case — and hence the amount of legal work required — may not increase in direct proportion with the amount that is in dispute. Disproportionate costs may therefore be more frequent in disputes involving lower amounts (relative to higher amounts). Because most of the available data have been sourced from matters involving compensation claims, where the amounts in dispute are relatively large, the extent of disproportionality is likely to be understated.

Table 3.3 Average proportion of legal costs to the amount in dispute^a
For selected courts and tribunals, by type of party

	<i>Year</i>	<i>Applicant</i>	<i>Defendant</i>	<i>Total costs</i>
		%	%	%
NSW District Court	1993	27	28	55
Victorian County Court	1993	32	30	62
NSW Supreme Court	1993	20	14	34
Victorian Supreme Court	1993	15	14	29
Dust Diseases Tribunal	2006	15	na	na
Dust Diseases Tribunal	2007	12	na	na
CTP claims (various jurisdictions)	2009	13	8	20
CTP claims (various jurisdictions)	2010	14	9	22
VCAT (small businesses)	2013	74 ^b	na	na
South Australian Magistrates Court	2013	73 ^b	na	na

^a na denotes not available. ^b Includes both applicants and defendants, as the available data was not separated based on type of party.

Sources: Productivity Commission estimates using data from NSW Government (2007); Victorian Small Business Commissioner (2014); Worthington and Baker (1993); unpublished data supplied by a major insurer; and the Commission's survey of court users in South Australia.

Worthington and Baker (1993) previously found that legal costs, as a percentage of the amount awarded, decrease as the amount in question increases. The disproportionality of costs in lower value disputes appears to be borne out by contemporary data. For example, the Commission’s survey of court users found that legal costs in disputes in the South Australian Magistrates Court on average comprised 73 per cent of the amount in dispute (table 3.3). Similarly, a survey of small business disputes in VCAT found that while direct costs on average were low compared to the amount in dispute, indirect costs were much less proportional (VSBC 2014). In smaller claims, the indirect costs of resolving the dispute often exceeded the amount in dispute, while the average cost across all disputes was 74 per cent of the amount at stake.

These conclusions are also supported by the Commission’s analysis of serious personal injury cases in the Supreme Court of Victoria, which reveals legal costs decreasing as a proportion of damages as the amount awarded increases (table 3.4).

The proportionality of costs in disputes over deceased estates has also been subject to recent examination by Vines (2011). In this research, costs were defined as disproportionate when they amounted to at least 25 per cent of the value of the estate in question. It was found that costs were disproportionate in close to half of the cases examined from New South Wales and over one third of the cases from Victoria.

Table 3.4 Legal costs as a proportion of amount awarded in personal injury cases

By dispute amount and type, from Supreme Court of Victoria in 2009 and 2010

<i>Amount in dispute</i>	<i>Medical negligence</i>	<i>Transport accident</i>	<i>Workplace injury</i>	<i>Other</i>	<i>Total</i>
	%	%	%	%	%
\$0 to \$250 000	14	16	26	23	19
\$250 000 to \$500 000	14	8	21	7	11
\$500 000 to \$750 000	12	5	na	0	5
\$750 000 to \$1 000 000	15	6	na	18	8
Greater than \$1 000 000	5	5	6	5	5
Total	6	7	20	13	7

^a na denotes not available.

Source: Productivity Commission estimates using unpublished data from the Senior Master’s (Funds in Court) Office of the Supreme Court of Victoria.

Have legal costs increased over time?

The terms of reference also ask the Commission to have regard to an assessment of trends in the real costs of legal representation over time. Some stakeholders have provided anecdotal observations of increases — IMF (Australia) Pty Ltd (sub. 103) suggested it often observes annual increases in lawyers’ charge-out rates of 5 to 10 per cent.

However, quantitative analysis of any changes in legal costs over time is constrained by a lack of accessible and comparable sources of data on legal costs across different time periods. As noted by IMF (Australia) Pty Ltd:

There is a significant lack of empirical data relating to legal and others costs which parties incur in civil disputes resolution. This information is not gathered by the Courts or other Government agencies. (sub. 103, p. 32)

The data on litigation costs made available to the Commission thus far have generally only covered periods of one to two years, preventing any conclusive findings regarding changes in costs over time. Without consistent and periodic collection of data it is unlikely that such an assessment can be made. The use of data and evidence in the civil justice system is discussed further in chapter 24.

How do the financial costs of accessing justice affect individuals?

Financial costs can discourage disputants from acting on their legal problems

The relatively high costs of taking action do not just impact on tribunal and court users. These costs discourage many Australians from seeking a remedy to their legal problems. Based on unpublished data from the *LAW Survey*, the Commission estimates that in around one third of substantial civil legal problems that were not acted on, a belief that action would be too costly was a reason for inaction.

For small businesses, concerns about costs appear to be similarly prevalent in decisions about whether to act on disputes. A 2010 survey found that of the 20 per cent of small businesses that had experienced a dispute in the past five years, roughly a third had experienced potentially serious disputes but avoided escalation due to concerns about potential costs (DIISR 2010).

Financial costs can prevent those who do take action from seeking professional advice or representation

Legal costs also appear to shape people's decisions about what assistance to seek when responding to legal problems. In around 40 per cent of substantial legal problems where the individual either took no action or only consulted friends and family for advice, individuals cited concerns about cost as their reason for not taking any further action (according to Commission estimates based on unpublished *LAW Survey* data). Once again, this was most common in problems involving credit and debt, money or health issues.

Even when legal disputes are pursued in the courts, legal costs remain an important factor for some parties in deciding whether to seek representation. In its survey of South Australian court users, the Commission found that a third of respondents did not have a lawyer represent them at any stage during their case. A similar rate — around 28 per cent

— of self-representation in courts was estimated by the Commission based on unpublished data from the *LAW Survey*. According to the South Australian survey, just under half of these self-represented parties cited an inability to afford representation or lack of access to legal aid as the most important reason for their decision to self-represent.

Following a survey of its clients, the Small Business Development Corporation found that concerns about costs also deter businesses from seeking legal advice:

... in general small businesses cannot afford these services, and as a result, will attempt to resolve the dispute themselves or by using advice from other, potentially inappropriate, resources. There is also a perception amongst small business owners that these services are out of their reach financially ...

Under half of small business respondents who had a dispute sought legal advice. One of the main reasons given for not seeking legal advice when dealing with a dispute or issue was cost ... (sub. 76, p. 9)

Those taking action through formal channels may settle or withdraw due to costs

Legal costs also impact on the decisions of individuals as litigation progresses through the courts, and can lead to parties settling or withdrawing their cases:

... the South Australian District Court records that only 5% of civil matters go to trial ... that result is achieved in some cases because parties are worn down by attrition and the costs of continuing are prohibitive. (Law Council of Australia, sub. DR167, p. 6)

This view is supported by the results of the Commission's survey of court users in South Australia. Roughly a third of those survey respondents who decided to settle or withdraw their case cited concern about legal costs as important in their decision.

For those able to afford representation, the decision to settle to avoid escalating legal costs is often based on legal advice. Roughly 70 per cent of those with legal representation who settled because of concerns about costs also reported advice from their lawyer as an important factor in their decision.

There is also some evidence to suggest that some parties accept settlement terms that are much less than they believe they are entitled to in order to avoid rising legal costs. Only a relatively small proportion — less than 20 per cent — of those who settled due to costs concerns reported that the settlement offer they received was close to what they wanted.

3.2 How long does it take to resolve disputes?

Some legal disputes are complex and may necessarily take some time to resolve. But when the system is slow in resolving even relatively simple disputes, individuals can be deterred from taking action, or withdraw their case before completion. Those that are undeterred

may face a higher burden in resolving their disputes if the system is slow. As the legal maxim suggests, ‘justice delayed is justice denied’.

Ombudsmen perform well on timeliness but tribunals are slower

Data presented to the Commission suggest that ombudsmen resolve matters quickly — 80 per cent within one month and 97 per cent within two months (ANZOA, sub. 133).

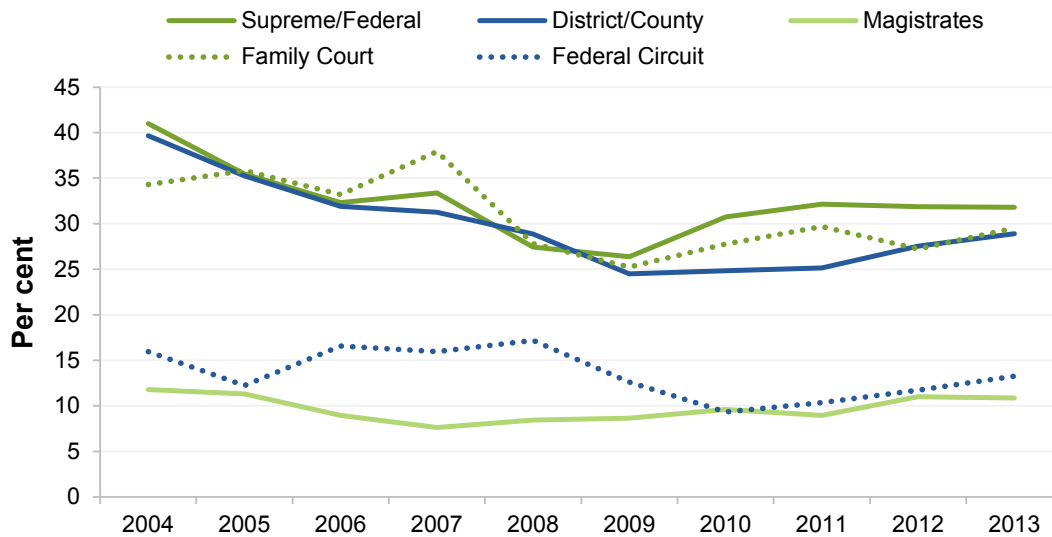
While most tribunals operate under statutory exhortation to be quick, submissions to this inquiry expressed concern regarding delays in accessing justice through tribunals (Consumer Action Law Centre, sub. 49). The extent to which these concerns about delays are borne out in the data is mixed. While there is a lack of consistent reporting on timeliness from tribunals, most tribunals that provide timeliness data report that at least 50 per cent of disputes are resolved within six months. The Commission has estimated a weighted average time to finalisation of roughly three months across all tribunals (chapter 10). However, in some complex cases, the average time taken to resolve a dispute can be as long as six years.

Lower courts provide more timely resolutions than superior courts

The timeliness with which courts deal with disputes varies greatly with the superiority of the court. Magistrates’ courts and the Federal Circuit Court resolve a majority of their cases within six months (SCRGSP 2014). Roughly a tenth of cases in these courts take more than 12 months to finalise. In contrast, in superior courts — such as Supreme Courts and the Federal Court — about a third of cases take more than a year to resolve (figure 3.3). These differences in timeliness will at least partially reflect differences in the complexity of cases, but may also be explained by differences in court practices, procedures and rules, and the relative availability of resources.

The time taken to resolve court-based disputes is often longer than users expect. In a survey of users in the family law courts, only 63 per cent of applicants and 56 per cent of respondents said the matter took the time they were expecting (Family Court of Australia and Federal Circuit Court of Australia 2011).

Figure 3.3 Percentage of pending caseloads older than 12 months^a
For non-appeal cases, by court level



^a Pending caseloads averaged across all jurisdictions for each court level, weighted by the size of their caseloads. Note that jurisdictions are not identical in their allocation of civil cases between court levels.

Data sources: SCRGSP (2009a, 2014).

Improvements in timeliness have not been universally sustained

There is evidence that over the past decade many courts have increased their clearance of cases and that timeliness has improved (SCRGSP 2014). In some jurisdictions, improvements have been substantial. For example, the Commission has estimated that the share of backlogged civil cases older than 12 months has decreased from over 40 per cent to around 25 per cent across New South Wales courts over the past decade.

However, there is some evidence that improvements in timeliness have slowed, and even reversed, in recent years. Many courts, having achieved their shortest measured backlogs around 2009 or 2010, have since experienced deteriorations in their backlogs.

Moreover, the general improvements in timeliness measured over the past decade appear to have not been realised in all types of courts. Most notably, measures of timeliness have shown little improvement in the Magistrates' courts of many states and territories, and in some states have worsened. For example, the shares of cases in the Magistrates Court of Victoria taking more than 6 months and 12 months to resolve have both roughly doubled over the past decade.

Even within those courts and jurisdictions where timeliness has improved, these improvements have not been universally realised. For example, while many superior courts

have reduced their backlogs in an overall sense, in some of these courts there appears to be a small — but growing — tail of cases that still take a long time to resolve. In particular, the Supreme Courts of New South Wales, Victoria and Queensland have experienced notable increases over the past five years in the share of cases taking more than two years to resolve (SCRGSP 2014).

How do delays in the justice system impact on users?

People may avoid acting on legal problems due to the potential for delays

Concerns about delays can contribute to unmet legal need. Commission analysis of unpublished data from the *LAW Survey* revealed that more than a third of individuals who chose not to act on a substantial legal problem cited a belief that it would take too long as a reason for inaction. Further, among those whose only action was to consult family or friends, roughly 40 per cent said that consulting a different source would have taken too long.

Delays can have adverse consequences

Some stakeholders have suggested that delays in formal dispute resolution processes undermine the ability for just outcomes to be achieved:

The Association contends that systemic delay due to an absence of court based resources undermines the ability of a court to come to an effective determination of issues by reason, among other things, of the impact of the passage of time on the ability to bring cogent reliable evidence to an issue. This undermines a key aspect of the proper resolution of disputes on merit. (Australian Bar Association, sub. 149, p. 2)

More tangibly, delays in resolving legal problems can impact adversely on the parties themselves and the wider community, as suggested by Legal Aid NSW:

When a legal problem is delayed ... there are social and economic implications. Protracted legal disputes affect families and communities and lead to an increase in demand for Government services across all sectors. (sub. DR189, p. 15)

For example, a delayed process for determining an accident compensation claim may leave the injured person without a means of funding their care and support in the medium term. Similarly, family law cases concerning a division of assets or payments of child support are not timely if the legal process leaves a parent without the means to support the child or children at the centre of the dispute.

The Consumer Action Law Centre provided examples of cases where delay imposed direct financial costs on disputants:

Delay has very real tangible and intangible costs for our clients. Even in industry ombudsman schemes (which are free for consumers), a dispute over a debt will cost the consumer as interest continues to accrue on the amount owing while the dispute is being dealt with. This can be a significant amount where there are delays in hearing the dispute.

Similar problems arise in VCAT. For small civil claims, there is typically around a six month delay between applying to VCAT and having a case heard. In a recent case, Consumer Action assisted a client in relation to a defective vehicle which involved an eleven month delay between the time our client stopped using the defective car to the time a favourable result in VCAT was achieved. In the meantime our client had access to another car which was loaned to her, but was not large enough to fit all of her children. (sub. 49, p. 11)

In addition to these indirect costs to disputants, the Australian Bar Association suggested that delays can increase the direct costs of providing legal services:

... delay also leads to duplication of the work required in preparation of matters for court which clearly creates inefficiency in the delivery of legal services. (sub. 149, p. 2)

However, there is some empirical evidence that suggests the time taken to resolve disputes does not typically affect the direct legal costs to consumers associated with a dispute. Rather, it is the stage at which a dispute is resolved and the number of court events involved which appear to directly impact on legal costs (Fry 1999; Williams and Williams 1994; Worthington and Baker 1993). Hence, a case that goes through a number of court stages, such as pre-trial conferencing, hearing and final verdict, will likely have similar legal costs regardless of whether those court stages are 12 weeks or 12 months apart.

Delay in some cases can force parties to settle or withdraw

The frustrations associated with delay can force some parties to withdraw from the civil justice system. This was illustrated in the Commission's study of court users in South Australia — over a quarter of parties that settled or withdrew their cases reported frustration with the legal process as the reason for doing so. Two thirds of these parties had disputes which had been in the court system for at least 12 months before ultimately settling or withdrawing. Very few of these parties reported being satisfied with the settlement offer they received.

3.3 How complex is the civil justice system?

The civil justice system is undoubtedly complex

Any system or set of rules can be defined as complex if it consists of many components, often with intricate arrangements or interactions. A system can also be described as complex when it contains more information than one can easily process (Zack 2007).

There are examples of complexity across the entire civil justice landscape, spanning both its informal and formal elements:

[Public Interest Advocacy Centre] often receives inquiries from individuals who need assistance in navigating a complex legal system. Informal dispute resolution mechanisms can also be complex, reducing the ability of individuals to deal directly with their own legal needs, and increasing delays. (sub. 45, p. 9)

While positive attempts have been made by courts and various public sector agencies to simplify the civil dispute resolution system and make it ‘user-friendly’ for consumers, the [NSW Young Lawyers] Committees are of the view that the system remains, overall, complex, and may be difficult to navigate in the case of lay parties or self-represented litigants. (sub. 79, p. 8)

As a result, few Australians consider that they understand the system intended to promote and protect their rights. A survey of adult Australians found that 88 per cent of respondents believed that the legal system is too complicated to understand properly (Denniss, Fear and Millane 2012).

The law itself is a source of complexity

A number of participants pointed to the law as a source of potential complexity:

[Public Interest Advocacy Centre] believes that the way civil laws are drafted certainly contributes to the complexity of the law ... (sub. 45, p. 9)

Our laws are many, complex, specific to areas of law, and vary from jurisdiction to jurisdiction. Accordingly, they are often difficult to navigate. (Consumer Action Law Centre, sub. 49, p. 13)

Complexity of the law is difficult to measure directly but the number of Acts, the page length and the rate of amendment can be used as (albeit imperfect) proxies for complexity.

It is widely acknowledged that the number, volume and complexity of laws is increasing (French 2013; Lindgren 2013; Rares 2013; Law Council of Australia, sub. 96).

In 1973, the entire consolidated statutes of the Commonwealth were printed in 12 bound volumes. In 2011, the 190 Acts passed by the Parliament in that year alone occupied nine bound volumes. ... The High Court has emphasised that a court must construe a provision in the context of the Act as a whole. That can be a tall order with the many legislative behemoths such as the multiple volumes of the *Income Tax Assessment Acts 1936 and 1997*, the 1414

pages of *Competition and Consumer Act 2010*, the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* (Cth). (Rares 2013, s. 54)

... there has been an enormous growth in the number and volume of the laws to which Australians are subject. In 1901, the Commonwealth Parliament passed 17 Acts. Since 1973, the House of Representatives has considered about 200 Bills each year and has passed between 150 and 200 of them. The total number of pages of legislation passed in the first decade of Federation were 1072. In the first six years of the 21st century there were 40,266 pages of statute law enacted [Berg 2007]. We have more laws, and more technical and detailed laws. (French 2013)

There are also countless regulations, by-laws, rules and statutory instruments made by every level of government (French 2013) which exacerbate the problem of complexity.

Laws are striving for precision and are frequently amended

French (2013) acknowledges that there are various reasons why the complexity of the law has increased, including:

- society is more complex in terms of its composition, outlook and diversity of interests
- more is expected of governments
- governments want to be seen to have a legislative program.

The demands on governments, the growing complexity of society and indeed the very nature of the common law tradition, extend legislation into new arenas of life, and compel law makers to strive for ‘precision and particularity’ (Campbell 1996, s. 1). Increasing precision through purposive drafting by spelling-out every possible scenario that the law may cover makes the interpretation and application of the law more predictable.

Certainty follows from specifying the factual circumstances in point and their legal implications. It may be initially difficult to follow the text but, once understood, it gives definite answers in matters concerning the legal rights and duties of the citizen. (Campbell 1996, s. 10)

A concrete example of the precision imperative is the high rate of legislative amendments. Legislation is amended to account for previously unimagined (and hence not enshrined) possibilities. The vigour for amending legislation is demonstrated by the *Migration Act 1958* (Cth) which has been amended 68 times in the last ten years — about once every two months (Rares 2013). The frequency with which tax legislation has been amended is even higher — there were 30 amendments in 2012 alone.

Approaches for reducing the complexity of the law are further discussed in chapter 5.

The formal avenues used to resolve disputes can also be complex

The processes and procedures used in more formal institutions, such as the courts, are also considered complex:

In the standard adversarial system there is a voluminous set of rules of evidence of great detail and complexity. They present an obstacle course for parties and their lawyers. (Christopher Enright, sub. 10, p. 44)

Legal Aid NSW notes that both the Family Law Court and Federal Circuit Court rules are complex and that there are different rules, forms and procedures for each jurisdiction. This creates additional difficulties for self-represented litigants and legal practitioners. (sub. 68, p. 32)

This is illustrated by the labyrinth of numerous forms, steps and processes that disputants are often required to navigate when seeking resolution through the courts, as described by Women's Legal Service Victoria:

... the steps required to attain an order for a division of superannuation ... that's an ordinary order that our lawyers often seek in the Family Court system, and it's an incredibly complex process, and I think we counted at least eight different applications and affidavits that needed to be filed, and 12 different steps that needed to be completed before you could get a final court order, and that just illustrates one aspect of the Family Court system and its complexity. (trans., p. 794)

Court forms, in particular, are an avoidable source of complexity. Surveys by the Family Law courts have previously shown that court forms generated the lowest satisfaction among users, especially non-lawyers (Family Court of Australia and Federal Circuit Court of Australia 2011). Among those surveyed, roughly a third of non-lawyer court users responded that court forms were not clear or easy to understand. This view was also expressed in submissions:

Of the small minority of small businesses surveyed who had been to a Court or a Tribunal to resolve their business-related disputes ... approximately half reported being confused by the forms and found the whole experience daunting and overwhelming ... (SBDC, sub. 76, p. 10)

Many of our clients struggle with court forms and timelines. Many of our clients also experience difficulty in understanding the law ... Court forms are often not simple or useable. Knowing the correct form to use is half the battle. The use of legal terminology can confuse, especially those from non-English speaking backgrounds. While these forms do contain guidance notes, a person would have to be legally trained to source and interpret the rules to which they refer. (QPILCH, sub. 58, pp. 3, 12)

Lawyers too, are thought to contribute to the complexity of the legal process:

Legal practitioners may contribute to complexity of matters by engaging in, for example, large requests for discovery or seeking to adjourn matters which may cause unnecessary delay and expense (NSW Young Lawyers Committees, sub. 79, p. 8)

While these sources of complexity may be hard to capture quantitatively, complexity can be assessed to some extent through its impact on users.

How does complexity impact on users?

Complexity can make the law incomprehensible to the public

While greater precision through purposive drafting may improve the consistency with which the law is interpreted and applied, it can come at the expense of accessibility and readability. For example, greater precision can mean greater length:

... precise and so-called comprehensive legislation gives rise to an enormous volume of law. The aim is certainty but the result is inaccessibility. (Campbell 1996, s. 15)

Greater precision is also associated with more technical language, clauses and cross-references that are difficult for the public and non-specialist readers to understand (Campbell 1996; French 2013).

The increasing length and technical detail of legislation means that laws become unintelligible to the public (Campbell 1996; French 2013; Rares 2013). This raises multiple problems.

First, access to justice is reduced, and may be denied, because the public is unable to understand the law — especially in respect of their entitlements under the law and how the law regulates their behaviour:

The primary complaint is that our statute laws are becoming increasingly complex. They are therefore less accessible to the public and even to non-specialist readers within the profession. It is correspondingly more difficult for people who are bound by them or their advisors to discern their purpose. (French 2013, p. 1)

... certainty is often attained at the cost of intelligibility. ... The contorted complexities of the common law style with its interlocking clauses and cross referencing produces laws which, it is argued, are beyond the grasp of the citizens whose conduct they are meant to facilitate and control. So severe is this phenomenon that it can bring the law into disrepute. (Campbell 1996, s. 13)

The Commonwealth no longer prints its statutes for its Courts because it is too expensive and the legislation is too big. Those Acts are not light reading or even light. The ordinary person could not wade through them. (Rares 2013, s. 7)

Even some legislation that is overseen by tribunals, intended to be accessible for lay persons, has been described as too complex by stakeholders to this inquiry:

Many of the acts that come under QCAT's jurisdiction are complex, for example the Residential Tenancies and Rooming Accommodation Act 2009 is difficult for many lawyers to navigate, let alone a lay person. It is unrealistic to expect a person to be able to apply the legislation to their legal problem when the rules set out in the legislation are only discernable by reading the entire piece of legislation. (QPILCH, sub DR247, p. 33)

Second, confidence in the law may dwindle. If the purpose of the law is blurred by the difficulty of reading it, the public may question its legitimacy.

When faced with arcane voluminous legislation that challenges comprehension, one can legitimately raise a question as to whether that is a law at all? (Rares 2013, s. 75)

Confidence in the law is further tested by the rapidity of amendments:

When legislation is amended before the ink is dry on the last round of amendments, it is well nigh impossible to be confident that what you are reading is the current law. (Lindgren 2013, p. 12)

Complexity can prevent people with legal problems from taking action or seeking assistance

Complexity makes it less likely that individuals will take action to resolve legal problems when they arise. When faced with a complex system to navigate, people often exhibit behaviours and decisions which may ultimately not be in their best interest, such as:

- putting things off and leaving their problem unresolved
- sticking with the default option, even if it is not the best
- avoiding making a decision altogether
- being readily confused and prone to misleading advice (Reeson and Dunstall 2009).

Complexity can make it difficult for people to know how best to resolve their legal problems:

... many people do not realise what their rights are or that a cause of action exists and they may be unaware of available avenues for redress or agencies who can assist, or both ... (NSW Young Lawyers Committee, sub. 79, pp. 8)

A lack of awareness of legal rights — and the avenues of legal assistance and advice available when rights are transgressed — is relatively common (chapter 5). The Commission has estimated, using unpublished *LAW Survey* data, that not knowing what to do was cited as a reason for inaction in an estimated 30 per cent of substantial civil legal problems which were not acted on in 2008. This was most common in legal problems involving health, employment, rights, and credit and debt.

The complexities of the civil justice system may be particularly challenging to navigate for people experiencing disadvantage and for some people with disabilities:

The lack of simplicity and usability in the legal system affects vulnerable and disadvantaged members of society the most. (QPILCH, sub. 58, p. 3)

It is fair to say that legal language and process can be daunting and confusing. For people with a cognitive impairment (intellectual disability, learning difficulty or Acquired Brain Injury) the complexities of the justice system can seriously limit their access. (Australian Federation of Disability Organisations, sub. 24, p. 4)

Yet some areas of law that affect those experiencing disadvantage, such as social security, are recognised as being particularly complex:

Social security and family assistance law is complex and subject to frequent legislative change. Inevitably, its consumers are the most socio-economically disadvantaged in our society. Social security recipients are most likely to have multiple civil law problems, but least able to afford legal services and least able to advocate for themselves or resolve legal problems efficiently without advice and representation. (National Welfare Rights Network, sub. DR201, p. 1)

Further, some stakeholders suggested that aversion to complexity can become entrenched, contributing to future inaction:

The complexity of the law and legal processes is a general barrier to avoiding or resolving legal problems early. Research has consistently shown that people can feel intimidated or overwhelmed by legal problems. Behaviour becomes generational. People who do nothing when faced with a legal problem are far more likely to continue to do nothing when faced with a new legal problem, and their families are far more likely to do nothing when faced with a legal problem. (Legal Aid NSW, sub. 68, p. 65)

Complexity makes it more difficult and costly to resolve problems

Those who are not dissuaded from seeking resolution to legal problems are still adversely affected by complexity. From the outset, those seeking to resolve a legal problem are faced with a multitude of options on how to resolve their problem:

... the various different avenues that can be pursued to resolve disputes vary enormously as to their ‘user-friendliness’ ... The fact that there are so many potential avenues to pursue, depending on the problem, is itself a factor that increases the complexity for those wanting to resolve a civil dispute. (Maurice Blackburn, sub. 59, p. 5)

Complexity also reduces the capability of individuals to address legal issues themselves — increasing the stress and effort required to solve their problems — and increases the need to seek advice from others:

The simpler the process, the less capacity is needed of an individual to negotiate the process on their own. The more complex the system, the more people will require assistance, including those who may have some degree of education ... Legal Aid NSW suggests that the level of unmet legal need reflects ... the increasing complexity of the law ... The complexity is such that navigation of this legal framework will require legal advice and advocacy ... (Legal Aid NSW, sub. 68, pp. 20–21)

Increased complexity makes it more difficult and time consuming for legal practitioners to understand the law themselves. French (2013) observes that even non-specialist lawyers can find the law too complex. This has been echoed by the Centre of Rural Regional Law and Justice, especially with respect to lawyers in regional areas:

... while regional practitioners have traditionally offered generalist services, the growing complexity of laws is requiring a greater level of specialist expertise, which is placing pressure on practitioners to take on work in areas they lack proficiency. (sub. 20, p. 6)

The consequence of this is that lawyers must either spend greater resources providing services, thereby increasing the cost, or lowering the quality of their services. This reduces individuals' access to legal services. One inquiry participant pointed to an estimate of the extent to which complexity had raised costs:

... the increased complexity of litigation has led to an increase in the cost of cases across all courts by 78 per cent in real terms from 1998 to 2008. (Michael O'Keeffe, sub. 69, p. 3)

Interpreters of the law also have to invest more time reading and comprehending the law, especially if they are not specialists (French 2013).

Complex legislation uses valuable resources: the increased time and resources taken by courts, advisers, administrators and the general public in reading and understanding the legislation; and the increased time and resources taken by others involved in the legislative process, including instructors, drafters in the Office of Parliamentary Counsel (OPC), and legislators. (OPC 2011, p. 3)

The complexities and stresses of litigation also take a toll on parties. Sixty per cent of small business disputants in VCAT reported their dispute as having an adverse impact on their level of work-related stress. Many also reported the dispute as taking a toll on their health and wellbeing, or the performance of their business. Similar findings were echoed by the Small Business Development Corporation, which in its survey of its clients found:

... of those who said they had experienced a dispute; almost half reported that it was detrimental to their personal relationships. The vast majority of those also reported that the dispute was detrimental to their health, wellbeing and personal financial position. (sub. 76, p. 8)

These findings highlight the personal and non-financial impacts to individuals — including legal professionals — that can arise from engaging with a complex justice system.

4 A policy framework

Key points

- A well-functioning civil justice system underpins social cohesion and economic activity by protecting the personal, contractual and property rights established in law. It also provides a deterrent to, and redress for, violation of these rights by offering efficient and effective dispute resolution mechanisms.
- Governments play an important role in the civil justice system. They:
 - make laws and regulations, and establish and fund the courts, tribunals and ombudsmen that make up the institutional infrastructure
 - regulate legal services to improve market outcomes
 - provide funding to establish precedents and assist disadvantaged parties who would otherwise not be able to access justice.
- Governments can also affect the demands on the civil justice system by: ensuring clarity in laws and regulations; setting expectations of behaviour; and taking into account the potential impact on the civil (and criminal) justice system when designing laws, regulations and social expenditure programs.
- The main objective of the civil justice system should be to improve the wellbeing of Australians 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.
- Effectiveness, in the context of civil justice, requires that disputes are resolved justly and the law is upheld.
- Efficiency requires that civil justice is provided through the least cost avenues for dispute resolution, the market for legal services is competitive; consumers are well informed, and quality standards are proportionate and enforced. Efficiency also means that in budget constrained environments public funding, including for legal assistance services, is allocated to the activities and cases that provide the greatest benefit relative to their cost.
- When deciding where to spend taxpayers' money in the civil legal system, governments should take into account the full range of costs and benefits, including the value of establishing precedents, the impact on individuals' circumstances, and the effects on other publicly funded services.

The underlying objective of any reform of the civil justice system should be to improve the wellbeing (or quality of life) of Australians.

This chapter provides the Commission’s framework, or approach, for assessing whether policy changes are likely to improve the wellbeing of the community as a whole — that is, taking into account users and potential users of the civil justice system, service providers and taxpayers. The framework provides guidance on how the Commission has assessed policy changes in the context of improving the efficiency and effectiveness of the civil justice system, as well as looking at the vexed question of how to allocate taxpayer funds to maximise the wellbeing of the community given the resources available and alternative uses.

The framework presented in this chapter guides the analysis and development of policy throughout the remainder of this report.

This chapter begins with a brief discussion of the contribution of a well-functioning civil justice system to economic activity, and social and environmental outcomes valued by the community (section 4.1). It then outlines the role of governments in setting the institutional infrastructure for the civil justice system, regulating the market for legal services, and funding legal assistance for disadvantaged Australians (section 4.2). The final section sets out the considerations for assessing how well the civil justice system is performing, and whether proposals for change are efficient and effective (section 4.3).

4.1 The role of the civil justice system

A well-functioning civil justice system is important for society ...

The civil justice system shapes social and economic activity by establishing and enforcing legal rules. As Genn said:

The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. (2010, p. 3)

Much of what Australians value about a well-functioning justice system takes place ‘behind the scenes’. When the justice system functions well, it allows Australians to determine their rights and responsibilities and provides an incentive for individuals and businesses to comply with laws and regulations. For example, a well-functioning system gives people the confidence to enter into personal and business relationships, to enter into contracts, and to invest. This, in turn, contributes to Australia’s economic performance.

When people are confident that returns from engaging in activities are protected, economic growth is promoted and innovation encouraged.

Well-functioning judiciaries guarantee security of property rights and enforcement of contracts. Security of property rights gives agents incentives to save and invest, by protecting returns from these activities. A good enforcement of contracts stimulates agents to enter into economic relationships, by dissuading opportunistic behaviour and reducing transaction costs. This has a positive impact on growth through various channels; it promotes competition, fosters specialisation in more innovative industries, contributes to the development of financial and credit markets and facilitates firm growth. (OECD 2013, p. 2)

A civil justice system that offers a range of dispute resolution mechanisms can also help to ensure that the transaction costs of legal redress are minimised. This, in turn, means that resources can be allocated towards their highest valued use.

Well-functioning justice systems can also promote social order and facilitate the peaceful resolution of disputes. To the extent that the law reflects the community's expectations and desires, the courts communicate and reinforce civic values and norms in making and promulgating their decisions.

... and for safeguarding rights and ensuring accountability

Justice systems that work well also protect individuals from infringement of their rights by others (individuals, companies or government), provide recourse for individuals to object to the actions of government and ensure governments are accountable (AGD 2009).

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. As the Law Council of Australia said:

If a person suffers a civil wrong or is subject to government decisions affecting their rights, they are entitled to enforce their rights through litigation or a fair and transparent review process. If citizens cannot enforce their legal rights, those rights are effectively taken away, leading to wrongful transfer of assets, money and other property. (sub. 96, p. 30)

To ensure access to justice, all individuals and businesses must have fair and equitable access to legal redress, regardless of their circumstances. As the Attorney-General's Department said:

Difficulties in accessing justice reinforce poverty and exclusion. Maintaining a strong rule of law is a precondition to protecting disadvantaged communities and helping people leave poverty behind. (AGD 2009, p. 2)

4.2 Civil justice and the role of government

Governments are important players in Australia's civil justice system. They:

- make laws and regulations and establish most of the institutions that make up the 'legal infrastructure'
- regulate the market for legal services
- provide legal assistance for dispute resolution.

Governments are also major consumers of legal services.

Governments provide the institutional infrastructure ...

Governments shape the civil justice system by making laws, which outline rights and responsibilities ('the rules') that guide economic and social activity. As Genn said:

The civil law maps out the boundaries of social and economic behaviour while the courts resolve disputes when they arise. (2010, p. 3)

Laws and regulations affect many aspects of Australians' lives.

- Specific and generic regulations establish rules that govern the way that businesses operate. The laws and regulations are largely designed to protect the rights of consumers, workers, the natural environment, and investors — with rights reflecting society's preferences.
- Individuals and communities are also governed by a range of laws and regulations that restrict their activities. These aim to protect the rights of others by assigning responsibilities that reflect socially agreed acceptable behaviour. Examples include freedom from discrimination on the basis of race, sex, sexuality or disability, noise restrictions in residential areas, and animal control and building restrictions that reflect neighbourhood values.

Governments also provide formal and informal avenues for enforcement ('the tools') when rights and responsibilities are violated. Genn, using a metaphor from Tamanaha (2004), said:

If the law is the skeleton that supports liberal democracies, then the machinery of civil justice is some of the muscle and ligaments that make the skeleton work. (2010, p. 4)

Governments establish and fund the courts, tribunals, and statutory ombudsmen and work with industry and business groups to establish industry funded ombudsmen. The nature of disputes that different legal bodies will adjudicate, and the rules by which they operate, are also established by the relevant government. For example, parties are required to consider alternative options to resolve problems prior to litigation in Commonwealth jurisdictions (chapter 12).

Together, the rules and tools of the institutional framework generate broad community-wide benefits by promoting civic cooperation and economic activity. By providing a range of dispute resolution options, the institutional framework is flexible enough to accommodate a range of different individual circumstances.

... regulate the market for legal services

Legal services constitute advice about rights and responsibilities under the law, the negotiation, preparation and execution of documents, and representation of individuals, businesses and other organisations in disputes. In Australia, the majority of legal services are delivered through private practice. Parties can choose from a wide range of providers offering a variety of services — from the local solicitor providing advice on writing a will to a Senior Counsel representing a party in the High Court.

Consumers face a number of potential disadvantages when engaging with legal services providers and principal-agent problems can arise from the service provider having more knowledge than their client. Most people and small businesses are infrequent and inexperienced users of legal services and comparing providers is expensive and often inconclusive. Consumers also rely on legal professionals to diagnose their needs and identify the services they require. They are poorly placed to judge the quality of services they receive, often relying instead on reputation. Providers also have superior knowledge of the likely cost and outcome of any action they take and can use this knowledge to ‘over service’ and extract higher revenue from consumers (chapter 6).

A well-functioning market for legal services is therefore predicated on government establishing a robust institutional framework that provides consumers with protection and choice. Consumer protection aims — both in terms of overall quality of the profession and preventing providers from taking advantage of consumers in individual transactions (chapters 6 and 7) — are typically the reasons that governments often go beyond the protections enshrined in consumer law and impose additional regulation on legal service providers.

Like most other markets, which deliver social services and have broader public benefits, government involvement in the market for civil legal services is important to correct for ‘market failures’ and to provide consumers with the confidence to use legal services. That said, it is important for government to demonstrate that market interventions will improve market outcomes and overall community wellbeing.

... and provide funding to support access to justice

Public as well as private benefits arise when disputes are resolved

The establishment of clear precedents is an important part of the law. It allows the courts to apply the law, while the process of appeal to higher courts provides for these interpretations to be corrected, the clarification of precedents and the development of the law more generally.

The decisions of courts (as well as tribunals and ombudsmen) have an influence ‘outside the courtroom’, giving rise to public benefits. Their determinations provide a framework within which parties determine their rights and responsibilities — known as bargaining in the ‘shadow of the law’ (Mnookin and Kornhauser 1979). For other parties with similar disputes, understanding what is likely to happen in a formal determination can assist in earlier resolution of disputes and save considerable private and public transaction costs. Public resolutions (including precedents) also act as a deterrent to unlawful behaviour by demonstrating that the civil justice system is effective in upholding the law.

At the same time, public funding of cases is not necessarily required to establish a precedent where the private benefits alone are sufficient for the affected party to take action (chapter 16). If such resolution would not occur unless funded by the government, public benefits, or *positive externalities*, can provide the justification for public funding. However, such funding decisions need to be warranted by the return to the community relative to the opportunity cost of the funding (that is, the alternative use to which the funds would have gone).

Public benefits can also arise where failure to resolve disputes imposes costs on other government-funded services (such as where employment is lost), or other people (as can be the case in family violence). For example, a person who breaches tenancy rules may find themselves homeless which, in turn, might exacerbate health problems, and make it difficult to retain employment. While these outcomes have significant personal costs, they can also increase the need for a range of social services. Where such *negative externalities* arise from failure to address a dispute or provide timely advice, government funding will be in the public interest if the benefits exceed the costs to the community.

While individuals clearly benefit from having their rights upheld (such as in a human rights matter), public benefits can also arise — the community as a whole benefits from living in a ‘fair and just’ society.

Funding services that will not be provided by the market

There can be substantial ‘gaps’ in the market for legal services where ‘for-profit’ providers have little or no incentive to provide services (such as community legal education services (chapter 5)). If left to the market, legal services may not be provided in some areas, such as

rural, remote or low income locations, or to groups who have special needs (for example, cognitive problems or language barriers).

Legal services are not services that people normally want to buy; rather they do so because of need, and often in response to circumstances beyond their control. In addition, many are infrequent users of legal services and may be vulnerable because of disadvantage and/or a limited capacity to bear the risks associated with legal action. In the absence of government support, some Australians would not be able to access legal services due to financial constraints (Alvarez and Lippi 2012). As with health and education services, the provision of a basic legal safety net can be argued on equity grounds. It may also be justified on efficiency grounds if positive externalities, or the avoidance of negative ones, are welfare enhancing.

Figure 4.1 summarises the role that governments play in aiming to ensure that Australians have access to appropriate services for dispute resolution and quality legal services, and that such services are affordable.

4.3 Promoting an efficient and effective civil justice system

While there are valid rationales for governments to intervene in the civil justice system, policy makers need to demonstrate that such interventions can be expected to improve outcomes. That is, the benefits to the community from a new policy, program or regulation need to outweigh the costs of the intervention. This analysis should be undertaken when developing new or reforming existing laws and regulations; establishing or altering the various institutions and their roles and responsibilities; designing regulations to improve market conduct; and allocating legal assistance funding.

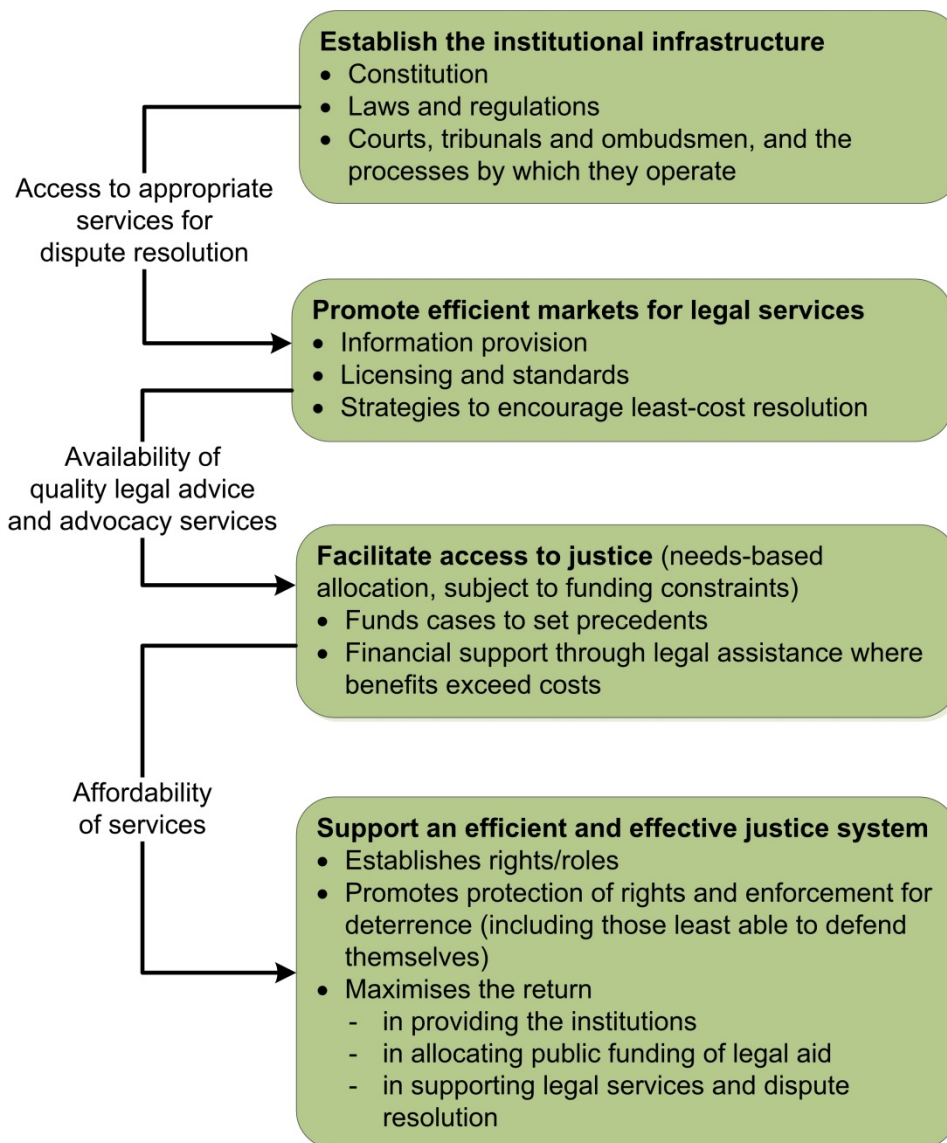
As noted earlier, the objective of any policy change should be to improve the wellbeing of Australians. In line with this, the Attorney-General's Department proposed that the overarching objective of the civil justice system could be that it:

... contributes to the well-being of the Australian community by fostering social stability and economic growth and contributing to the maintenance of the rule of law. (sub. 137, p. 6)

Taking the system as a whole, this objective would be achieved if the following three goals were satisfied. Namely, that the system:

- upholds the rule of law, protecting individual and property rights as set out in Commonwealth law (including the rights of those least able to defend themselves)
- has public institutions and policies that aim to ensure timely, least-cost, and appropriate legal services are available to the Australian people, businesses, and community organisations
- maximises the return from the allocation of public funding.

Figure 4.1 Governments are key players in the civil justice system



In proposing reforms to improve the efficiency and effectiveness of the civil justice system, the Commission has tested its recommendations against these goals.

An effective system is required first and foremost to uphold the rule of law. To do so, the system must be acceptable to the Australian public, whose behaviour it seeks to regulate. Laws, and the system that upholds them, must both be accepted if society is to flourish.

Efficiency requires that resources are allocated in a way that not only minimises the cost of anything produced (productive efficiency), but also ensures that resources are used where they are most valued and give the greatest net benefit to the community (allocative efficiency). Allocative efficiency is inherent in the last two of the three goals as this is

about distributing resources, either to reform or maintain the infrastructure of the system or to direct funding for legal assistance to where it will deliver the greatest benefit.

Cost-effective and appropriate legal services

An appropriate service is one that addresses the legal needs of the individual, business or community organisation. To be efficient, the service must be appropriate as well as provided at the least cost.

The cost of resolving disputes can be reduced through a number of strategies — for example, by seeking to solve problems before they become disputes and resolving disputes quickly before they escalate into entrenched and intractable positions. Other actions that can assist in reducing the need to use the formal system (and hence the cost of resolving disputes) are establishing clear precedents and ensuring the public is well informed about their responsibilities as well as their rights.

While these actions appear sensible at a ‘system’ level, they may be less relevant for certain parts of the system in isolation. For example, a long and complex process to establish a precedent could be warranted if it then provides guidance for compliant behaviour in the future but it may be less relevant if cases are unique and precedents do not generally apply. While there is no single ‘check list’ that can be used to assess the efficiency of each part of the system, the Commission considers that government intervention and funding may deliver the greatest benefit through:

- maximising user understanding — investing in better information services for consumers to understand their rights and promote greater understanding of the legal system, its processes and the costs involved
- taking the least cost approach to dispute resolution — providing incentives for internal resolution of government and business complaints, encouraging more use of alternative dispute resolution techniques in appropriate circumstances, and ensuring frivolous and vexatious litigation is screened before hearings commence
- focusing financial support — delivering legal assistance to disadvantaged people most in need (see below) and exploring alternative funding options for other people facing large costs relative to their capacity to fund their litigation.

Is funding prioritised to maximise returns?

Given the resource constraints faced by all governments, it is not a sufficient test that the benefits of funding exceed its costs. Rather, funding must be prioritised to the areas with the highest return.

Returns need to be viewed broadly in terms of community wellbeing

As the wellbeing of society is a complex concept, it is useful to apply some rules of thumb to assessing the likely net benefit. There are several ‘wellbeing frameworks’ that can be used (box 4.1). Each of the frameworks point to the importance of taking both social and economic costs and benefits into account.

As a conceptual framework for considering the impacts of a policy, wellbeing is a good place to start. But, given the measurement challenges inherent in applying a formal cost-benefit analysis to non-market activities and social impacts¹², the analysis is often limited to an assessment of:

- which side of the ledger each direct and indirect impact of the policy occurs — a cost or a benefit
- whether each impact is relatively large or small — which depends on the size of the impact and the number of people affected
- the timing of each impact — whether it is immediate, in the near future or the relatively distant future
- the distributional impact — who benefits and who pays the costs, and the merit of this distributional impact.

If one side of the ledger is not clearly greater than the other, then further analysis is required including quantification of the impacts most amenable to measurement.

Taking a wellbeing approach does not imply that all needs are met. In a world where funding is not constrained, government intervention to address needs would be justified where the benefits exceed the costs, taking into account the opportunity cost of the funds. However, in a budget constrained environment, funding must be allocated to those needs that deliver the greatest benefit relative to the cost of meeting the needs. That is, funding must be allocated efficiently.

Applying the framework

While the three goals set out above can be used to assess the performance of the current system, they can also be applied to any proposed reforms (changes) to the current system. That is, will the change:

- better uphold the law?
- provide least-cost and/or more appropriate services?
- better target legal assistance to increase the net benefit delivered by the funding?

¹² Social impacts encompass changes in mental and physical health, relationships, freedoms and self-esteem.

Box 4.1 Wellbeing frameworks — assessing the benefits from policy

Wellbeing is a complex and multi-dimensional concept.

The Organisation for Economic Co-operation and Development's (OECD) *How's Life?* framework for measuring wellbeing identifies three pillars for understanding and measuring wellbeing — material living conditions; quality of life; and sustainability. Under each category are a range of indicators that can be used to assess how a country is performing in the various things that have been found to matter for people's overall life satisfaction and happiness. The OECD does not assign weights to the various indicators, recognising that countries have different value systems and an indicator that might be a policy priority in one country may not be as important in another.

Indeed, taking a broad cost-benefit approach to policy evaluation is challenging as it involves making value judgements about what is important to the individuals (knowing that people value outcomes differently) that make up society. Further, many of the dimensions of wellbeing are broad and intrinsic outcomes, which can be difficult to measure.

The Australian Treasury has also developed a wellbeing framework as a descriptive tool to provide context for public policy advice. The framework is built on elements of Sen's *Capabilities Framework*. Treasury identifies five dimensions that directly or indirectly have important implications for wellbeing:

- the set of opportunities available to the population
- the distribution of those opportunities across the population
- the sustainability of those opportunities over time
- the overall level and allocation of risk borne by individuals and the community
- the complexity of choice facing individuals and the community.

This framework provides a broad context for considering policy options and highlights the importance of trade-offs between and within dimensions. This is particularly important when considering which potential reforms across the broad spectrum of government funded activities in the civil justice system will deliver the most value by avoiding harm at the least cost.

Sources: OECD (2011); Treasury (2011).

In answering these questions, the Commission has sought to:

- address problems that are large enough to justify government involvement that are amenable to reform. Given the substantial costs associated with developing, implementing and administering government policy, it is important to target government resources to those areas which could benefit most
- articulate clear objectives to underpin the development of targeted policies and reduce the risk of unintended impacts
- reflect an assessment of the efficiency and effectiveness of the different options, including the likely costs and benefits for the community as a whole
- use extensive stakeholder and community consultation, accompanied by transparent analysis

-
- seek further information, where the evidence is insufficient to identify a clear recommendation, and embed periodic reviews into all policy changes to check that they are achieving their objectives, where appropriate.

Reform needs to be undertaken in a way that ensures the sense of legitimacy, credibility and trust in the legal system held by the community (the ‘social licence’) is not weakened. The Commission has sought to identify practices that significantly undermine the social licence — such as governments not behaving as model litigants or legal professionals not effectively communicating information to clients — and to ensure that any recommendations for reform strengthen, or at least do not erode, this social licence.

Policy responses that may be effective in one area can lead to unintended consequences in others (such as the interaction between the civil and criminal justice systems, and between the civil justice and social welfare systems). This needs to be taken into account when considering the impact of policy reforms.

The Commission has drawn on existing data and analysis as well as the information provided in consultations and submissions to assess whether there are options to improve the efficiency and appropriateness of the system. In the absence of empirical evidence on the functioning of the current system, proposals for improvements to the system have to rely more on qualitative analysis, which can be affected by the strength of different views. The challenges to this inquiry due to the lack of systematic empirical data on the functioning of the system are highlighted throughout the report and are discussed in detail in chapter 25.

5 Understanding and navigating the system

Key points

- Many Australians are, or feel, unable to understand or navigate the civil justice system. There is a range of options to build knowledge and capacity to make the system more accessible — both for the general population and for those who experience disadvantage.
- Options that help to build knowledge and capacity of individuals include community legal education, legal information (including self-help resources), minor assistance and advice. Better coordination of the development and delivery of these measures, and a system of greater quality control, could improve the reach and value of education and information resources.
- Public knowledge of legal assistance services is generally low, often because it is unclear which service to use. A well-recognised entry point or gateway for legal assistance and referral in each jurisdiction would make it easier for people to navigate the legal system.
- However, there will be some disadvantaged people who would not use a well-recognised entry point and require additional assistance to identify and resolve their legal problems. Legal health checks and outreach are important mechanisms that can be used to seek out people who are likely to be experiencing legal problems but are unable to identify them themselves.
- Resolving the legal and non-legal problems experienced by disadvantaged Australians requires greater collaboration between legal and non-legal organisations. Greater training of non-legal workers who deal regularly with disadvantaged people can be an effective means to improve access to justice.
- Services that help build knowledge and capacity, and those services that specifically assist the disadvantaged, should be evaluated to determine best practice.
- Many services have emerged to assist small businesses in preventing and resolving disputes however, small businesses may have difficulty finding appropriate assistance. Referral networks, including well-recognised entry points should have the capacity to refer businesses to appropriate assistance, such as small business commissioners and relevant government agencies.
- A complementary measure to address people's understanding of, and therefore access to, the civil justice system is to reduce the complexity of the law itself. But this is a more challenging and longer-term endeavour.

The complexity of the civil justice system acts as a barrier to accessing justice for many, and is an insurmountable barrier for some (chapter 3). It can be difficult to identify the right assistance and to find the right information to resolve a legal problem. The complexity of the law can also contribute to the difficulties many face in understanding and navigating the system – the need for such complexity is clear in some cases but not in many others.

This chapter begins by examining the capabilities — knowledge and capacity — people need in order to understand and navigate the civil justice system (section 5.1). It then discusses the education, information, minor assistance and advice services that can equip people with the capabilities to understand and navigate the civil justice system and presents improvements to these services (sections 5.2 and 5.3). Section 5.4 examines the difficulties faced by disadvantaged and vulnerable people in understanding and navigating the system. Services that target businesses’ legal capabilities are examined in section 5.5. The chapter concludes by discussing the unnecessary complexity of the law and how it affects the accessibility of the civil justice system (section 5.6).

5.1 Using the civil justice system

To utilise any system requires knowledge of how the system works and the capacity to use the system. The more complicated the system, the greater the knowledge and capacity necessary to use it. The civil justice system is a very complex system indeed (chapter 3), and so requires a great deal of knowledge and capacity to understand and navigate it (figure 5.1).

Knowledge helps people identify legal problems and work out how to resolve them ...

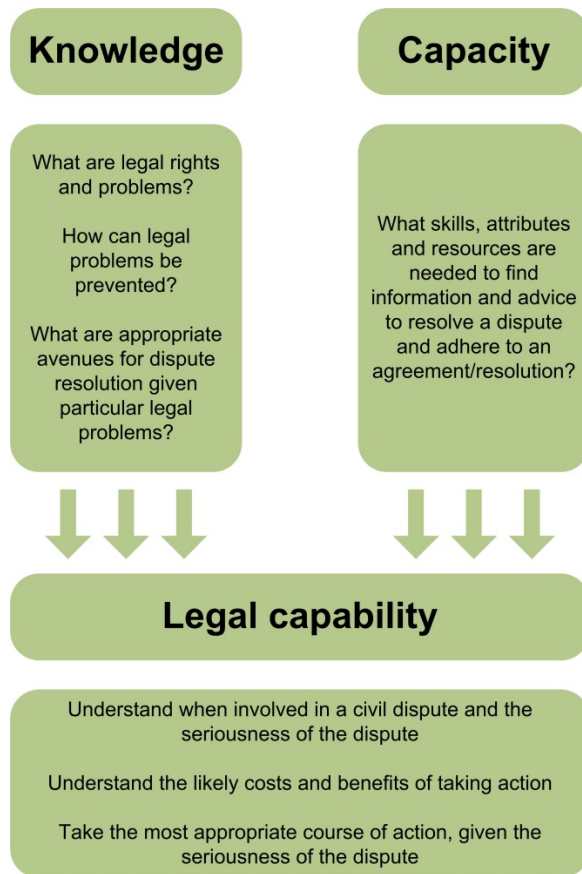
Basic legal knowledge is an ‘essential component of legal capability’ (Coumarelos et al. 2012, p. 20). It involves:

- having an understanding of the role of the law in everyday life
- recognising and asserting civil and legal rights (and knowing when those rights have been violated)
- having an awareness of potential legal solutions
- knowing where to gain additional information and advice (Coumarelos et al. 2012).

Knowledge about how the system works can make the system appear less daunting and may give people the confidence to assert their rights. The benefits of learning how to use the legal system are broad. Knowledge about rights and responsibilities can give individuals the confidence to enter into personal and business relationships, enable more

informed choices and empower people to resolve disputes on their own or with minimal assistance.

Figure 5.1 **Factors relevant to understanding and navigating the civil justice system**



... but evidence suggests that legal knowledge is lacking

Not having basic legal knowledge often means that people are unaware that the problems they face have legal dimensions and resolutions:

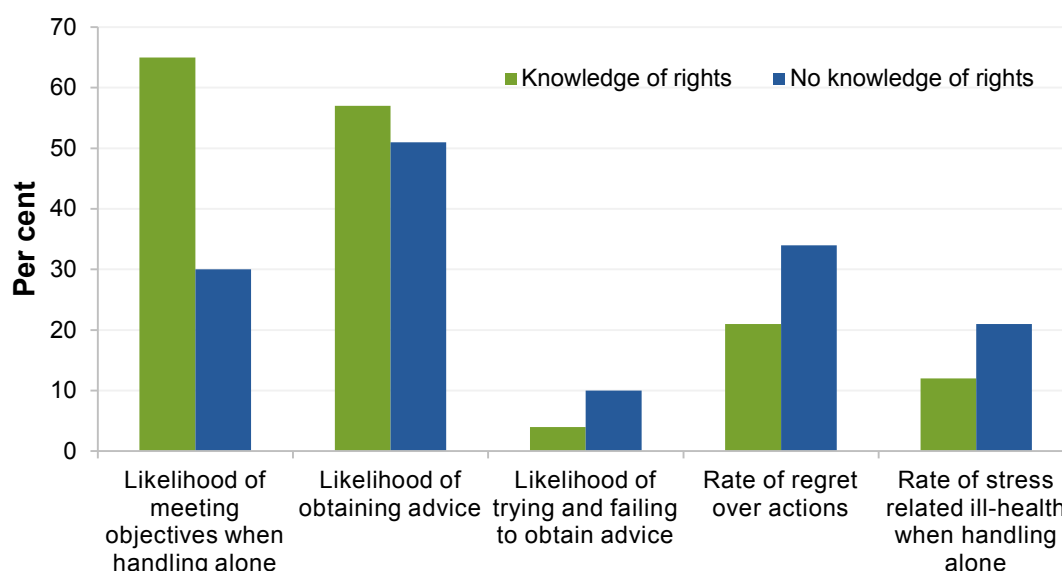
... the role of the 'legal' in a problem or a situation is rarely well understood. Despite the importance of the legal in, for example, relationship breakdown, illness, loss of a job, buying or renting property, or in debt problems, it is common for people to fail to identify how the law can be used. The legal may even be regarded as unhelpful or treated with suspicion. (PLEAS Task Force 2007, p. 7)

Even if people can recognise that they are experiencing a legal problem, a lack of knowledge about the avenues to assert those rights can still compromise justice. Findings

from the English and Welsh Civil and Social Justice Survey¹³ suggest that around two-thirds of those experiencing legal problems did not have knowledge of their rights, and a similar proportion were unaware of the formal legal avenues available to deal with their problems (Balmer et al. 2010).

Those without basic legal knowledge often make poor choices to resolve their legal need. This includes failing to take action to resolve their problem and not sourcing appropriate advice. They end up with worse outcomes, such as not meeting their objectives and experiencing stress-related illnesses — relative to people who have basic legal knowledge (Balmer et al. 2010) (figure 5.2).

Figure 5.2 Level of knowledge and outcomes



Data source: Balmer et al. (2010) findings from the 2009 English and Welsh Civil and Social Justice Survey.

In Australia, findings from the *Legal Australia-Wide (LAW) Survey* indicate that large proportions of the population lack an awareness of the spectrum of dispute resolution services available to them. Only legal aid is well-known.

The LAW Survey demonstrated considerable gaps in legal knowledge about not-for-profit legal services in all jurisdictions. Although there was very high awareness of Legal Aid (87-91%) awareness of ALS [Aboriginal and Torres Strait Islander legal services] was usually more moderate and awareness of the other legal services examined [including community legal centres and court services] was considerably lower. (Coumarelos et al. 2012, p. 182)

¹³ As part of the English and Welsh Civil and Social Justice Survey, over 10 000 adults were interviewed face-to-face in their homes between 2006 and 2009 (Balmer et al. 2010).

People may also ignore legal problems because of a lack of legal knowledge. Findings from the *LAW Survey* indicate that while there were many reasons legal problems were ignored, ‘in many cases, failure to take action was due to poor legal knowledge, other personal constraints or possible systemic constraints’ (Coumarelos et al. 2012, p. xvii). A survey by the Australia Institute revealed that nearly 90 per cent of respondents found the legal system too complicated to be understood properly and fewer (70 per cent) thought they had an understanding of their rights (Denniss, Fear and Millane 2012).

Capacity to resolve problems

While knowledge is a prerequisite for taking action, it is not sufficient for action to occur (Coumarelos et al. 2012). Even with legal knowledge, people may not have the capacity — including financial security, communication skills, confidence, time-management and practical skills, and mobility — to take action to resolve their disputes (Balmer et al. 2010; Curran and Noone 2008).

People often need additional skills to be able to recognise some types of legal problems. For example, lacking basic arithmetic skills may:

... contribute to the emergence of debt/finance problems and/or hinder the individual’s ability to negotiate appropriate resolutions. This is especially so in relation to debt and financial problems where negotiation of repayments may avoid the need for legal recourse. (Balmer et al. 2010, p. 60)

Without the capacity to take action, people may end up tolerating rather than resolving their legal problems (Sandefur 2007). A system that encourages people to tolerate problems represents a clear barrier to justice. Building legal capability — both knowledge and capacity — helps overcome these shortcomings.

Some require specific assistance

Not everyone has the same ability to develop legal capability (Genn and Paterson 2001). Curran found that people who find it difficult to develop legal capability tended to be disadvantaged and vulnerable (box 5.1). This included:

... people who have limited income, limited employment opportunities, have minimal power, live in poverty, have limited education and who often live in communities that are deprived, under-resourced and lack sufficient infrastructure. It may also include people who suffer from some form of disadvantage in terms of mental illness, intellectual disability, racial or cultural background, their ages, or a combination of all these things. (2008, p. 48)

As a consequence of a lack of legal capability, disadvantaged and vulnerable people may have difficulty identifying legal problems until their problems become very serious (Women’s Legal Service Tasmania, sub. DR262). They are also more likely to experience

clustering of particular types of legal problems such as the inability to pay debts and fines, housing issues and problems related to income support payments.

Box 5.1 Some examples of those who may have difficulty accessing mainstream services

The homeless may find it difficult to keep appointments if they do not have access to a clock. Missing appointments may lead to homeless clients losing access to support.

I recall one client who was homeless and had a severe mental illness. He had no clocks and did not own a watch and so missed appointments. Many services would no longer see him due to missed appointments. We were concerned he would miss his court date. He was facing severe penalties for non-payment of fines. ... He had no money and no income. ... Buying him a clock he can carry with him or indicating the public spaces with clocks or delivering the legal services to the charitable organisations where [he is] likely to be may be the way forward. (Curran 2013b, p. 36)

People with disabilities find many aspects of the civil justice system, and the mainstream services offered, difficult to access. Even where mainstream services have attempted to cater for people with disabilities, these services may still be inaccessible.

People with disability have variable access to mainstream community legal assistance services around Australia. While some services provide accessible and responsive legal assistance to persons with disability, there are significant barriers to access in many of these services. Barriers include some of these services being located in buildings which are not fully physically accessible, client meeting rooms may lack hearing augmentation, legal information may not be in accessible formats, staff may refuse Auslan interpreting, and staff may not be capable of working with people with additional comprehension needs or who utilise unfamiliar communication systems. (Australian Centre for Disability Law, sub. DR215, p. 6)

Culturally appropriate education and information services are better able to improve the legal capability of Aboriginal and Torres Strait Islander communities.

National FVPLS Forum members assert that single contact points and interfaces are not the appropriate mechanisms to effectively increase access to justice for our specific clients. There are a number of identified reasons why establishing a single contact point for legal assistance and referral would not be suitable for Aboriginal clients generally and FVPLS clients specifically. The complex nature of family violence and the responses and capacity of its survivors in turn mean that community engagement and outreach are essential components of identifying legal needs, ensuring community access to service and effective, holistic service delivery. Sometimes it is simply unsafe for our clients to use the phone to discuss family violence matters. (National Family Violence Prevention Legal Services Forum, sub. DR194, p. 5)

This is not to say, however, that all disadvantaged and vulnerable people will have difficulty developing legal capability or using general legal services. Rather, it suggests that more assistance, in addition to general services, may be needed for some groups.

An American study of money and housing problems found that specific support was required to prompt those on low incomes to overcome entrenched inaction (Sandefur 2007). Inaction stemmed from fear, shame and frustrated resignation — which contributed to people ignoring future problems:

[These emotional responses] tended to create pervasive, entrenched inaction for subsequent problems. For example, some people learnt that trying to resolve legal problems is frustrating

and, thus, were resigned to tolerating rather than solving new problems. (Coumarelos et al. 2012, p. 37)

Often a combination of legal and non-legal support is necessary to resolve the multiple problems experienced by disadvantaged and vulnerable people, including outreach services (Coumarelos et al. 2012).

There are many benefits of providing additional assistance to disadvantaged and vulnerable people. It is often more cost-effective for government to help solve civil (including family) disputes before they escalate and potentially become criminal problems (chapter 21). For example, Baldry et al. found that vulnerable people can end up being enmeshed in costly criminal processes instead of using community services that better suit their needs:

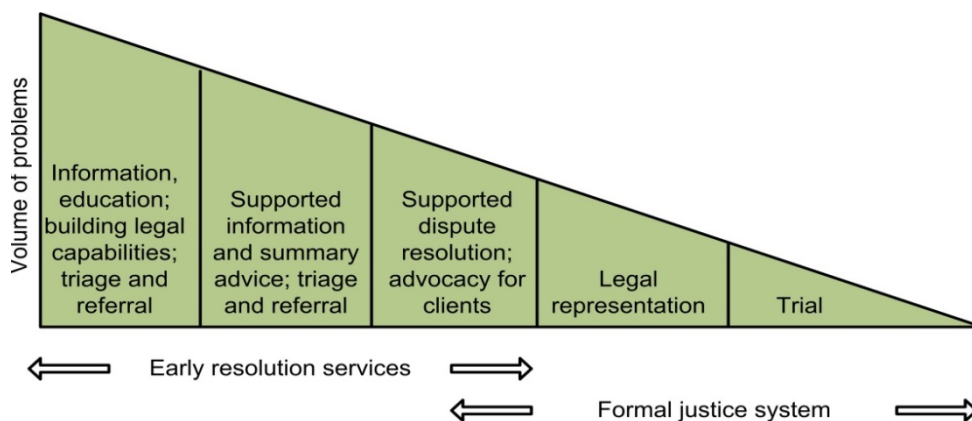
Early and well-timed community and human service interventions to establish and maintain secure supported housing are likely to reduce if not eliminate years of high levels of police contacts, court appearances, associated legal processes, frequent custody and community corrections interventions and ambulance use. As important as financial burdens, the social and human cost of a lifetime of offending and homelessness can also be reduced. (2012, p. 107)

5.2 Existing services that build legal capability

Many organisations — including legal assistance providers — offer services to improve the legal capability of the general population or specific groups within the population. These services — community legal education (CLE), information, minor assistance and advice — are widely available. Other services provided by legal assistance providers that are subject to eligibility criteria are discussed in chapter 21.

Services designed to improve legal capability have the potential to improve the functioning of the civil justice system by preventing disputes or resolving them before they escalate and enter into the formal system (figure 5.3).

Figure 5.3 Resolution service by volume of legal problems



Source: Adapted from the Canadian Forum on Civil Justice.

Community legal education

CLE aims to improve legal capability so that people:

- are more aware of how the law affects them
- can better identify legal problems
- can better understand which avenues for recourse are appropriate given the nature and severity of their legal problem
- have the confidence to deal with their problems (PLEAS Task Force 2007).

CLE can assist people to avoid legal problems and resolve their problems before they escalate.

... [CLE] ensures that people have the knowledge, confidence and skills needed to deal with legal problems. ... Focus is on the early stages to help people avoid problems, act more quickly when problems do occur and deal with problems more effectively by knowing when and where to get expert help. (Legal Services Commission of South Australia, sub. 93, p. 15)

There is also a promotional role played by CLE for other legal services:

CLE is just absolutely vital as a way of promoting the [outreach] clinics [run by LACs and CLCs] and raising the profile of the service ... That's another strategy we use to ... build the profile, develop a little bit of enthusiasm, little bit of buzz in the community. (Forell et al. 2013, p. 55)

CLE is delivered in a number of ways to a variety of audiences — some forms of CLE are targeted at the general population, while some are targeted at specific groups such as young women — and is provided by a range of organisations (table 5.1). Broadly these involve:

- legal aid commissions (LACs), which have statutory obligation and a requirement under the National Partnership Agreement on Legal Assistance Services (NPA) to deliver legal education (Buck and Curran 2009)
- community legal centres (CLCs), which have historically provided CLE (Buck and Curran 2009)
- family violence prevention legal services (FVPLS)
- Aboriginal and Torres Strait Islander legal services (ATSILS)
- the ACCC and state government agencies responsible for consumer protection and small business, and other regulatory agencies
- ombudsmen (chapter 9)
- law schools
- trade unions, industry associations and chambers of commerce.

Table 5.1 Examples of CLE projects

<i>Provider</i>	<i>Initiative</i>	<i>Audience</i>	<i>Content</i>	<i>Method of delivery</i>
Legal Aid NSW and The Aged-care Rights Service	<i>Older Persons' Legal and Education Program</i>	Seniors and community workers	Wills, power of attorney, appointments of enduring guardianship, elder abuse, reverse mortgages, grandparent issues	Workshops
Youth Legal Service (WA)	Law education program, which includes preventative measures	Young people aged between 10 and 18 years	Wide range of issues that potentially have legal implications, such as debt. Information on financial planning and budgeting is provided to help young people avoid debt-related disputes	Workshops
Women's Legal Service NSW	<i>Think B4 U Click</i>	Aboriginal and Torres Strait Islander people	Cyber bullying	Youtube video
Women's Legal Service Tasmania	<i>Girls Gotta Know</i>	Females aged 14 to 24 years	Employment, housing, personal relationships, family violence, consumer issues and debt, online security, and cyber bullying	Mobile phone app and website
Northern Rivers Community Legal Centre	<i>Aboriginal Legal Access Program Radio Show</i>	Aboriginal and Torres Strait Islander people	Family law, rights in public spaces, credit and debt, youth services, and family violence	Radio program
Aboriginal Family Violence Prevention and Legal Service Victoria	<i>Sisters Day Out</i>	Aboriginal and Torres Strait Islander women	Family violence	Legal, and community and welfare services workshops

Legal information including self-help resources

People can use legal information and self-help resources — including websites, books, leaflets and guides — to take action by themselves. Information can be used to assist people to directly negotiate with the other party to the dispute, lodge complaints with relevant authorities, or undertake proceedings (Coumarelos et al. 2012).

Legal information is widely available. It is provided by LACs, CLCs, a number of ombudsmen, and many government and regulatory agencies.

Commission estimates using unpublished *LAW Survey* data showed that self-help resources were used in response to around a fifth of all civil (including family) problems. These resources were used more often in the areas of family, government, employment, housing and money legal problems (and used less often used for accidents and personal injury problems).

Printed and online legal information are relatively low-cost services compared to providing legal advice. For example, Legal Aid WA (2013) estimated the average cost for a single contact with a legal information service (which includes printed, online and telephone information) in 2012-13 was \$34 compared to \$199 for legal advice.

Minor assistance and advice

Minor assistance and advice are generally ‘one-offs’ and are not intended as a first step to ongoing representation. Minor advice occurs when a legal practitioner gives a client guidance on the appropriateness of a course of action based on the likely outcome or consequence of that action. Minor assistance is given in addition to minor advice to support a client in resolving their legal problem. Examples of minor assistance include drafting letters for clients, preparing court documents and making telephone calls on behalf of the client (Legal Aid NSW 2011). Minor assistance is similar to unbundled legal services (chapter 19) in the sense that a lawyer provides enough assistance for the client to then manage their own dispute.

Legal assistance services provide minor legal advice, and in some cases minor assistance to the general public, or to targeted clients. LACs deliver minor advice over the telephone, face-to-face and online. CLCs provide similar advice services but on a smaller scale, and in some cases operate telephone helplines to provide advice for only a couple of hours a week.

In New South Wales, legal information, referrals and minor advice is provided by LawAccess NSW — a telephone helpline and website. LawAccess NSW is a joint initiative of Legal Aid NSW, NSW Department of the Attorney General & Justice, the Law Society of NSW, the NSW Bar Association and Community Legal Centres NSW (LawAccess NSW 2010). LawAccess NSW also hosts the LawAssist website, which provides information to people representing themselves in court.

Many law societies also operate online and telephone services that refer people to private lawyers. Some law societies also provide minor advice for a small fee. For example, people in the Northern Territory can access 30 minutes of minor advice for \$99 (Law Society Northern Territory 2014).

5.3 Reforms to improve knowledge and capacity building activities

Legal information, CLE, minor assistance and advice help people develop their legal knowledge and capacity, which in turn enables them to resolve their disputes efficiently. But these services could be more effective at reaching clients and building their legal capability if efforts were made to promote the development and sharing of best practice. Their efficiency can also be improved by pursuing greater coordination in the creation of information and education resources, and the provision of triage and referral services. Together, these improvements can make it easier for people to understand and navigate the civil justice system.

Best practice community legal education and information

Many organisations produce CLE and information resources. For example, there are 350 CLE projects entered into the National Association of Community Legal Centres (NACLC)'s *Community Legal Education and Reform (CLEAR) Database* — a repository of CLE projects developed by CLCs and other legal assistance providers across Australia. But not all are of good quality. Kirby found that ‘while there are some good examples of community legal information there are also many examples of poor materials’ (2010, p. 28). Just as good CLE can improve people’s knowledge and capacity and help them understand and navigate the civil justice system, poor quality CLE can create obstacles in accessing justice.

There is an abundance of guides on preparing best practice CLE and legal information — including Victoria Law Foundation (2011), Victorian Legal Assistance Forum Online Legal Information Working Group (2013) and NACLC’s *CLE Made Easy* kits (2014a).

Best practice legal education and information guides stress that:

- the content of the education and information provided should be appropriate to the needs and capacity of the audience
- the content should reflect the experience of frontline staff. Within an organisation, staff developing resources may not be the same staff working with clients on a daily basis, so there may be a disconnect between the issues frontline staff are identifying and the resources (Curran 2012b)
- the chosen delivery methods should convey content effectively

-
- community groups and organisations should be consulted in the development and delivery of education and information materials.

Modes of delivery

In general, face-to-face methods of delivery such as training courses, workshops and information sessions are more likely to enhance skills and improve confidence than printed or online materials (DCA 2006; PLEAS Task Force 2007). An additional advantage of face-to-face delivery (over printed or website materials) is that the content can be more easily tailored to the particular needs of the people involved in the session, course or workshop.

On the other hand, printed and online materials are less resource intensive than face-to-face methods of delivery, and they can reach larger audiences (PLEAS Task Force 2007). However, printed and online materials may not be appropriate for all people. Some groups — such as those living in remote communities or the homeless — have more limited access to the internet or telephone services (National FVPLS Forum, sub. DR194). In these cases, online information and education will be of little use (NACLC, sub. DR268). Service providers may also lack the capacity to use online technologies to deliver information and advice:

[Welfare Rights Centre South Australia] reported that the challenges involved in their project [using videoconferencing to connect lawyers with disadvantaged clients in remote areas] have related to lack of familiarity with the technology, surprisingly on the service provider rather than the client end. While both clients and service providers were unfamiliar with the technology, clients were generally happy to continue using it once they had started using it. In contrast service providers who were unfamiliar with the technology continued to be reluctant to use it and were unlikely to be able to support clients' use of it. While they believe that these challenges could be overcome with training, there was (and currently remains) no funding available for this. (Ho 2014, p. 16)

Evidence on the suitability of using online methods for providing young people with legal information is mixed. A study from the United Kingdom found that online information did not build the competence or confidence of university students when choosing actions to resolve legal problems because the students had difficulty finding appropriate information (Denvir and Balmer 2013). On the other hand, the internet has been successful in reaching young people in Australia where efforts have been made to examine their knowledge, capacity, and advice-seeking behaviour (box 5.2). This demonstrates that the delivery method of CLE and legal information needs to be carefully considered and matched with the target group and highlights the importance of evaluations and using best practice methods in developing and delivering CLE and legal information.

Box 5.2 Examples of changing technology to target legal need

Technological approaches to delivering legal services — including video conferencing (such as Skype), email, and online chat — are seen to have the potential to improve the efficiency and accessibility of the civil justice system, particularly for those living in remote areas or those with mobility issues. However, adoption of new technology to reach those with legal needs has not always been successful.

One more success example is the use of email based advice by the National Children's and Youth and Law Centre (NCYLC), which uses the medium effectively to engage with young people. NCYLC recognises that even though young people have difficulty identifying the legal dimensions of their problems, they are likely to use the internet to try to solve them.

For example, they will use the internet for advice on how to resolve cyberbullying without the knowledge that there could be a legal resolution. As a result, NCYLC also uses techniques — search engine optimisation and social marketing — that match young people's internet searches with its website.

NCYLC's email advice service — *Lawmail* — responds to young people's preference for using the internet (over the telephone) to receive assistance. NCYLC has found that young people feel more comfortable disclosing their problems via email because it allows them to remain anonymous. Email is also able to reach young people in regional and remote areas because it can be used with slower internet speeds.

NCYLC has growing demand for its service — the number of *Lawmails* increased by nearly 30 per cent between 2012-13 and 2013-14 (Keeley 2014) — and has been able to manage the risks associated with email advice by implementing a number of controls. NCYLC leverages pro bono resources to manage the costs associated with the time taken to respond to email requests and uses a quality control system that ensures the advice is correct and accessible.

While NCYLC has had success using email to provide advice, other services that have trialled email have found it too costly to be feasible. For example, LawAccess NSW found that there was not much demand for the service, it was time consuming, and it was difficult to get sufficient information from clients to give advice (NPBRC 2013d).

There are also a number of difficulties in using videoconferencing technology. Three recent pilot projects — funded by the National Broadband Network (NBN) Regional Legal Assistance Program — that used video conferencing to deliver legal services found that:

- many target clients did not have ready access to the internet and some clients were reluctant to discuss their legal issues over Skype
- it was too costly to set-up and maintain the hardware and many service providers did not have the requisite skills to use the technology (Ho 2014).

Technology can be used to better tailor services to target clients. But there are many risks and costs involved that can frustrate service delivery if not properly managed. Service providers should carefully consider using technology to reach clients, especially as the skills of clients and providers adapt to emerging technologies.

Greater coordination of information and education resources amongst legal assistance providers

Having a range of organisations produce their own information and education materials helps tailor services to the needs of particular audiences. However, this approach is resource intensive, may lead to the duplication of effort and could result in the public accessing incorrect information as each provider is left with a stock of material in need of updating as laws and circumstances change (NSW Young Lawyers Committees, sub. 79).

An effective way to minimise these problems is coordination between service providers. Coordination is about sharing and linking high quality legal information and education materials that providers can use and adapt to meet the needs of their clients. It is not about forcing providers to use ‘one-size-fits-all’ materials because it is unlikely that it would be effective given the diversity of issues, needs and capability across the population.

As demonstrated by the Public Legal Education and Support (PLEAS) Taskforce, coordination can improve consistency, sharing and linking of CLE projects.

Coordination also helps people to navigate the system because it makes it easier for people to find the information they are after, by removing duplication.

... information about the law and relevant services can be hard to access and confusing, often because there are many potential sources of information. Difficulties in navigating through the maze of services and institutions to identify the correct source of information, advice or assistance is itself a significant barrier to justice. (AGD 2009, p. 77)

Coordination is also a means to be more efficient with limited resources and may lead to higher quality information being provided to the public. For example, Women’s Legal Services Australia note:

... it is both economic and time efficient for CLE workers to collaborate with other CLE providers as well as appropriate social services working in the same sector, in order to produce resources and education programs that are relevant, informative and up to date. (sub. DR207, p. 8)

The benefits of coordinating CLE and information resources have already been recognised. In WA, NSW, ACT, Queensland and Victoria, legal assistance providers are already moving towards greater coordination of information and education resources. Coordination is being encouraged through legal assistance forums in each of these jurisdictions. For example, LACs tend to share their information factsheets and materials with CLCs. In turn, generalist CLCs focus on producing information resources for legal areas not covered by the LACs or for their specific communities. Specialist CLCs produce materials for their areas of specialisation (such as consumer issues, women’s issues or for Aboriginal and Torres Strait Islander people).

In Queensland, legal assistance providers are working together to identify need and allocate funding to collaborative CLE through the legal assistance forum and the *Community Legal Education (CLE) Collaboration Fund* (box 5.3).

Box 5.3 Coordination of information and education in Queensland

Coordination is a central tenet of Legal Aid Queensland's community legal education (CLE) and information strategy:

... [our community legal education strategy] includes [collaboration] with other service providers to reduce duplication, and we leverage existing resources to achieve the greatest reach and optimal outcomes. The way we drive this strategy is through an overarching community legal education forum that CLCs and the Legal Aid Commissions participate in, and the ATSILS. We also have a CLE collaboration fund in which we provide smaller grants to CLCs to undertake community legal education activities. But we'll only fund things if they don't duplicate what's already out there, and in fact we say no to things that do duplicate. (Legal Aid Queensland, trans., p. 1126)

As part of this strategy, Legal Aid Queensland established the *Community Legal Education (CLE) Collaboration Fund* in 2011 to extend the reach, scope and scale of CLE projects, and encourage coordination of CLE in the state. CLCs and Regional Legal Assistance Forums — which are based in areas where Legal Aid Queensland has a regional office and are comprised of Aboriginal legal services, CLCs and Legal Aid Queensland — are invited to apply for funding. Legal Aid Queensland uses \$100 000 of its Commonwealth funding each year to fund CLE projects. Projects that receive funding must demonstrate that they collaborative, client focused and respond to legal need. Evaluations of existing CLE projects have also been funded.

Sources: Legal Aid Queensland (2014a, 2014b).

Because CLE is important in making other legal assistance services more effective, the allocation of funding to CLE projects that cover state, territory or Commonwealth matters needs to be made in a coordinated manner. The Commission considers that legal assistance forums in each state and territory are best placed to coordinate these activities. These forums should consider establishing collaborative CLE funds, which should allocate resources to providers on the condition that the CLE they produce is collaborative, improves the stock of CLE or fills a gap. Members of the legal assistance forum should be involved in determining the priority areas of need, setting eligibility criteria, and assessing applications.

To make the stock of CLE more readily available and visible, CLE projects should be uploaded into a visible database where service providers can access and adapt existing CLE. While a national CLE database already exists — NACLC's CLEAR Database — it is not being used by all providers, and it does not have the capacity to assess and review the quality of the information on CLE that is uploaded. The Commission has heard that emphasis is also placed on getting more CLE in the database rather than avoiding duplication. However, the CLEAR Database could be adapted to facilitate the sharing of best practice, to remove duplication and to make it easier to use. The legal assistance forums will need to determine whether to invest in the existing infrastructure of the CLEAR Database or establish a new database.

A national database of CLE would facilitate the sharing of CLE across jurisdictions, particularly CLE relating to Commonwealth matters. Many CLCs and LACs already create CLE that covers Commonwealth matters — including migration and social security issues — but the extent to which these resources are shared across jurisdictions is unclear. The

CLE collaboration funds should fund CLE for Commonwealth matters where need is identified, and the national database should seek to minimise the duplication of CLE covering Commonwealth matters.

While CLE collaboration funds should produce high quality CLE measures, efforts will need to be made to ensure that CLE continues to be up-to-date. A peer review system, overseen by each legal assistance forum could encourage service providers to update CLE once laws change. Funding could also be provided to update CLE as part of the CLE collaboration fund. CLE that is potentially out-of-date (due to a change of law) could also be flagged in the database. Service providers that have used CLE sourced from the database should also be able to comment on the quality and usefulness of the CLE, to inform other potential users.

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, to identify community legal education that may be out of date and to minimise duplication. Mechanisms to ensure coordination between CLECFs on matters of Commonwealth law should be put in place.

Well-recognised entry points can also serve as legal triage

Information and assistance are of little value if people are not aware of these services or do not know how to access them. For the most part, Australians have limited awareness of the different legal assistance providers available, with the exception of legal aid (Coumarelos et al. 2012).

A lack of knowledge of most legal assistance services contributes to people not taking action or consulting non-legal advisers. Australians are more than twice as likely to consult a non-legal adviser than a legal adviser (around 70 per cent versus around 30 per cent) (Coumarelos et al. 2012). While non-legal advisers may be appropriate in some cases, for example consulting an accountant on a tax issue, the use of a non-legal adviser could also indicate unmet need (chapter 2).

Most people consult only one adviser when they have a legal problem (figure 5.4). If the first adviser consulted is inappropriate, it is unlikely that a person's legal needs will be met — highlighting the importance of ensuring that the first point of contact can either directly

assist or at least, has the ability to refer people to appropriate legal assistance (known as the ‘no wrong door’¹⁴ approach).

In Australia, it has been remarked that ‘there are as many entry points as legal service providers’ (Pleasence et al. 2014, p. 33). The diverse range of telephone assistance offerings by LACs and CLCs means that those seeking help have many options. But the range of options, including the different services they offer and different times when they are available, make it difficult for people to find the right service for their needs. An entry point can help mitigate the potential for such confusion:

In Victoria, there is a vast range of information available on how to get legal assistance but no single entry point, which would be beneficial for the general public and could aid in disputes being resolved in a timely and efficient [manner]. (Law Institute of Victoria, sub. DR221, p. 3)

A well-recognised entry point — consisting of a telephone helpline and an online resource — can act as a visible entry point into the civil justice system. A well-recognised entry point was recommended in the United Kingdom as a way of increasing public awareness of legal services and making it easier for people to navigate the system.

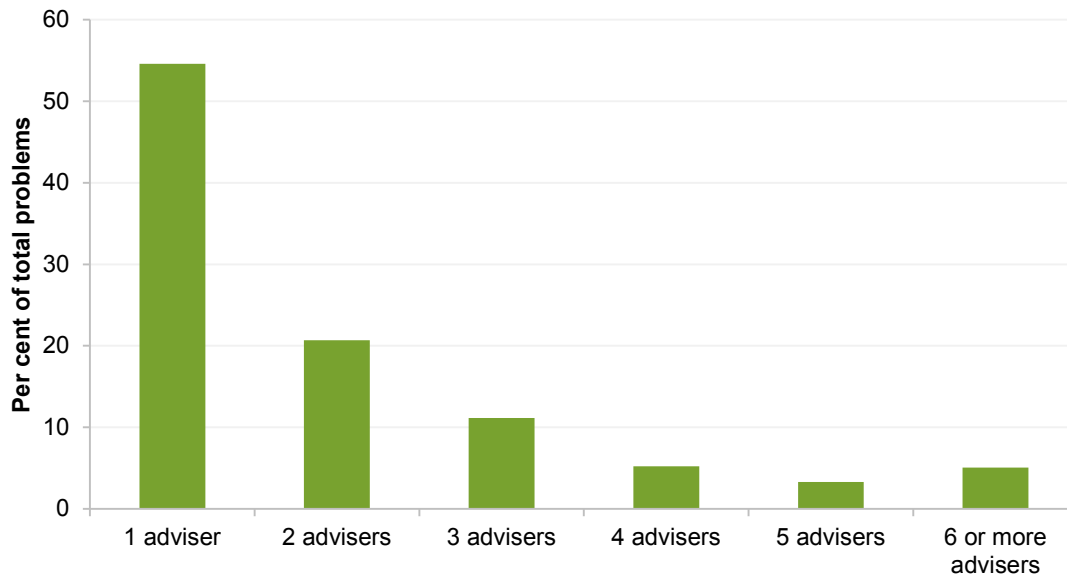
Our research suggests that people need clear, well-known brands to help them navigate the range of services available and the majority of the independent advice sector is made up of a large number of small providers. This means that a key barrier to people obtaining independent advice is being unaware of where to go which often results in people not seeking advice at all, or seeking it from the wrong provider. Those who try to obtain advice from the wrong place are rarely signposted elsewhere and, even if they are, the suggested alternative is often still unsuitable. People then quickly give up as ‘referral fatigue’ sets in. (DCA 2006, p. 9)

The benefits to users of a visible entry point into the civil justice system are also recognised in Australia:

I think the notion that there be a central point to which people who are in a dispute can go for information about the most appropriate means of resolving that dispute, a kind of advice [and] triage, I think is very, very important. We have a very ill-informed market on the part of consumers with respect to legal services. They don’t know the nature of the services they need, they don’t know the basis upon which they’re going to be charged very often, and they don’t know the quality of that service. (Chief Justice Martin, trans., p. 584)

¹⁴ In the *Strategic Framework for Access to Justice in the Federal Civil Justice System*, the AGD sets up the ‘no wrong door’ approach as an alternative to a well-recognised entry point — comprised of a telephone helpline and website — that provides information, warm referrals and minor advice. The AGD’s ‘no wrong door’ approach involves every legal and relevant non-legal service provider maintaining complete referral networks to ensure that whichever service a client approaches, they can be directed towards appropriate legal assistance (AGD 2009). The Commission considers that a well-recognised entry point is not incompatible with the ‘no wrong door’ approach because clients can be directed to it. This approach is less costly for service providers because they are not required to maintain complete referral networks.

Figure 5.4 Number of advisers consulted for civil and family problems
Proportion of total legal problems (where advice was sought)



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

A well-recognised entry point also makes it easier for non-legal workers to refer clients to legal services without needing knowledge of wider referral networks and can assist service providers operate more efficiently. Many legal service providers in New South Wales, including CLCs, have benefited as a result of LawAccess NSW, which acts as the recognised entry point into the civil justice system.

Women’s Legal Services NSW argues:

Our experience with LawAccess in NSW is that we receive appropriate referrals and can deal with urgent matters, while reducing the burden on WLS NSW on providing our own telephone advice triage service. (sub. DR257, p. 3)

Community Legal Centres NSW notes:

In NSW, we have seen the benefits of the LawAccess model and can see it working for other States and Territories. (sub. DR213, p. 29)

The NSW Bar Association also supports LawAccess NSW:

In New South Wales, a government agency, LawAccess, plays a major practical role in the co-ordination of legal assistance. ... LawAccess provides a first port of call for many people seeking legal assistance. LawAccess works extensively to raise community awareness of its services, and the levels of client satisfaction and performance are uniformly high. The Bar Association works closely with LawAccess on legal assistance referrals and participates in training of LawAccess staff. (sub. 34, pp. 18–19)

Maurice Blackburn argues:

We are particular concerned that LawAccess model in New South Wales maintains its presence in New South Wales. We think it's a very good model for Australia wide. Advice and minor assistance really do need to be rationalised, as LawAccess is doing. It's a collaborative approach, LawAccess was introduced and funded without stripping funding out of community legal centres or the law societies or the bar association. It provides a very good first point for people who really have no idea how to access the legal system and where to go within it and it enables a rational and clear referral and hopefully a referral service where people don't end up on the merry-go-round that they used to in the past. The position in the past really was very confusing for people. I was in the community legal centre world and then at Legal Aid for years, and we knew of the frustration of people being bounced around from one referral option to another because they hadn't been properly thought through or rationalised. (Maurice Blackburn, trans., p. 636)

NACLC (sub. DR268) and the Community Legal Centres Association WA (sub. DR214) are also supportive of building well-recognised entry points across Australia.

What should an effective well-recognised entry point do?

Well-recognised entry points are not intended to be the only way into the civil justice system, but as highly visible 'first ports of call' that many people can use to get information, minor advice or referrals to other services.

LACs already provide online legal information and operate telephone helplines — except in NSW where there is LawAccess NSW (table 5.2). The LACs can leverage their high visibility to transform their helplines and websites into well-recognised entry points (figure 5.5). While the *LAW Survey* found that very few people were aware of LawAccess NSW in 2008, LawAccess NSW has targeted people that are likely to need legal assistance, such as people at courts and police stations, in order to improve their visibility.

LACs' telephone helplines provide information, referrals, and for some clients, minor advice. They are also state- and territory-based, which helps people receive relevant information about nearby appropriate services:

Recognising differences in law, legal services and court and dispute resolution services between jurisdictions, the Foundation supports the suggestion of these triage points being state/territory based. (Law and Justice Foundation, sub. DR231, p. 6)

While the telephone helplines and websites operated by LACs are attuned to state and territory legal issues, they are also capable of providing information and advice on Commonwealth matters. For example, the Legal Services Commission of South Australia provides telephone advice on many Commonwealth matters including consumer issues, unfair dismissals and bankruptcy. LawAccess NSW also provides online information on Commonwealth matters and advice in cases where priority clients face a Commonwealth matter before a court located in NSW (NSW DAGJ 2012a).

Table 5.2 Services provided by legal aid telephone helplines in each jurisdiction^a

<i>Name</i>	<i>Organisation</i>	<i>Information</i>	<i>Referral</i>	<i>Minor advice^b</i>
LawAccess NSW	Department of Attorney-General and Justice, Legal Aid NSW, Law Society of NSW, NSW Bar Association	Y	Y	PC
Legal Aid Phonenumber	Victoria Legal Aid	Y	Y	PC
Info Line	Legal Aid Queensland	Y	Y	PC
Telephone Advice Line	Legal Services Commission of South Australia	Y	Y	Y
Infoline	Legal Aid Western Australia	Y	Y	SF
Telephone Advice Service	Legal Aid Commission of Tasmania	Y	Y	Y
Legal Aid Helpline	NT Legal Aid Commission	Y	Y	R
Legal Aid Helpline	Legal Aid Commission ACT	Y	Y	R

^a LawAccess NSW is operated separately from Legal Aid NSW. However, Legal Aid NSW refers clients to LawAccess NSW's helpline. ^b Y denotes that service is provided free of charge. SF denotes that a small fee is charged for the service. PC denotes that the service is available for priority clients. Priority client groups differ in each jurisdiction but generally relate to those with urgent matters and those experiencing disadvantage. R denotes that the helpline makes referrals to legal aid advice services rather than directly offering advice sessions. Information, referral services and advice given for civil (including) family and criminal matters. This table does not indicate the levels of services provided.

Sources: NSW Department of Attorney General & Justice (2012a); VLA (2014b); Legal Aid Queensland (2012); Legal Aid WA (2013); Legal Services Commission of South Australia (sub. DR265); Legal Aid Commission of Tasmania (2013); NT Legal Aid Commission (sub. DR255); Legal Aid ACT (2013).

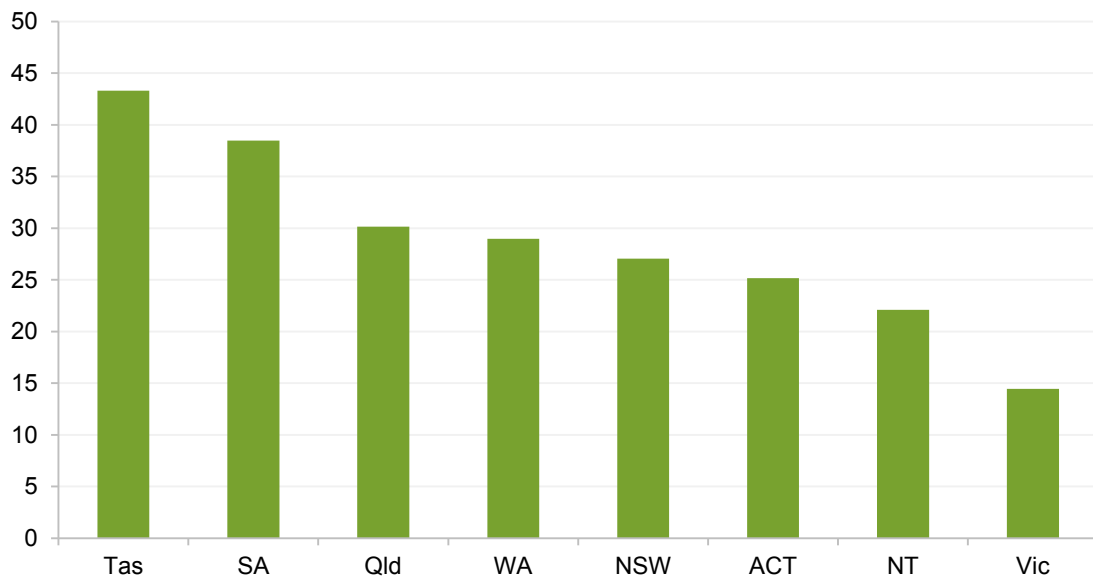
To help clients build their knowledge and capacity, well-recognised entry points need to ensure that clients receive consistent and clear information and advice there are a number of ways to promote these outcomes. LawAccess NSW ensures that staff provide consistent information through LawPrompt — an internal database of plain language legal information designed to be used by staff (Legal Aid NSW, sub. DR189). While many LACs have developed plain language law handbooks for users, resources that encourage staff to provide consistent information and advice should also be developed.

Methods of delivering advice and information also need to be considered. Advice provided over the telephone can be timely in cases where immediate action is needed to avoid a problem escalating or when someone is at risk of harm (AGD, sub. DR300). As discussed earlier, some CLCs — such as NCYLC, Youthlaw and the Financial Rights Legal Centre¹⁵ — complement telephone advice with email advice because it gives those providing advice greater flexibility and can help to target particular users (such as young people). However, there are some people who will find it difficult to use technology to access legal advice and assistance (box 5.2; Pleasence et al. 2014). There can also be considerable costs in setting up and maintaining particular types of technology. Well-recognised entry points should

¹⁵ Formerly the Consumer Credit Legal Centre NSW.

consider both the benefits and the costs in adopting new methods of delivery, including email.

Figure 5.5 **Number of calls serviced by legal aid telephone helplines per 1000 people (2012-13)** ^{a, b, c}



^a LawAccess NSW is operated separately from Legal Aid NSW. However, Legal Aid NSW refers clients to LawAccess NSW's helpline. ^b The intensity of the service provided is not reflected in the count of callers that receive a service. ^c Information, referral services and advice given for civil (including family) and criminal matters..

Data sources: ABS Cat. No. 3101.0; Legal Aid Commission of Tasmania (2013); Legal Services Commission of South Australia (2013); Legal Aid Queensland (Legal Aid Queensland, pers. comm., 22 July 2014); Legal Aid WA (2013); NSW Legal Aid (sub. 68); Legal Aid Commission ACT (2013); NT Legal Aid Commission (sub. DR255); VLA (2013b).

Well-recognised entry points need to be connected to a range of legal assistance services to ensure appropriate referrals. While legal assistance providers have informal referral networks, maintaining such networks is resource intensive given the number of legal assistance providers and non-legal services — for example there are over 50 CLCs in Victoria (FCLCV 2014). Ensuring that well-recognised entry points have up-to-date referral networks will relieve some of the pressure on individual legal assistance providers to complete and maintain their own referral networks. Legal assistance forums could facilitate consultation and coordination between the entry points and legal assistance providers to ensure that referral networks are up-to-date.

A well-recognised entry point should also be capable of facilitating 'warm referrals', where users are connected directly to appropriate assistance rather than having to initiate contact with assistance services themselves. LawAccess NSW gives 'warm referrals' to its priority clients — including people who are at risk of harm, have low levels of literacy, are from culturally and linguistically diverse backgrounds, have a disability, are homeless, and

are in custody — making it easier for these clients to access appropriate assistance (NSW DAGJ 2012a).

Given well-recognised entry points will provide information and advice on Commonwealth and state and territory legal matters, the cost of the provision of these services should be shared by these levels of government. Current Commonwealth funding for LACs' telephone helplines should be withdrawn and a new funding arrangement should be determined. The Australian Government should provide funding to cover half of the efficient costs associated with providing the service (including initial fixed costs). With states and territories funding the remainder.

Opportunities for cost sharing between jurisdictions should be examined and exploited, and common performance and design standards agreed by the Australian, state and territory governments. Arrangements to deal with the failure to meet the standards should also be established.

In order to ensure that it is effective, and that missed calls are minimised, well-recognised entry points should be appropriately funded and promoted. As a guide, LawAccess NSW received more than \$5.7 million in funding over 2011-12 (NSW DAGJ 2012b), and the Commission considers that a similar level of per-capita funding would be appropriate in other jurisdictions.

The Commission considers that well-recognised entry points will benefit the community by reducing the knowledge and capacity needed to navigate the civil justice system.

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 Australian, State and Territory Governments. A funding model should be finalised no later than 30 June 2015.

5.4 Specific measures to identify and assist those that need more help

While a well-recognised entry point in each jurisdiction would help the majority of Australians, it may not be as effective for some of those who experience disadvantage because they may have greater difficulty knowing they have a legal problem, lack confidence, or have additional barriers to using a helpline or online information.

Indeed, some disadvantaged and vulnerable people are less likely to seek assistance until their problems reach crisis point. As a consequence, legal assistance providers are beginning to move away from traditional models of service delivery — where they wait for clients to come to them — to seeking out and engaging with people who are likely to need their support (Curran 2013b). More proactive ways of identifying clients that need legal assistance include legal health checks and outreach. Another component of contemporary service delivery models is holistic services, which offer a package of legal and non-legal services to resolve people's multiple problems. Culturally-appropriate services are also offered.

Legal health checks and screening tools

Rather than simply responding to the self-identified needs of clients, legal health checks enable legal and community workers to identify a person's legal issues and direct the client to an appropriate response. This emphasises the need for community organisations to be attuned to the legal issues faced by their clients and aware of appropriate avenues for legal resolution.

The legal health check operates as:

... a structured interview tool for pro bono lawyers; a resource for community workers to identify and prioritise the legal needs of their clients; and a menu for clients to maximise their choice by understanding which issues the lawyers can assist with. (QPILCH, sub. 58, p. 29)

An example of a legal health check that is well-established in Australia is *QPILCH Homeless Persons' Legal Clinic Legal Health Check*. This legal health check assists lawyers and community workers to identify legal problems experienced by homeless people. Since 2011, nearly 100 clients have been assisted with over 290 legal issues through the use of the legal health check (QPILCH 2013b). The legal health check has helped resolve many issues that would not have been readily self-identified in the past:

In 2012/13, the Legal Health Check enabled the HPLC [Homeless Persons' Legal Clinic] to identify that 65% of homeless clients had fines debts requiring legal advocacy, even though only 5.4% of typical HPLC clients raised this issue with the visiting lawyers. (QPILCH, sub. 58, p. 29)

QPILCH has also developed legal health checks for refugees and people with a mental illness (sub. DR247).

Legal health checks have also been used successfully overseas as a way of preventing issues from escalating (La Trobe School of Law and Advocacy and Rights Centre Ltd, sub. DR184).

The I-HELP tool has been used fairly extensively in the United States within the medical-legal partnership (MLP) model. ... the I-HELP tool has normally been used by health case workers to screen patients for unmet legal and other needs. ... Patients ‘diagnosed’ with legal needs are then referred to lawyers who provide legal advice within the health care setting. There is some evidence that this model can have considerable benefits, with a number of the studies [Beeson, McAllister and Regenstein (2013); Pettignano, Caley and McLaren (2012); Rodabaugh et al. (2010); Teufel et al. (2012)] evaluating MLPs in the United States reporting economic returns on the investment to provide legal assistance in health care facilities. (Law and Justice Foundation, sub. DR231, pp. 4–5)

Several stakeholders have indicated that legal health checks could be usefully extended for many groups including social security recipients, people with disabilities, and for people living in remote and regional areas (La Trobe School of Law and Advocacy and Rights Centre Ltd, sub. DR184; Community Legal Centres WA, sub. DR214; Office of the Public Advocate (Victoria), sub. DR311; Centre for Rural Regional Law and Justice, sub. DR236). The Commission supports the continuing development of legal health checks as a means to make the civil justice system more accessible.

In order to maximise their use, the legal assistance sector could facilitate sharing of legal health checks. Existing legal health checks focus on identifying the legal needs of particular disadvantaged and vulnerable groups. These legal health checks are informed by studies of problem clusters (chapter 2). This means that even though clustering of problems can occur within jurisdictions, legal health checks could be used across jurisdictions in some cases.

Further, in order for legal health checks to be effective, non-legal workers need to know where to refer someone if they detect legal problems. This could form part of the training offered to non-legal workers to teach them to use legal health checks. Alternatively, non-legal workers could refer their clients to a well-recognised entry point. Non-legal agencies also need to have the capacity to undertake legal health checks (QPILCH, sub. DR247). Finally, legal assistance providers also need to have the capacity to deal with the likely increase in demand legal health checks generate (Legal Aid NSW, sub. DR189).

Without a place to send clients for assistance this approach [helping non-legal agencies identify legal problems] is largely pointless. (QPILCH, sub. DR247, p. 13)

Outreach services

Outreach — defined as a ‘*proactive* approach to contact clients or potential clients to relay information, advice or assistance’ (Pleasence et al. 2014, p. 39) — targets groups that are unlikely to recognise the legal dimensions of their problems on their own, or have the capacity to seek assistance (figure 5.6). Typically, outreach services are conducted for the

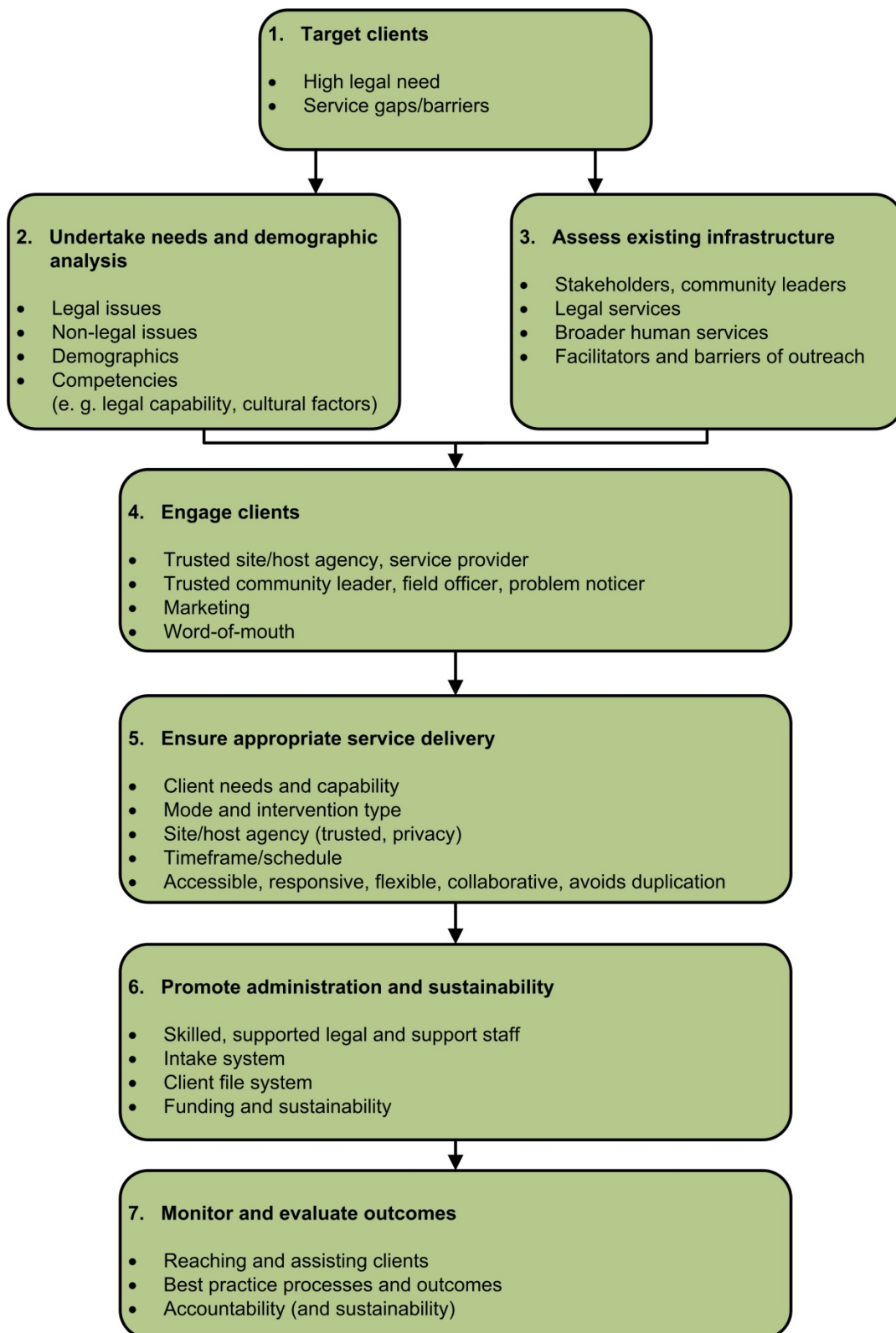
benefit of people who face geographic barriers, have mobility issues or may otherwise be unable to access assistance services (Pleasence et al. 2014; Legal Aid NSW, sub. DR189). Examples of outreach services in Australia are given in box 5.4.

Common methods of delivery outreach include:

- ‘hub and spoke’ — in-person outreach where paralegals and volunteers are located in satellite offices (‘the spokes’) in remote locations and lawyers are located at the main office (‘the hub’) in a regional or urban centre (Buckley 2010). Lawyers visit the satellite offices and conduct advice sessions regularly or on an as-needed basis. In some cases the satellite offices are non-permanent and may operate within other agencies.
- mobile office arrangements — travelling lawyers cover a circuit or set up mobile clinics. For example, duty lawyers follow the court circuit in regional, rural and remote areas.
- ‘inreach’ — clients (typically people with health or mobility issues) are transported to lawyers. This form of outreach also used to bring clients from remote areas so they can access medical, dental, consumer and other services (Wilcannia Community Working Party 2005).
- technology-based outreach — includes services conducted via telephone hotlines, online chat, audio-visual services such as teleconferencing and virtual law offices.

Outreach has been shown to provide clients with positive legal outcomes provided that it is closely connected to the target group and their support agencies (Forell and Gray 2009). Outreach can also improve non-legal workers ability to identify their clients’ legal problems (Legal Aid NSW, sub. 68). The Commission considers that outreach services are an effective means to assist hard-to-reach clients.

Figure 5.6 Planning a legal outreach service



Source: Adapted from Pleasence et al. (2014).

Box 5.4 Examples of outreach services

Legal assistance providers use a variety of outreach services to target hard-to-reach clients.

- Legal Aid NSW provides legal advice services in 198 outreach locations (sub. DR189). In 2012-13, over 12 700 advice services were delivered through outreach. Outreach locations are selected on the bases of legal need, existing use by the target client group and accessibility. Locations include homeless services, Aboriginal medical services, Aboriginal community organisations, migrant resource centres, neighbourhood centres, settlement services, Centrelink, courts and correctional facilities.
- Youthlaw provides many outreach services including a Skype legal service to nine regional areas in Victoria. Youthlaw also provides outreach through the Salvation Army's Youth Bus in Melbourne, through the Youth Support and Advocacy Service (YSAS) Detox, a service that provides legal advice to young people withdrawing from drug and alcohol addiction and through Youth Hub:

In November 2008, Youthlaw established an outreach legal service at the Youth Enterprise Hub in Braybrook, in Victoria's socioeconomically disadvantaged western suburbs. Braybrook has a high population of newly arrived young people from refugee backgrounds. We began this outreach in response to concerns held by local youth workers, a large not for profit organisation and council staff that local young men were increasingly getting in trouble with the law and that interactions between police and young people were deteriorating. The weekly outreach at the Youth Hub fostered strong relationships between Youthlaw and the young people living in the area. We observed over time that they became much more positive and future focused. Those who had previously ignored court dates began attending court and, as a result, received better outcomes. They also used the legal service to address many of their previously unaddressed civil issues including debts, consumer contracts, Centrelink problems and complaints about authorities. Many of the young people accessing the service had traumatic pasts, had lost family members and had few, if any, people in their lives they could rely upon and seek help from. (sub. DR291, p. 5)

Some ombudsmen also provide outreach services. For example, the Telecommunications Industry Ombudsman (TIO) uses its outreach program to promote its services to particular groups including young people and Indigenous communities. In 2012-13, the TIO was involved in 72 outreach events (TIO, sub. 134). The Public Transport Ombudsman (PTO) also delivers outreach services to community groups, disability advocacy services, government agencies and universities (PTO, sub. 118).

Holistic services

Disadvantaged and vulnerable people may experience legal problems that coexist with other social, economic and health issues (Azpitarte 2012; Saunders 2011; Scutella, Wilkins and Kostenko 2009).

Legal issues rarely occur in a vacuum and are often triggered by underlying problems; or lead to further problems. Providing services which assist vulnerable groups, requires an appreciation of both the *type* of services that should be delivered, as well as the *method* in which they should be delivered. (Buck and Curran 2009, p. 2)

Holistic services focus on addressing the range of legal and non-legal issues faced by disadvantaged people, rather than addressing each issue in isolation (the 'silo' approach).

The ‘silo’ approach can be an inadequate response to the multiple issues experienced by disadvantaged people (AGD 2009; Buckley 2010; Clarke and Forell 2007; Coumarelos et al. 2012).

... it is often impossible to obtain effective legal remedies for clients in isolation from their complex and ongoing social problems, so being able to address both sets of usually overlapping and interrelated needs simultaneously leads to far better outcomes. (Allens, sub. 111, p. 3)

All jurisdictions in Australia have been pursuing holistic services in community and human services since it can improve the efficiency and effectiveness of service delivery (Shergold 2013). The National Partnership on Legal Assistance Services also recognises the importance of holistic services. Some examples of holistic legal services are provided in box 5.5.

Holistic services delivery is resource intensive, as each client may require multiple services. However, holistic services offer a number of benefits to providers and users. For providers, holistic services help non-legal workers identify legal issues and understand the type of services legal workers provide, and vice versa (Consumer Action Law Centre and Consumer Credit Legal Centre NSW¹⁶, sub. DR202). A better understanding of people’s problems reduces the number of referrals to inappropriate services and allows for those resources to be better utilised. Further, holistic services can streamline some functions (Shergold 2013). This is achieved by:

... [eliminating] the duplication of tasks such as intakes, eligibility, assessment, diagnosis and personal and social history taking. (Fine, Pancharatnam and Thomson 2005, p. 2)

There are also benefits for users. For example, users’ transaction and search costs are reduced by accessing a range of services ‘under one roof’ (Shergold 2013). Trying to find multiple service providers and having to repeat similar processes — including giving personal details and retelling stories — for each provider is likely to cause frustration in disadvantaged and vulnerable people. This in turn, may lead to referral fatigue (Dr Elizabeth Curran, sub. 92), and failure to resolve legal problems.

Holistic services are a particularly effective mechanism for disadvantaged individuals to have their legal needs addressed. For example, close connections between disability advocates and lawyers may help to overcome the barriers faced by people with disabilities who may need additional assistance to understand information or communicate with their lawyers.

Holistic services can ‘help to prevent the degeneration of circumstances that can lead to further problems’ for users by targeting a number of their problems at once (Buck and Curran 2009, p. 23). This in turn, saves ‘the courts and legal system money in the longer term’ and reduces stress on the user (Dr Elizabeth Curran, sub. 92, p. 7).

¹⁶ Consumer Credit Legal Centre NSW is now the Financial Rights Legal Centre.

Box 5.5 Examples of holistic service delivery

Holistic services can be delivered via co-locating different services (such as legal, social and health services) so that clients can be transferred to other services within the one location (allowing for seamless service delivery and providing a more 'client-focused' approach to resolving problems). Examples include:

- The West Heidelberg Community Legal Service in Victoria, which delivers an integrated model of assistance in partnership with Banyule Community Health and has done so for over 30 years. Lawyers and community health centre staff work together to resolve legal problems and any underlying causes that may have resulted in the legal problem.
- ACT Community Legal Centre Hub — in 2014, the ACT Government allocated just over \$1 million over four years to assist with renting commercial accommodation. Three CLCs, including the Welfare Rights & Legal Centre, the Women's Legal Centre, and the Tenants Union ACT have now co-located in one building (Corbell 2014).
- The Nundah Community Legal Service in Queensland is based in a neighbourhood centre. A principal solicitor provides advice and referrals alongside social workers, domestic violence workers, and emergency relief (Queensland Association of Independent Legal Services, trans., p. 1205). Funding is provided by Legal Aid Queensland and community donations (Nundah Community Legal Service nd).

Holistic services can also take the form of referral networks and formal agreements between separate services. Seamless or 'warm' referrals seek to reduce referral fatigue by connecting clients directly to appropriate assistance through a three way conversation (rather than a cold referral, which just points the client in the right direction without immediately communicating with the provider who the client is being referred to).

- Legal Aid Queensland's Domestic Violence Referral Pathways project provides warm referrals and priority access to legal advice for vulnerable victims of domestic violence from identified service partners. Pathways have been developed in Ipswich, Brisbane and Southport, and further areas have been identified for future expansion.
- Legal Aid NSW engages a community liaison and referrals officer, who has the role of providing an initial assessment of clients' socio-legal needs and offering referral information and advice to solicitors in NSW. The referrals officer is also responsible for maintaining a referral database of human services agencies and non-government organisations.

Government departments, including the Attorney-General's Department and the Department of Human Services are also collaborating to design services to better meet the needs of their shared client base (AGD, sub. DR300).

Pursuing a holistic approach to solving legal problems is challenging. Establishing and building relationships between agencies that provide legal, health and social services requires planning, cooperation, resources and time. For holistic services to be effective, changes to how funding is allocated and the way that organisations operate may also be required.

Buck and Curran (2009) and Noone (2009) have argued that a challenge to the delivery of holistic services is the different outcome models used for funding. Having to report to multiple funders may lead to the individual services coming 'into conflict with the holistic approach' as they compete to record outcomes (Buck and Curran 2009, p. 18).

One way around this issue is to design funding models that encourage the delivery of holistic services. NACLCL supports the development of a funding model built on a holistic approach to addressing identified legal needs in a region:

Building a requirement to consider such [collaborative] approaches where appropriate, into the funding model is the most effective way to encourage all providers to participate as much as possible. Establishing this type of funding approach would have important flow on effects for integrated and collaborative service delivery, which would be better able to address the complex and multi-dimensional difficulties experienced by many CLC clients. (sub. DR268, p. 37)

While funding approaches can facilitate the delivery of holistic services, ultimately, such services need to be driven by the organisations involved rather than driven by a top-down approach because they require organisational commitment and trust (Consumer Action Law Centre and Consumer Credit Legal Centre NSW¹⁷, sub. DR202; Dr Elizabeth Curran, sub. DR170).

Funding at a policy or sector level also needs to be matched by a commitment at an organisational level to allocate resources to this task and to be willing to share resources. This necessitates a sharing of goals and visions and a high level of trust and mutual responsibility. (Noone 2009, p. 208)

The Commission is of the view that holistic services have an important and prominent role to play in meeting the legal needs of disadvantaged individuals. Governments and legal assistance providers should continue to work together and future agreements between them should not be structured in a manner that precludes holistic services being provided.

Improving the linkages between non-legal and legal services will likely increase the demand for legal assistance providers as non-legal workers learn more about identifying legal issues and develop referral networks. The resourcing of legal assistance services is examined in chapter 21.

Training non-legal staff to identify legal issues and refer clients

In order to maximise the effectiveness of legal health checks and holistic services, non-legal workers need to be able to identify legal problems and to refer clients to appropriate legal services (Dr Elizabeth Curran, sub. DR170; Forell, McCarron and Schetzer 2005). These processes can be particularly effective, for example, the Blake Dawson Waldron legal clinics located at Lou's Place (a women's refuge) and the Exodus Foundation (a charity that provides food, education and social wellbeing services) receive between 75 and 90 per cent of their clients from referrals from community organisations (Forell, McCarron and Schetzer 2005).

¹⁷ Consumer Credit Legal Centre NSW is now the Financial Rights Legal Centre.

What would training look like and who would provide it?

Providing training is one way of better enabling non-legal staff to identify legal issues. Training can take a variety of forms. For example, the Legal Services Commission of South Australia provides lectures for the *Law for Community Workers* course (part of TAFE SA's Certificate IV in Legal Services) that teaches non-legal workers how to identify legal problems, how to provide legal information, and where to refer their clients (trans., pp. 385–6). In order to encourage the uptake of training, the Legal Services Commission of South Australia offers scholarships for community workers who deal with vulnerable clients.

There are other less resource-intensive training options. For example, CLCs and LACs have developed CLE and information materials to train non-legal workers to identify legal problems (Forell, McCarron and Schetzer 2005). QPILCH also received a grant of around \$10 000 to develop training videos for non-legal workers (sub. DR247).

Training would be informed by research on problem clusters. This will help identify the types of non-legal workers who should be trained and the types of issues they should learn about (Law and Justice Foundation, sub. DR231).

Those organisations responsible for creating legal health checks or involved in holistic services could provide training to non-legal workers. Community Legal Centres Association (WA) argues that legal assistance agency peaks should be responsible for training non-legal workers.

All staff using legal health checks (both legal and non-legal) must be trained and monitored in understanding the background, context and use of any checklist or survey. It is our position that such training should be undertaken by legal assistance agency peaks, such as [Community Legal Centres Association Western Australia], in collaboration with its membership. (sub. DR214, p. 21)

Some CLCs are already active in training non-legal workers, including Redfern Legal Centre (sub. 115), Consumer Credit Legal Centre NSW¹⁸ (sub. 87) and QPILCH (sub. DR247). As mentioned above, greater coordination of CLE and information (section 5.3) could benefit these organisations by enabling them to leverage off existing training materials.

¹⁸ Consumer Credit Legal Centre NSW is now the Financial Rights Legal Centre

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 service 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.

5.5 What about businesses' legal capability?

Just like individuals, businesses need knowledge and capacity to effectively use the civil justice system. There is anecdotal evidence that some businesses have difficulty understanding and navigating the civil justice system:

... many small businesses can lack the understanding of the full nature of a legal problem and can be subject to an information imbalance depending on the nature of the dispute. (Australian Small Business Commissioner, sub. DR185, p. 1)

An abundance of information services — provided by regulators, government agencies, industry associations and the private profession — has emerged to assist small businesses to understand and navigate the civil justice system. Many of these services focus on preventing, rather than resolving disputes. For example, regulator websites provide information to assist small businesses in understanding how to establish a business, where to find advice, and how to comply with regulation. These resources have the potential to assist small businesses in avoiding legal issues.

Small business commissioners (where they exist) focus on assisting small businesses to resolve their legal disputes efficiently. The Australian Small Business Commissioner has developed a coordinated dispute resolution portal, which provides jurisdiction specific information on relevant areas of the law and issues that small businesses may face. Information is also provided on referral services, and on preventing legal disputes.

The private profession — typically suburban law firms — and industry associations, such as NSW Business Chamber, also cater to the needs of small businesses. Many have developed legal health checks that assist businesses to self-identify their risk of experiencing a dispute. These legal health checks canvass many issues including workplace health and safety, risk management, commercial leasing, personal asset protection, and relationships with creditors and debtors. While these legal health checks are developed for the benefit of clients and members, they are often available to other small businesses online for free.

While not as prevalent as information resources, education services are also provided for small businesses. Even though most education workshops do not specifically teach small businesses how to resolve legal disputes, they can help small businesses avoid them. For example the Australian Taxation Office provides educational workshops on tax issues around setting up and operating a small business (ATO 2014). The Small Business Development Corporation (WA) also organises educational workshops that teach small businesses about their legal rights and responsibilities (Small Business Development Corporation 2014).

There are also publicly funded avenues for small businesses to receive inexpensive legal advice. For example, the University of Canberra, in conjunction with Legal Aid ACT, runs a small business legal advice clinic where small businesses are provided with 45 minutes of minor advice for a fee of \$50 (ACT Legal Assistance Forum 2013). NT Legal Aid also provides advice clinics for small businesses. Small businesses can get free advice for 40 minutes. These clinics operate in all of NT Legal Aid's offices across the territory, and are staffed by in-house lawyers and private practitioners who are contracted to provide the service (NT Legal Aid, trans., p. 1002).

Even though there are many services that seek to assist small businesses to understand and navigate the civil justice system, too little attention can be paid to communicating effectively:

[I]nformation is nearly always difficult to read and understand and certainly not engaging. ... Assuming that the small business person has time to read and fully understand ... pages of gobbledygook, is a common mistake made by regulators. (Council of Small Business of Australia, sub. 15, quoted in PC 2013e, p. 145)

Further, many small businesses still seek assistance from inappropriate sources — including utilising information designed for the general public (Small Business Development Corporation in WA, sub. DR240; sub. 76).

Small businesses should be directed towards useful and relevant information sources and advice via referral networks, including well-recognised entry points (outlined in recommendation 5.2). The Commission considers that there are grounds for introducing Small Business Commissioners in those jurisdictions where they do not currently exist (this is discussed in more detail in chapter 8).

5.6 Less complex law makes it easier to navigate the system

A complementary method of assisting people to understand and navigate the civil justice system is reducing the complexity of the law that underpins it.

A less complex legal system means that those seeking access to justice will need less knowledge and capacity to be successful. If laws are less complex, especially in areas of policy that relate to the disadvantaged (such as welfare and tenancy law), it helps reduce unnecessary barriers to justice for those who are most vulnerable. Reducing complexity also helps to minimise the costs to legal assistance providers, governments and the private profession in interpreting and exemplifying the law.

Efforts are already being made to keep the complexity of the law in check

It is widely recognised that the unnecessary complexity of the law acts as a barrier to justice and many agencies have sought to address this, including:

- the offices of parliamentary counsel, which are responsible for drafting and publishing legislation (box 5.6)
- the law reform commissions that review and develop recommendations to reduce defects and unnecessary complexities in the law
- government departments, including the Attorney-General's Department, Department of the Prime Minister and Cabinet and Department of Finance and Deregulation.

Box 5.6 **The Office of Parliamentary Counsel's role in reducing the complexity of the law**

The Office of Parliamentary Counsel (OPC) is responsible for drafting and publishing Commonwealth legislation. An objective of the OPC is to improve legislative drafting so that access to justice is improved by maintaining:

... a high standard of legislative drafting capability, ... a consistent layout and format for legislation that is in a form that will enable ready accessibility for the public ... advice to other agencies who might be responsible for giving drafting instructions to the OPC. (2013a, p. 13)

The OPC has undertaken a number of projects (some of which are in partnership with other government agencies) to improve the clarity of legislation. One example is the *Clearer Commonwealth Laws* initiative which recognises that the complexity of law is commonly sourced from the underlying policy, the failure to consider alternatives to legislation, and an insistence on covering all imagined possible outcomes. The latter can add substantially to the length of legislation.

The OPC has designed a number of guides to assist policymakers, instructors and drafters in thinking about the complexity of the underpinning policy and the corresponding appropriateness of legislation, and the capability of those that will be subject to the legislation to read it.

The OPC has also introduced a Complexity Flagging System which provides a framework for OPC drafters to raise complexity issues with instructing departments (OPC 2013b). The system involves OPC drafters 'flagging' (making comments) where there are sources of complexity in the draft legislation, and then the instructing department responding to these comments (OPC 2013b). Comments may relate to the intent in the underlying policy or aspects of how the policy is to be implemented (OPC 2013b). OPC drafters work with the instructing department to abolish or reduce the flagged complexity, and where complexity remains in the draft legislation, senior management in the instructing department are notified (OPC 2013b). The OPC maintains a database of all the complexity comments and the department's responses so that systemic issues of complexity can be identified and resolved (OPC 2013b).

The OPC has also been using plain language (or 'plain English') techniques since the 1990s to make legislation more readable for the relevant audiences — which includes those that are affected by the legislation, public administrators, courts and judges.

The OPC has also tried to move away from the drafting approach that emphasises precision in exchange for a drafting style that is broader and more flexible — it covers a range of circumstances without articulating each one individually (Lovric 2010). This principles-based approach to drafting is a less rigid style of drafting.

There are benefits from reducing complexity, but doing so is hard

Reducing complexity of the law remains a very difficult task (French 2013). It is telling that even with two decades of complexity-reducing measures, the length of legislation continues to increase and legislation remains difficult to understand (Rares 2013, 2014). Some options that have been considered by the Commission to reduce the complexity of the law include a greater reliance on 'principles based drafting' and more consideration of those most affected by legislation.

Principles-based drafting can substitute complexity with uncertainty

One potential way of making legislation easier to understand is by using principles-based rather than prescriptive drafting (box 5.6). Principles-based drafting simply states the general principle of the law without ‘spelling-out’ every possible scenario.

[Principles-based drafting] state[s] the law in general principles and leave[s] the details to be filled in by the courts, by delegated legislation or in some other way. It has one big advantage: it’s very easy to read, and the general purpose of the law is easy to understand. But it has a big disadvantage: the precise meaning is uncertain. (OPC 1993, p. 7)

Principles-based drafting results in legislation that is not as complex or lengthy, but sacrifices certainty because it allows for greater interpretive scope over the unspecified scenarios (Campbell 1996; French 2013). In this way, principles-based provisions are said to have some level of ambiguity (Lovric 2010), which needs to be resolved by the courts through case law or the parliament with regulations.

Principles-based drafting is not a panacea. In many cases, it is the underlying policy that contributes to the complexity of the law. Drafting techniques will do little to make the law more accessible in these cases (OPC 2011). Ultimately, it is up to parliaments to draft clear laws, judges to deliver clear judgements, and legal practitioners to provide clear advice to laypersons.

Legislation should consider the needs of the audience

Legislation that is drafted with the capability of the audience in mind can go some way to reducing complexity and improving accessibility.

Legislation should be about communication, where possible with citizens, not just with lawyers who in any event are also not immune from finding complex legislation unintelligible! (Campbell 1996, sec. 21)

In some cases, it is clear that the capabilities of the group affected by the legislation is not at the forefront of the drafting process. For example:

Complexity of the law and the legal system creates barriers to accessing justice for Indigenous people, including because of literacy and language issues. (Indigenous Legal Needs Project, sub. 105, p. 9)

There will be circumstances where the general accessibility of legislation is a secondary consideration — for example where legislation is not aimed at the general public such as in relation to complicated commercial matters (AGD 2009; Lindgren 2013). But even in these cases, legislation still needs to be accessible to those interpreting and explaining the law to their clients. As discussed in chapter 3, the law can be so complex that even non-specialist lawyers have difficulty with it.

Making the law less complex so that it is accessible to affected parties or their advocates, requires a serious and long term commitment from government. As demonstrated in

chapter 3, and echoed by QPILCH (sub. DR247), a primary source of complexity of the law is the underlying policy.

The accessibility of legislation could be assessed during public consultation of an exposure draft and there could be regular reviews of legislation (AGD 2009). QPILCH also argues that reviews of laws could include input from those who are affected by the law (sub. DR247). Such activities could not only improve the accessibility of the law, but also help minimise the cost of unintended consequences.

Summaries of legislation can also make the law easier to understand and could be included in introductions to legislation. An example is provided by *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

This allows the user to gain a basic understanding of what the legislation is aiming to achieve even if the actual language used in section[s] of the legislation is difficult to comprehend. (QPILCH sub. 58, p. 15)

Alternatively, relevant government agencies in each jurisdiction could publish easy-to-understand summaries of legislation. For example, the Department of Human Services could publish a guide to understanding social security law (with assistance from the OPC where appropriate).

Priority should be given to areas of the law that affect a large volume of people and areas that disproportionately affect disadvantage and vulnerable people.

Trade-offs between the complexity of the law and other policy priorities mean that keeping law simple is not always possible, and indeed not always desirable from a community-wide perspective. Providing an additional layer of support, through extensive consultation to prevent unnecessary complexity, and plain English guides to mitigate against existing complexity, can assist both consumers and providers of legal services alike.

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.

6 Protecting consumers of legal services

Key points

- Many consumers find assessing the costs of legal services daunting, complex and uncertain. The information asymmetry between lawyer and consumer provides justification for regulation on consumer protection grounds.
- While the ‘billable hour’ remains predominant, lawyers charge for their services in a range of ways, including event-based billing, capped and fixed fees.
- There has been some reform of billing and disclosure requirements, although some jurisdictions have made more progress than others.
- Banning any particular fee structure inhibits market innovation. Instead, consumers should be empowered through meaningful transparency requirements.
 - Transparency could be achieved in an accessible and digestible form through online reporting of typical costs for specific types of matters.
 - Guidance from costs assessors (and equivalents) on what could be considered as ‘fair and reasonable’ costs could improve certainty for providers, and (anonymous) publication of past cost assessments could assist both lawyers and consumers.
- While reform to billing practices can improve outcomes for consumers ‘up front’, there remains a need for complaints processes to protect those who have been the victims of misconduct or overcharging. This need particularly arises due to the information asymmetry mentioned above, which makes it difficult for clients to recognise wrongdoing and to manage disputes that do arise.
- Each state and territory has a body charged with receiving complaints about legal practitioners. However, current arrangements do not adequately protect consumers.
 - The powers of complaint bodies need to be strengthened to include disciplinary powers in relation to ‘consumer matters’ — which are disputes between clients and lawyers about service cost or quality — rather than purely professional conduct issues.
 - Complaints bodies need to have a consumer focus and their enabling legislation should include an explicit primary purpose of aiding consumers to achieve redress.
 - Complaints bodies should also report publicly on outcomes achieved for consumers of legal services.

When consumers seek formal legal advice, they face a daunting prospect of dealing with a complex and technical legal system for an unknown, and potentially prohibitive fee. These consumers can find it hard to assess the quality of the services provided by legal practitioner they engage and whether they are getting value for money.

There are regulations designed to protect individual consumers. Broadly, these regulations aim to ensure that consumers are provided with information on costs upfront and that they have avenues for complaint should issues arise.

This chapter begins by discussing the rationales for specific protection for consumers of legal services (section 6.1) and lawyers' billing practices and their regulation (section 6.2). The chapter then goes on to examine the need for reform of consumer regulation (section 6.3) as well as complaints processes (section 6.4).

6.1 Why do consumers need protecting?

Some in the legal profession considered that protecting consumers of legal services was not a major access to justice issue:

Any suggestion that [protection of consumers] does have something to do with '*access to justice*' because it concerns disciplinary action regarding overcharging supposes that the problems concerning access to justice that the report aims to deal with are effected by '*overcharging*'. It is submitted that the constraints on access to justice exist regardless of whether the legal services are charged for at appropriate rates or at excessive rates. The clients involved could rarely afford either. (Bar Association of Queensland, sub DR245, p. 2)

The Commission acknowledges that many consumers are unable to afford even legitimate charges for legal services, and has made a number of recommendations to make services more accessible for those individuals. But this does not mean that overcharging and other forms of wrongdoing by lawyers should be ignored — they are of themselves constraints on access to justice for many middle-income consumers on the margins of being able to fund legal action themselves (the 'missing middle' identified in chapter 19). If such consumers fear that they cannot afford a lawyer due to perceptions of high costs, they will not approach one.

In any services market, be it medicine, plumbing or legal services, there can be examples of 'bad apples' — instances where providers have exploited consumers. Additionally, in some markets, the very nature of the product or service puts consumers at a disadvantage relative to suppliers who are better informed or face perverse incentives. In such markets, government intervention is warranted to 'level the playing field' to ensure that services are not over or under provided, and that they are not charged at excessive rates — benefitting suppliers at the expense of consumers and society as a whole. Regulation needs to address poor behaviour, and be seen to be doing so, in order to alleviate such fears and promote better use of legal services.

In the context of legal services, there are aspects of the behaviour of both consumers and suppliers that point to a core flaw (‘market failure’) in their relationship — an imbalance of information about the nature and quality of services provided.

An imbalance of information favours the providers

As is common with a variety of professional services, the ‘product’ that lawyers sell is their knowledge. The opaque, complex and technical nature of many legal services means that, while consumers may be able to place a value on the benefit they have received from the outcome of a legal service, they cannot judge whether the quality of services they received met their needs. In some instances, the consumer may not be able to judge the quality at all. As Chief Justice Martin commented:

We have a very ill-informed market on the part of consumers with respect to legal services. They don’t know the nature of the services they need, they don’t know the nature of the services that are provided, they don’t know the basis upon which they’re going to be charged very often, and they don’t know the quality of that service. (trans., p. 584)

Further, the outcome of engaging a lawyer’s services — whether ‘win’, ‘lose’ or ‘compromise’ — is affected by a wide range of factors, including the underlying facts and applicable laws, the counterparty, and even the particular mediator, arbitrator or judge. This makes the consumer’s attempts at judging quality even harder.

Indeed, in many cases the consumer must rely on their lawyer to diagnose their needs and identify the services required. In economics, such products are termed ‘credence goods’ (Dulleck and Kerschbamer 2006) Examples of credence goods include services provided by doctors and mechanics, where the consumer is aware of a problem, but not its exact nature or solution.

A client’s circumstances can further hinder their ability to fully understand the services and charges. General levels of education can affect a client’s ability to understand the legal process and monitor the necessity of each of the lawyer’s actions. Even for a given level of education, clients in some situations can be less likely to monitor legal costs. For example, someone engaged in an emotion-charged child custody dispute may not dispassionately evaluate the costs and benefits of each component of the legal services they receive. While they may take advice in order to find a ‘good’ lawyer, once the lawyer has been engaged the client may pursue their objectives at nearly any cost.

Effects of information asymmetry

The lack of information on the part of consumers can give rise to several problems. For those contemplating legal action, difficulty in even gauging a rough range of costs, particularly for first time litigants, can discourage them from engaging legal advice. As such, it is not only the quantum of *actual* costs that might cause people to choose not to

engage a lawyer, but also the *perception* of costs, a point noted by the Centre for Innovative Justice:

... this is as much to do with the fear of the unknown — of what legal costs *might* be, given so much uncertainty is attached; as well as perceptions of the legal market as designed only to service the ‘big end of town’. (2013, p. 9)

Faced with a lack of information and the risk of engaging a low quality provider, consumers may not be willing to pay high prices for legal services. In theory, this could mean that prices are not sufficient to sustain high quality providers, with the end result ‘a low volume, low quality, low price market’ sometimes referred to as ‘adverse selection’ (Decker and Yarrow 2010, p. 31). Professional regulation relating to education and certification (chapter 7) seeks to avoid this problem by setting and maintaining a quality standard for service providers. In the case of some consumers, repeat transactions can give rise to reputations for providers that would also avoid adverse selection.

More difficult to avoid is the ‘principal-agent’ problem. The ‘principal’ (the consumer), hires an informed ‘agent’ (their lawyer) to act on their behalf and would like their agent to make the same decision they would have made with the same information. But the agent may take advantage of the information imbalance to meet their own objectives, either by over or under supplying their service (by altering the quantity and quality of devoted resources) or by providing the appropriate level of service, but overcharging for it.

Unlike some other professions where the identification of the services needed and their supply are provided by different suppliers (for example an architect and a builder), the diagnosis of issues and the legal services required to resolve them are typically conducted by one provider (sometimes with ‘subcontracting’, for example a solicitor engaging a barrister). This compounds the difficulty for the client:

In such circumstances, a lawyer motivated solely in terms of financial gain may be tempted to suggest an expensive remedy in the knowledge that he/she will receive a higher fee for providing that remedy. By definition the client is not in a position to judge whether the remedy is the only one possible or even if it is likely to be successful. In the economic literature on the professions this is often described as giving rise to ‘supplier-induced demand’. (Stephen 2004, p. 3)

This ‘information asymmetry’ has long been regarded as a principle basis for the regulation of legal services. Such regulation can have broader effects — reforms that redress information imbalances can improve consumers’ trust in the broader legal system (chapter 4).

Different consumers have different levels of information

Information imbalances are not uniform. As discussed in chapter 7, the market for legal services is a broad but connected series of sub-markets. The market can vary based on the parties involved, underlying facts, complexity of the applicable laws, resolution processes and the services provided — ranging from an intellectual property dispute between two

corporations to a disadvantaged party using legal aid to contest a family law matter. Even within a given area of law, clients can have different levels of knowledge and capability to understand legal and financial issues.

As the rationale for regulation rests on the consumer's lack of information, different consumers would benefit from different levels of regulation, and so attempting to set a single level of information for all cases will not be effective. At the other end of the spectrum, attempting to regulate at a granular level where each client, in each income bracket and for each area of law, has different protections is an exercise in false precision, and would impose a substantial informational and administrative burden on regulators and the regulated alike. The middle ground is best — regulation that broadly differentiates between client types, and ensures that information is understood, but does not rely on complicated and prescriptive standards.

At the broadest level, a distinction can be drawn between regular users (such as large businesses) and those individuals who rarely interact with the formal legal system. Those who regularly interact with the legal profession can compare across different practitioners from their own experience, and leverage some 'buying power' in order to obtain value for money. And, in many cases, the staff of large companies that procure legal services are themselves lawyers.

While sophisticated clients enjoy informational and bargaining power advantages relative to 'retail' consumers, even they experience difficulties. For example, the Australian Corporate Lawyers Association submitted that:

- 38% of General Counsel do not believe the main law firm they work with is upfront and transparent about pricing
- 53% of General Counsel do not believe the main law firm they work with provides realistic estimates
- 54% of General Counsel do not believe the main law firm they work with provides advice at a reasonable price
- 79% of General Counsel do not believe the main law firm they work with offers Alternate Fee Arrangements that work. (sub. DR263, p. 9)

Clients who rarely interact with the profession (and do so in their personal time, not as their core business) are in a worse position and may only rely on recommendations or anecdotes.

While not directly applicable to the Australian market, overseas evidence supports the delineation between user types. For example, a survey conducted for the Competition Authority of Ireland showed a clear difference, with more than half of individuals having not engaged a solicitor in the last five years while over two thirds of insurance companies engaged solicitors over twenty times per year (Indecon 2003).

Not all businesses should necessarily be considered sophisticated clients. For example, many small businesses share the characteristics of individual retail clients, such as a lack of

understanding of the full nature of a legal problem (SBDC, sub. 76). Therefore, any consideration of addressing the information imbalances for vulnerable groups of clients should also consider small business issues.

Searching for better information is difficult

At the time their dispute arises, most retail consumers of legal services are unlikely to be well versed in the options to resolve their dispute, the choice of legal service providers, and their relative costs. Therefore, an additional means to protect consumers is to arm them with more information.

For many products, consumers are able to improve the information that underpins their decisions at relatively low cost, either by personal experience, or by searching for information to compare products. For example, some products (such as milk or bread) are frequently purchased and similar in nature, meaning consumers can readily compare price and quality. Other products, while not purchased frequently, can be assessed against objective criteria (such as the screen size and resolution of a television), and can easily be compared before a purchase.

In the case of legal services, addressing information deficiencies is not such a simple task. Compared to other products, legal services are a relatively infrequent purchase for most individuals. And, outside of transactional matters such as conveyancing, there can be substantial variation between duration and complexity of cases, even in similar areas of law. As such, hourly rates may not provide consumers with adequate, let alone full, information about the likely costs of the services they are buying. Further, client confidentiality prevents market participants from gaining adequate knowledge about the prices paid by others in the market. The Centre for Innovative Justice identified the lack of centralised information as an issue that impedes consumers' ability to compare prices:

... no source of consolidated information exists for legal consumers regarding what or how firms charge – even in a generic or de-identified form. Accordingly, consumers have almost no way of comparing like services with like, of knowing whether there are alternate charging models on offer, or of ascertaining whether they have received or been quoted value for money. This contributes to the fear and uncertainty around costs that one practitioner consulted by the CIJ has suggested is as much of a problem associated with legal costs as the final figure itself. (2013, p. 14)

In the absence of centralised resources, finding information is costly, time consuming, and likely to yield disparate information that is difficult to compile and compare. Faced with undertaking a costly search for relatively little gain, people will instead rely on potentially imperfect proxies such as pre-existing relationships or word of mouth. This may be especially true in instances where the legal action is not optional and the client's need for immediate representation outweighs concerns about value for money, such as child custody or housing matters where the client is facing the risk of homelessness.

Commission estimates, based on unpublished *LAW Survey* data, verified the tendency for consumers to rely on referral and relationships, rather than conducting an objective search. It showed that for a large share of problems, clients were referred to a legal adviser either by someone they knew (22 per cent) or another (legal or non-legal) professional (19 per cent), or personally knew the legal adviser (19 per cent). Conversely, relatively few consumers relied on a telephone book or internet search (12 per cent) or advertising (only 3 per cent) to find a legal adviser.

The cost of conducting an effective search to compare prices and services between lawyers effectively vests market power in the first lawyer that a client sees:

... the higher the search cost the less willing the client will be to seek a second option, and thus the greater the monopoly power of the first lawyer visited. The search cost (expended by the client for each new lawyer that the client visits) is only applicable to visiting a lawyer for the first time: returning to a previously-visited lawyer is costless. (Daughety and Reinganum 2013, p. 12)

6.2 The current approach to billing is changing

Billing practices still focus on the billable hour ...

While billing practices vary between legal firms, the most prevalent — and perhaps infamous — form of billing is time-based, widely referred to as ‘the billable hour’. A longstanding practice, the billable hour is predicated on the notion that the best available measure of a lawyer’s output is a dollar rate applied to the amount of time spent working on a client’s matter. It is possible that billable hours can be an appropriate measure, provided that:

- the dollar rate is an accurate measure of the value of the time
- time is the most accurate measure available of the quality (or value) of the work
- the time is recorded and attributed to an individual matter accurately.

However, even where these conditions are met there are substantial downsides to using billable hours (box 6.1). These relate to incentives for overservicing, rewarding inefficiency and a lack of certainty and transparency for clients:

... billable hours ... ignore whether the lawyer’s work actually furthers the client’s interests. Lawyers who bill on an hourly basis have limited incentives to engage in case planning and have a specific incentive to adopt defensive over-servicing and strategies. ... clients run the risk of having to pay for inefficient lawyering, costs incurred in training junior lawyers, turnover and aggressive time recording. ... billable hours provide clients with little or no predictability about cost. Without further information, clients (especially unsophisticated clients) have no capacity to check whether the services for which they are being charged were necessary to the matter and efficiently performed. (Parker and Ruschena 2012, p. 620)

Box 6.1 **The pitfalls of the billable hour**

While time-based billing can affect clients' costs, it also creates certain pressures on lawyers, affecting their behaviour:

... junior lawyers labor under the strong and consistent impression that the value of their work is assessed primarily on the basis of the fees that they earn. ... Lawyers who perceive that their firms are only interested in revenue production may feel a direct pressure to bill and a reduced motivation to deal with their case efficiently. (Parker and Ruschena 2012, p. 656)

The factory environment of the law firm reinforces the ethos that time is money and one cannot waste time on tasks that cannot be billed. ... The demands of hourly billing and the pressure of law firms not to waste time on irrelevant matters such as discussing costs has prevented lawyers from communicating such vital issues to a client. (Mark 2007, p. 5)

Beyond the effect on the client, the billable hour also has an effect on the internal working of law firms:

Hourly billing has severely altered the legal working environment, often with detrimental effects. ... Hourly billing is now used by firms to measure the utility of an employee - hours now decide salary levels, raises, promotions and bonuses – driving up billable hours at an unreasonable rate. ... Two years ago only 12% of the profession were working more than 50 hours a week. Today the number of practitioners working 50 hours or more has increased to twenty nine percent. (Mark 2007, p. 1)

... the lawyer's capacity to generate income ... may be the only means of assessing whether he or she is good at the job. ... The pressure that this places on lawyers is all the more acute when compensation varies with management's assessment of the lawyer's contribution to the firm, and in many cases this is assessed mainly by whether the lawyers reached their billable hour targets (rather than the quality and quantity of the actual work provided to the client). (Parker and Ruschena 2012, p. 622)

There is so much focus on the number of hours you put down. If you bill a lot, you will be thought of very highly. There was a lot of angst at the end of the month ... You had to speak to clients to make sure they were happy. It was never a pleasant thing to do. (Ford 2012, p. 22)

The impact that these pressures can have on the mental health and overall wellbeing of lawyers within firms was also noted by the Chief Justice of Western Australia:

High levels of dissatisfaction are evident in surveys, computer blogs and in the high number of young lawyers who leave the profession. The emphasis upon the production of billable hours creates a working environment which ... discourages professionalism and reduces work satisfaction to unacceptable levels. Clever young lawyers are leaving the profession in droves, or shifting to corporate, government and NGO roles where their motivation is provided, and their performance assessed by outcomes other than the production of billable hours. High levels of depression and substance abuse have also been detected amongst legal practitioners. (Martin 2010, p. 18)

Lawyers have a 'fiduciary' (trust) relationship with their clients that gives rise to several duties, including that they act 'as promptly as reasonably possible' and be diligent in acting in the best interests of the client.¹⁹ This requirement to be diligent, coupled with a desire to ensure the best outcome for the client, and a risk aversion borne of fear of incurring liability or complaint if the case is not conducted perfectly, can all be reinforced by the incentives provided under time-based billing. The end result can be lawyers exploring

¹⁹ See for example the New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules), rule 4.1.3.

every ‘rabbit hole’ of the case, with little regard for the expediency, cost and added benefit of doing so.

This tendency to explore all options (safe in the knowledge that the cost of time will be recovered from the client), combined with clients that may be adamant that their perceived rights be enforced (a view that may not accord with likely legal outcomes), can inflame and extend disputes:

... disputants with fiery emotions should be very wary of engaging lawyers carrying a can of accelerant, a match and a dedication to booking billable hours. (Mair 2010, p. 4)

Further, time-based billing does not take into account the relative efficiency of different lawyers to complete a given task. In doing so, it leads to perverse incentives wherein:

... quantity of work is appreciated far more than quality. Under an hourly billing system the lawyer who takes the most time on a matter is rewarded, as the number of hours billed is greater than the lawyer who does his work quickly and efficiently. (Mark 2007, p. 2)

Lawyers are better placed than their clients to manage risk, often having more information relating to the likely duration of a case and (in larger firms) able to pool the risk across their caseload. Despite this, the billable hour shifts the risk relating to the costs of the case away from the lawyer and onto the client. As others have noted in the context of court costs scales, using the billable hour puts consumers in a position few would regard as desirable in other industries — tantamount to handing a builder ‘carte blanche’ in the costs of building a house:

There is also now a total disconnect between the cost scales which are charged on an activity basis and the actual costs, since most lawyers now calculate costs on a time charge basis. This puts litigants in the position of not knowing how much they will recover and having no fixed cost basis with which to negotiate with their lawyers. They are left in the position as if they were building a house on a cost plus contract rather than a fixed price contract, which most prudent people would not dream of doing. (Cannon 2009, p. 5)

Despite these well-known faults, and long discussion of the ‘death of the billable hour’ (see, for example, Glater (2009)), this has yet to eventuate. There may be many reasons for this, including a culture and tradition within the legal profession that is slow to adjust. Clients may also see billable hours as safe (‘better the devil they know’) and prefer them to new methods. Further, there are likely to be cases where, if recorded and valued accurately, the billable hour may remain the best available option for valuing and charging for a lawyers work. This may particularly be the case in complex or rare matters where estimating a fixed fee in advance with any degree of accuracy is difficult.

... but alternatives to the billable hour are emerging

While the billable hour is dominant, other innovative forms of pricing are emerging. Annual surveys of the legal services market have shown that the proportion of respondents who used hourly billing for 90 per cent or more of their legal spending fell from 77 to

59 per cent between 2010–2013 (Allens, sub. 111). The use of so-called ‘alternative fee arrangements’ (AFAs) has been driven by large, typically corporate clients seeking value from large law firms and using their buying power to leverage preferred forms of pricing (Allens, sub. 111). Some AFAs incorporate elements of time-based billing (box 6.2).

Over time, the usage of AFAs has spread beyond corporate clients. For example firms such as Slater & Gordon (2011) and Shearer Doyle (sub. 21) offer fixed fees in family law, and Kays & Hughes Entertainment Lawyers offer fixed quotes for services other than litigation (such as drafting contracts and uncontested intellectual property matters) (CIJ 2013).

Box 6.2 **Alternatives to traditional time-based billing**

There are a variety of ‘alternative fee arrangements’ emerging in legal markets both in Australia and overseas.

- *Interim billing*: billing on a partial basis (such as monthly) rather than in totality at the end of the transaction. In lengthy matters, use of interim bills can assist in reducing ‘bill shock’ and may help the client to better manage their payments and avoid defaulting on bills (a benefit to the lawyer).
- *Blended fees*: where the differing hourly rates for all staff working on a matter are ‘blended’ together to create a single hourly fee to charge the client.
- *Capped fees*: hourly fees billed at the normal rate, with an aggregate total maximum that the client would have to pay for a particular matter.
- *Conditional billing*: where some or all of the lawyer’s fees depend on success in the matter. In this form of billing, the lawyer’s fees are calculated in a normal (time-based) manner, sometimes with an uplift to compensate for risk (chapter 18).
- *Contingent or ‘damages-based’ fees*: are contingent on success in the matter, and calculated as a percentage of the amount recovered (chapter 18).
- *Fixed fees*: where a single price is set to handle an entire matter from start to finish. Notable subsets are:
 - *Event-based billing*: a set amount is charged for certain events, stages or milestones met.
 - *Hybrid*: a combination of fixed and time-based fees.
- *Value pricing*: fixed fees agreed at the outset of a matter, that focus on the work done and the value to the client, rather than the time spent.

Sources: Hew et al. (2013); Allens (sub. 111).

The Legal Services Commission of Queensland (2013b) survey of billing practices for medium to large law firms also provides some evidence of wider uptake of AFAs. Respondents were asked whether they ‘always’, ‘sometimes’ or ‘never’ used various billing practices and the results provided the following insights.

- Interim billing was common — 79 per cent of firms reported they sometimes used this method and a further 17 per cent always used it.

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- Fixed fees were also common — with over 70 per cent of firms sometimes offering a fixed fee ‘menu’ for standard tasks or tailored to client needs.
 - However, time-based billing was still prevalent — half of firms sometimes used time-based billing and a further quarter always used it; moreover, roughly half of respondents never used hybrid fees or value pricing (described in box 6.2).

Arriving at an AFA estimate for more complex matters can involve detailed assessments of the legal cost and duration of an ‘average’ matter. While some routine tasks might lend themselves to quantification more easily, the assessment of past billing data and converting probabilities into financial metrics may not be an area of expertise for some law firms, and can require further work by the firm:

There are additional transaction costs associated with planning, agreeing and then providing legal services under AFAs. For example, considerable resources must be expended by the law firm scoping work and defining assumptions in order to be able to properly manage the risk associated with proposing a fixed fee ... (Allens, sub. 111, p. 14)

Under fixed fee arrangements the lawyer also shares some of the risk of longer-running complex disputes (as opposed to time-based billing where the client typically bears the risk). These factors can explain some reluctance on the part of firms to whole-heartedly adopt AFAs.

Nonetheless, adoption of AFAs can provide substantial benefits to clients in terms of improved value, certainty and transparency (a fixed fee is substantially easier to understand than a multi-tiered time-based fee). Importantly, there are also benefits to law firms. Firms can offer AFAs to differentiate themselves from more traditional firms, and this may potentially capture additional clients and improve their revenue. Some commentators have also pointed to a potential reduction in complaints about billing, as increased certainty and ease of communication reduces the risk of ‘bill shock’:

... remember that without our clients we have no reason to exist as lawyers. We must find out not only what our clients need, but also what they want — and then provide it to them in a way they can appreciate. When that happens, fees are not an issue and client complaints about billing are not a problem. (Poll 2010)

While time-based billing is likely to remain prominent into the future, the development of the legal services market could prompt wider adoption of AFAs, especially if assisted by demand from large buyers of legal services (corporations and governments) that identify opportunities for cost savings. Further, changes to regulation to increase information available to consumers (below) is also likely to raise awareness of AFAs.

The regulation of billing is undergoing some reform

The issues identified above suggest there is cause for regulation of lawyers’ billing practices to rectify information imbalances and to protect consumers. Indeed the profession has long been regulated in recognition of the potential for such issues. Recently, the

regulation of the legal profession was the subject of a concerted reform effort, the *National Legal Profession Reform* project (discussed in chapter 7). While the reform stalled before national agreement was reached, there have nonetheless been some changes to billing regulation within some jurisdictions.

Billing reforms have taken place, but jurisdictional differences remain

Although billing regulation is similar across jurisdictions, recent reforms have led to increased divergence. Table 6.1 compares the regulation across jurisdictions in relation to some key features, such as the means for ensuring that clients understand costs disclosures. Notably, despite different terminology, all jurisdictions exempt ‘sophisticated’ clients from disclosure requirements.

Table 6.1 Billing regulation: uniform law compared to other jurisdictions

	<i>New South Wales and Victoria</i>	<i>Other states and territories</i>
<i>Retail and sophisticated clients differentiated?</i>	Yes, ‘commercial and government’ clients exempt	Yes, sophisticated clients exempt from requirements
<i>Bills required to be fair and reasonable?</i>	Positive obligation on practice to ensure costs are fair and reasonable	Only ex post ^a
<i>Threshold for client understanding disclosure</i>	Practice must take ‘reasonable steps to satisfy itself that client has understood’	Written in clear language, oral if the practice is aware the client is unable to read
<i>Requirements for ongoing disclosure</i>	After any significant change, including to costs	Yes, ‘any substantial change’
<i>Minimum dollar threshold for disclosure</i>	No disclosure if costs less than \$750, simplified standard disclosure if costs below \$3 000	No disclosure if costs are not likely to exceed \$1 500

^a If there is no costs agreement, nor schedule of costs, then only fair and reasonable costs can be recovered by a lawyer seeking payment under dispute. Additionally, the costs agreement can be set aside if challenged by the client and the relevant supreme court (or tribunal) is satisfied that it was not fair and reasonable.

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

Following a failure to achieve agreement from all jurisdictions in the *National Legal Profession Reform* project, Victoria and New South Wales have moved ahead with the *Legal Profession Uniform Law* (‘uniform law’), covering roughly 70 per cent of Australian lawyers. The scheme commenced on 1 July 2014. In announcing the scheme, the Victorian and NSW Attorneys-General noted that they ‘hope that other jurisdictions will decide to join the scheme once they have had the chance to see it in operation’ (Smith and Clark 2013).

In brief, the features of the uniform law, beyond the existing laws in those states, as they apply to billing include:

- a new obligation on law firms to only charge ‘fair and reasonable’ legal costs
- no costs disclosure is required for matters expected to cost less than \$750. Small firms and sole practitioners can also use short, standard-form costs disclosure as an alternative to full disclosure where total costs are not likely to exceed \$3000.

The Australian Consumer Law also applies to lawyers

In addition to specific legal profession regulations in each jurisdiction, the operations of lawyers as they interact with consumers is governed by the Australia Consumer Law (ACL),²⁰ which applies Australia-wide. There are a number of provisions of relevance to lawyers (Qld LSC 2013d) including those governing: consumer guarantees; component pricing; misleading and deceptive conduct; unconscionable conduct; unfair terms in standard form contracts; and undue harassment or coercion (for example, in collecting outstanding fees).

Unlike legal-specific regulation, the ACL is not enforced by legal complaint bodies. Instead, enforcement is conducted by the Australian Competition and Consumer Commission and state fair trading offices (or their equivalents). This does not prevent the legal and competition regulators from sharing information or agreeing to refer complaints — for example, the Queensland Legal Services Commissioner and Office of Fair Trading have a memorandum of understanding setting out their respective roles (Qld LSC 2013d).

Such information sharing should ensure that appropriate actions are brought by the relevant regulator. However, given one set of circumstances can lead to action either under the ACL or legal professional regulation, there is also the risk of duplicated effort by the regulators.

In the draft report, the Commission sought feedback on the scope for legal complaint bodies to directly enforce the ACL. Several participants — including the Law Society of South Australia (sub. DR219, Attachment), Maurice Blackburn (sub. DR197), and the Law Council of Australia (sub. DR266) — argued that this was not appropriate. They did so on two grounds. First, enforcing the different laws requires additional expertise within the legal complaint bodies themselves. Second, diffusing enforcement of the ACL risks regulatory ‘fragmentation’, whereby bodies with different objectives may make different interpretations of the same laws.

Whilst the Commission is not overwhelmed by these arguments, it considers that cooperation and effective referral of matters, through mechanisms such as the memorandum of understanding used in Queensland, are more appropriate, more readily deliverable and likely to be less costly. Any remaining ‘gap’ with respect to protection for consumers of legal services is best addressed through changes to the powers and roles of

²⁰ Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

legal complaint bodies themselves (section 6.4). That said, the effectiveness of these arrangements should be part of the review of consumer protection contained in recommendation 6.8.

6.3 Some reforms are required to protect consumers

While billing practices have been subject to recent reforms stemming from the *National Legal Profession Reform* project (ACIL Tasman 2010; COAG CRIS 2010), there remain differences between jurisdictions that can impact on the wellbeing of the consumers of legal services. Recent change in some jurisdictions is not reason of itself for governments to pause. Rather, governments need to consider whether billing regulation is effective in achieving consumer protection goals.

Characteristics of effective regulation

Before examining any reforms to regulation, it is important to know the ‘goal posts’ — that is, what should effective regulation of billing practices look like? As discussed in chapter 7, good regulatory practice ensures that regulation is appropriately targeted at an identified problem, is the best available solution for that problem, and does not cause unnecessary or disproportionate regulatory burdens.

In the context of the legal services market, this requires that any regulation be targeted at the issue of information imbalance. As discussed above, there needs to be a broad delineation between up front requirements for ‘sophisticated’ clients such as large corporations and governments, and ‘retail’ clients, such as individuals and small businesses who require additional protections.

One issue this presents is that small firms, who typically have the least capacity to handle regulatory burdens (PC 2013e), are also more likely to deal with small clients (Stephen 2004).

This potentially disproportionate burden on small law firms could be remedied by applying proportional regulation — ensuring that the level of disclosure varies with the amount at stake (the bill). This means that the majority of small clients may only need a brief, standard form disclosure document, while those who face substantial bills would need more substantial (and potentially more tailored) disclosure.

Indeed, too much disclosure can frustrate the regulatory objective of improving the consumer’s level of information and understanding:

It is our experience that the Costs Disclosure regime, under which lawyers provide clients with lengthy disclosure documents and costs agreements, can act as a barrier to client’s understanding of costs. This is because clients treat these documents in the same way as other

consumer contracts that they are asked to sign — that is they rarely read them. (Shearer Doyle, sub. 21, p. 4)

Regulatory requirements for costs disclosure should promote brief, clear and easily understood documents, rather than ironclad, sub-clause-filled costs disclosure tomes that protect the lawyer from any eventuality while being inaccessible to the client. It is important that the objective — ensuring that the client is adequately informed — is not forgotten. As noted above, some clients may need more explanation than others to ensure that they have understood what has been presented to them. A discussion between lawyer and client should be sufficient to fill any gaps, but the onus should be placed on the lawyer to be satisfied that their client understands the range of cost outcomes they could face.

Given the nature of constraints faced by consumers, effective billing regulation would ideally have the following features:

- a delineation between ‘retail’ and ‘sophisticated’ consumers
- levels of disclosure that vary with the quantum of the bill
- standard form disclosures for smaller amounts
- brief, clear language
- a focus on ensuring the client’s understanding.

As noted above, the predominant and traditional method of legal billing, the billable hour, brings with it significant incentive issues that can impact on the performance of the lawyer, the price the consumer pays, and the level of risk and uncertainty that the consumer faces. Thus a threshold question in examining regulation is if the billable hour has a continued role in the future of the legal services market.

Kill billable hours?

Some participants, such as the Consumer Action Law Centre and Consumer Credit Legal Centre NSW (Consumer Action and CCLC, sub. DR202), submitted that billable hours should not be used for billing individuals — effectively banning it from the bulk of the ‘retail’ market.

While the billable hour has many flaws, there may be some circumstances where it remains the best available option to approximate the value of legal services. Indeed there may be some clients who value the use of time-based billing.

Further, while the legal market is evolving and experimenting with various different forms of billing, it is important for both clients and law firms to have a back stop of the billable hour, to enable comparisons with new measures and as a known option to revert to. Attempting to reform one ‘cog’ of the legal system (client’s bills) without addressing other parts of the system, particularly the manner in which costs orders are calculated

(chapter 13), could lead to unforeseen and undesirable outcomes, which may be exploited by some.

Finally, as noted above, some of the existing AFAs involve a component of time-based billing, so attempting to ban particular forms of billing may unnecessarily inhibit innovation.

Therefore, the Commission does not support banning the use of time-based billing. Instead, the Commission has made other recommendations to enhance competition — such as better-informing consumers. These recommendations should encourage the market to evolve to a point where the billable hour is used not as a default, but because it has found a niche where it is the most appropriate method.

Bills need to be understandable, and understood

Legislation in all jurisdictions includes a requirement that costs disclosure be written in ‘clear language’. However, this does not provide assurance that every client has understood (or read) what is presented to them. As *Negocio Resolutions* (one of whose principals acts as a cost assessor in New South Wales) submitted in relation to costs disclosure requirements that predated the uniform law:

I counsel caution in relation to the drive to rely on disclosure as a method of protecting consumers. Present systems in NSW are so complex and burdensome that even experienced practitioners have difficulty complying and the disclosure documents are so long and burdensome that consumers give up trying to understand. (sub. DR198, p. 8)

Professor Prue Vines elaborated on the difficulties faced by clients in relation to conditional fees:

... although the costs agreements are given to clients it appears that they often do not understand them. They often do not understand what ‘disbursements’ means, nor do they understand how much of a compensation payment will disappear – this seems to commonly be between 20-40% of a compensation award. Further, as approximately 90% of compensation payments are settlements, clients may have very little understanding of how the cost agreement fits in with the amount they ultimately receive. (sub. 17, p. 2)

Indeed, the mere existence of requirements for written disclosure, and lawyers’ efforts to comply with them, does not always translate to the client receiving, or understanding, a cost estimate. In a survey of disputants in the South Australian courts, the Commission asked respondents if their lawyer provided them with an initial estimate of legal costs for their case. Of those respondents represented by a lawyer, only 40 per cent reported receiving a costs estimate. In addition to cases where no documentation was provided, these figures may illustrate cases where written disclosure requirements were not effective as a means of communicating costs estimates to clients.

Further, as discussed in chapter 13, less than half of respondents represented by a lawyer at trial reported that they were provided with an estimate of the extent of potential adverse

costs awards for which they could be liable. In part, this may be due to the variability in costs awards, which limits lawyers' ability to deliver an accurate estimate. Adoption of the Commission's recommendations in chapter 13 would reduce this variability, and improve the ability for lawyers to provide their clients with accurate estimates of potential adverse costs awards.

As noted above, s. 174(3) of the uniform law in Victoria and New South Wales goes further than written disclosure and requires that:

... the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

While such a change may be difficult to regulate at times, at the very least it encourages lawyers to engage with their clients in a manner that ensures informed consent, rather than simply 'ticking a box' by handing over a possibly weighty disclosure document. The Commission favours the uniform law's approach — as it attempts to address the core of the information imbalance in a manner that accounts for differences between consumers — and considers that this approach should apply to both the lawyer's own billing and estimates of potential adverse costs awards.

The Commission appreciates that such an approach may introduce an additional regulatory burden on law firms in communicating with their clients, and documenting that communication (in case of complaint). However, this time is likely to be a valuable investment for those law firms who do not already engage in such communication. First, having a clear discussion may help to clarify the expectations of both client and lawyer, and limit misunderstandings that could cause issues later. Second, ensuring that the client has actually understood the costs disclosure can mitigate 'bill shock', and in doing so, may limit client complaints — benefiting both the client and the lawyer.

In this light, the Commission notes the Law Institute of Victoria's efforts to demonstrate the benefits to lawyers from better communicating with clients regarding costs:

We want to be able to do a project over say 50 law firms and go through that project and see from the Legal Services Board statistics a drop in the number of complaints about the types of fees charged so that there's empirical evidence that such a project would get results. (trans., p. 669)

Additionally, if firms find such communication excessively time consuming, it may be a sign that their billing structures are too complex. This could prompt the use of simpler fees (such as fixed fees), reducing the burden on lawyers to explain them.

A need for a national billing regulation?

While the Commission does not advocate uniformity for its own sake, and understands jurisdictions' genuine concerns regarding the exact standards proposed for uniformity, it

considers that protecting consumers of legal services is one area where cooperation in delivering minimum standards (as set out in recommendation 6.1) is warranted. Ultimately, it is the characteristics of the individual and the dispute (rather than the state or territory where the consumer resides) that determines the appropriate regulatory response.

As is the case with general consumer protection under the ACL, the Commission considers that jurisdictions should cooperate to adopt uniform rules on costs disclosure and billing. The Commission is not suggesting here that the entirety of the National Profession Reform package be adopted, rather those aspects that provide for the adequate protection of consumers (such as taking steps to ensure that clients actually understood the disclosure, and an upfront requirement on law firms that costs be fair and reasonable).

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.

Improving comparability and reducing search costs for consumers

Consumers would benefit from using more information to obtain rough boundaries and rules of thumb about what is fair and reasonable pricing:

Certainly, consumers would prefer to know at the outset, rather than after a costs dispute, whether costs were in fact fair and reasonable ... it is desirable that greater sources of information be developed for consumers. These sources should include data not just about what and how practitioners *can* charge, but what, in reality, they *do* charge — including, for example, what range of figures was considered reasonable by costs assessors in different types of matters in different areas of law. The inclusion of an opportunity for consumers to rate lawyer affordability may also be useful. (CIJ 2013, p. 15)

At present, consumers can obtain some information relating to cost. However, to do so requires significant effort on their part. They could attempt to compare what information is available on the websites of different law firms, which could be in different formats that inexperienced consumers might have difficulty interpreting. Alternatively, they could call or visit a number of law firms, which may involve having to share sensitive or traumatic information multiple times. Such a costly exercise would take up both consumers' and law firms' time in responding to every enquiry. Across the entire legal market, such enquiries would use up a substantial amount of business' time.

Collecting information on typical costs, and making it publicly available in a centralised online resource would avoid many of the transaction costs (to consumers and lawyers) of repeated one-on-one searches. At the same time, it would greatly improve the information base of consumers, allowing them to at least question their lawyer if the cost of services appears to be significantly above typical costs (or ranges). In order to do so, the information must be accessible to consumers, both in terms of the ease of finding and comprehending the information.

Experience from other sectors highlights the value of online consumer resources. For example, in the financial sector, the Financial Systems Inquiry noted the increasing tendency for Australian consumers to shop online for financial products. The interim report noted that more than two-thirds of online consumers had used an online comparison service in order to ‘obtain lower prices, save time and enable easier comparison for better-informed purchasing decisions’ (Murray 2014 p. 4-37). The report went on to note that the use of online comparators was one option available to improve the (similarly complex and legalistic) disclosure regime in order to ‘enhance consumer understanding of product information’ (2014 p. 3-59).

In the legal sector, examples of such services exist online, but are currently limited in scope. For example ‘rocketlegal’ provides an online clearing house service. It invites consumers to (confidentially) submit a legal matter, and for lawyers (who have opted to join the service) to respond with fixed price quotes. The client can then compare quotes, examine the ratings of the lawyer (from past clients) and select a lawyer. While this appears to be a valuable service, there may be some consumers who are reluctant to engage a lawyer purely based on online interactions (preferring face-to-face interaction), and there may be limited participation from lawyers.

Another mechanism that could enable better comparisons would be a requirement that a central online resource be made available for consumers in each jurisdiction. Some participants argued that exact comparisons are fraught with difficulty:

... it may be possible to have standard charges for routine simple wills, trust deeds and land contracts, but it would be next to impossible for someone to gain guidance on the costs of engaging in a legal dispute or litigation based on a range of fees put up by lawyers. ... every dispute is unique and the cost of prosecuting or defending a dispute is going to depend to a very large degree on the level of opposition and the complexity of the matter. ... [and] the expertise and efficiency of the practitioner taking on the work. (Law Society of South Australia, sub. DR219, Attachment, p. 9)

There may be some difficulty maintaining a meaningful database, given most matters involving time-based or event-based billing will differ significantly. ... it may only be of assistance in relation to fixed price matters, with some explanation of the sorts of tasks which had to be performed, [and] by whom ... (Law Council of Australia, sub. DR266, p. 23)

... whilst the proposal is superficially attractive, the reality is that the publication of meaningful data, with a sufficient degree of specificity as to be useful and relevant is highly problematic with litigation of any complexity. (Australian Lawyers Alliance, sub. DR298, p. 4)

We do not consider ... a centralised on line costs resource ... is either necessary or feasible. It is unlikely to be able to provide anything more than the broad range of costs estimates that is already required in the Costs Disclosure Statement required under the Legal Profession Acts. (Shearer Doyle, sub. DR165, p. 2)

Others, generally outside of the private profession, thought that such a resource was feasible and beneficial, particularly for the disadvantaged:

I genuinely think it's realistic. Obviously there are always riders that are put on these services ... You have to explain the background to the way legal costs are formulated and you have to explain about the very complex court scales and party-party costs and, ... it is a complicated process but there's no reason why you can't turn that into simple English language so people have got a gut feel for it. (Legal Services Commission of South Australia, trans., pp. 387–8)

In our experience, many vulnerable and disadvantaged clients struggle to understand the various fee structures which may be appropriate for different types of matters. For example, speculative or deferred fee assistance may be more appropriate than pro bono assistance in personal injury claims or family provision applications. We consider that a centralised resource may assist in clarifying this. (Queensland Public Interest Law Clearing House, sub. DR247, p. 16)

There were also those within the profession that acknowledged the difficulties of collating and presenting the data, but felt this was not an insurmountable challenge:

... [a] centralised online resource on typical legal fees would be difficult to develop due to differing types of legal matters. So that's a challenge. Our view is not that it's not a good idea, it's a challenge ... the more we can educate clients about indicative fees is the issue. What we want to get away from as a Law Institute position is a range of fees. ... 'Because we can do this between \$5000 and \$25 000, depending on a range of variables,' and clearly clients generally from my experience always say, '\$5000 is what it's going to cost me,' and then as those variables roll along, that's when the cost conversation becomes difficult. ... So we would certainly support a centralised system ... (Law Institute Victoria, trans., p. 669)

... a general guide is entirely sensible. I think what we were picturing is the horror scenario of having exact hourly rates compared with exact hourly rates and attracting a potential rush to the bottom. (Law Society of South Australia, trans., p. 411)

The Commission agrees that, in some areas of law and for some particular matters, attempts at precision are likely to be difficult and may not reflect the exact cost that any given consumer would face. However, the role of such an online resource is not to exactly predict every client's cost, but instead 'arm' consumers with a starting point for understanding how much a particular sort of matter may cost — be it hundreds, thousands or tens of thousands of dollars.

As such, any online resource should only publish measures of central tendency, such as typical costs (or where necessary a confined range of costs), expressed as typical hourly rates and average durations or fixed fees and other fee structures where applicable. Importantly, this information would be aggregated by area of law and jurisdiction.

What should, and should not, be included in an online resource?

Beyond summary data relating to typical legal costs, there was some debate following the draft report regarding the role and content of an online resource. Specifically, it was submitted that: only certain types of matters should be included, the resource might constitute advertising, and there could be other uses for the resource.

First, in relation to the types of matters covered, some participants suggested that the online resource could be useful if it only published information about ‘a limited number of straight-forward matters’ (Law Council of Australia, sub. DR309, p. 12), though even then stressed that it should be ‘heavily qualified’. In that context, a number of participants — such as the Law Society of New South Wales (trans., p. 132), and the Chief Justice of Western Australia (trans., p. 597) — noted that estimates of costs were possible for many family law matters as the work required is relatively predictable.

This simply highlights that some matters are already amenable to providing ‘typical’ costs (even without the benefit of aggregating information across different providers). The ability to view jurisdiction-wide data should ensure that a broader range of matters can be reported. Further, over time, the legal market may evolve to provide fewer services on a billable hours basis, with more use of fixed or events-based fees, improving the ability to compare costs. Indeed, over time the online resource itself could develop, with improvements to its accuracy and accessibility (for example, it may be possible to develop a location-based smartphone app at a later date). To do so, data collection must begin as soon as practicable.

The data collected should not include commercial matters, that is, those matters predominantly contested between ‘sophisticated’ clients. This is because such clients are typically capable of ‘shopping around’ themselves, face a smaller information imbalance and have no need for summary cost information.

A second issue was the possibility that the online resource could be used, or construed, as advertising. As Dr Elizabeth Curran noted:

Advertising prices alongside resources providing legal information could be confusing for clients and also blur the lines between legal information and advertising/marketing and so should be left to law society web sites. (sub. DR170, p. 6)

The Commission considers that, in line with its purpose of providing general information for the public, this online resource would not be misconstrued as an advertising or booking resource for firms — the only figures published would be aggregate figures for use as a guideline by consumers.

A typical cost listed on the central resource would not constitute advertising. The resource itself would not preclude firms from using any fee structures, nor would it limit them to charging fees within any listed range. Instead, such an aggregated resource merely equips consumers with the ability to gauge if the quote they receive from a lawyer is inordinately expensive relative to other (anonymous) suppliers. Where a quote appears relatively high,

this may be for good reason — for example, the matter is complex or the lawyer is particularly skilled. It would be up to the lawyer to explain these reasons to the client, and then up to the client to decide, as best they can, if the quote represents good value. While the lawyer would still be in a better position to judge value than the client, the central resource at least provides the consumer with a reference point to frame their consideration.

As Maurice Blackburn (sub. DR197) suggested, in addition to the aggregate fee information, the resource could also indicate to consumers which fee structures are typically offered for a given type of legal matter. This could encourage uptake of AFAs, by publicising their availability, but does so in a manner that cannot be misconstrued as advertising for any particular firm.

Finally, some participants suggested other uses for online resources:

... a more useful resource for consumers of legal services would be to provide an online list of questions, which those seeking to engage a lawyer could ask, to gain a better understanding of the way in which costs are likely to (or may possibly) accrue over the course of contemplated proceedings. (Law Council of Australia, sub. DR309, p. 12)

The Commission agrees that such a list of questions could be helpful for consumers who have already approached a given provider and could be included as part of an online resource. The Commission notes that some legal complaint bodies already provide such questions for clients, but these may not have the same visibility as a single online resource for consumers about to engage a lawyer. Generally consumers only become aware of legal complaint bodies after a problem arises with their lawyer.

However, lists of questions do not obviate the need for online measures of typical costs. Absent relevant information on costs, consumers may be more inclined to proceed with the lawyer in front of them, without an idea of the value for money they have been offered. In contrast, a consumer who is aware of typical costs may be more willing to shop around if a lawyer's quoted costs are far greater than the typical costs (and the lawyer has been unable to convince the client of any additional value they provide to justify such a cost).

Implementing an online resource

Before an online cost resource is able to publish any measures of typical costs, the data underlying those measures must be collected. The collection of comprehensive and carefully analysed data is crucial for the reliability of the measures published in the online resource.

While data collection is not a costless exercise (both for the firms surveyed and the body collecting the data), there is scope to gain economies of scale by collecting a range of data, for a range of purposes, at once. Therefore, the Commission considers that data for the online cost resource should be collected by the civil justice data clearinghouse to be established as part of the National Centre for Crime and Justice Statistics within the Australian Bureau of Statistics (ABS) under recommendation 25.3. Housing the collection

within the ABS allows benefits from scale of collecting a range of data, and utilises the expertise of qualified statisticians in de-identifying, collating and analysing the data. To assist in the data collection, each state and territory government should consider whether legislation is necessary to ensure that the required data can be collected from firms. This should take place at the time that governments are developing their online resources.

Once the data is collected and converted to an appropriate form for publishing, the next question is where an online resource should be hosted. It need not be hosted by the same body that collects the data. Instead, judgements as to the best host need to strike an appropriate balance between a well-known site that consumers will think of when attempting to engage a lawyer, and one that is independent from the profession and seen as trustworthy by consumers. The site also needs to draw on sufficient data to make the reported ranges meaningful while at the same time being broadly reflective of the local market.

This suggests that sites should be jurisdiction (rather than town or city) based, and that disaggregation for certain areas of law will not be appropriate, for example where there are very few specialist providers in a given jurisdiction. The accessibility of online material to all potential consumers of legal services is another issue. The eventual host of the online resource may also need to consider some manner of making localised (jurisdiction-based) hard copies available for perusal at easily accessible venues such as libraries or legal aid offices.

Some participants, such as the Insurance Council of Australia (sub. DR193), suggested that law societies in each jurisdiction should host an online resource. However, other participants — including the Law Institute of Victoria (sub. DR221) and National Legal Aid (sub. DR228) — submitted that the cost resource would best be made available through the ‘well-recognised entry point’ for legal assistance and referral in each jurisdiction as suggested in recommendation 5.2. The Commission agrees, and considers that the latter will improve the visibility and use of an online cost resource, while preserving independence. The online resource should be operational in each jurisdiction by no later than 31 December 2016.

A central government-hosted source would not preclude law practices (or law societies) from making billing information transparent on their own online directories, as other industries have done. Over time, such private directories could develop to incorporate anonymous feedback from (verified) past users of the law firms. This option could allow a form of ‘consumer rating’ that may provide a guide to quality. Such concepts have been suggested by members of the legal profession, including by the Chief Justice of Western Australia:

Another way we can address these problems is by providing better consumer information ... TripAdvisor is a website we are all familiar with. You can see what other people say about a hotel or restaurant you might be considering. Why do we not have the same for law firms? (2014, p. 12)

Quality ratings can be implemented in a variety of ways, though ease of consumer understanding favours the use of summary ‘star ratings’. Despite the potential pitfalls in such ‘star ratings’ they are used in a range of settings, including assessing the quality of service provided by medical specialists in the United States.²¹ Importantly, such private directories should remain clearly separate from the government online resource.

Overall, while there will be some complexity in establishing databases and the measures of typical costs that come from them, these are not insurmountable. Given it is feasible to establish some sorts of measures, it is important to bear in mind the purpose of a central online resource:

- *to provide general information*: the resource is intended to arm consumers with sufficient information such that they can identify high and low costs, for identified categories of legal matters. These categories could vary by area of law (family, planning, personal injury) as well as amount at stake.
- *not to advertise specific services*: Such general information would not be considered as an offer of any specific services by any specific providers. A simple and obvious caveat on the ‘front page’ of the online resource should be sufficient to ensure that consumers understand prices in the market can vary, for valid reason.
- *to provide this information for consumers, not lawyers*: Lawyers are already aware of their own likely costs for typical matters. Retail consumers are not. As such, the resource needs to target consumers, with information presented in an easily understandable form — any caveats, differences, exceptions or fine detail can be explained by lawyers in person when contacted by a potential client.

This reform is achievable. While those trained to identify potential liability will naturally be risk averse as they see the devil in every detail, for consumers, easily accessible and digestible information that can be used as a rough gauge of value for money is a valuable tool.

As such, the Commission considers that an online resource is vital in addressing the information imbalance faced by consumers of legal services. Importantly, its implementation should not be stymied by concerns of spurious precision that could result in a summary number being weighed down in pages of fine detail rivalling costs disclosures for individual services.

²¹ The ‘healthgrades’ service asks patients to assess the quality of service of medical specialists in the United States against a range of criteria of importance to patients, such as time spent waiting for an appointment, ability to listen to and answer questions, ability to explain medical conditions and appropriate time spent with patients.

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.

Other sources of information should also be public

Although an upfront obligation placed on lawyers, as recommended above, that bills be fair and reasonable will assist complaint bodies in addressing overcharging, there remains the question of exactly what constitutes ‘fair and reasonable’. The legislation provides some guidance on the factors taken into account in determining whether costs are fair and reasonable. These include the complexity and urgency of the matter, the time spent, the level of skill of the lawyer involved and the quality of the end product (the advice and outcome).²² However, this does not answer the question of what a fair and reasonable bill would look like.

One source of information that is, as yet, unpublished is the decisions of costs assessors where costs agreements have been challenged by clients. Costs assessors — present in some but not all jurisdictions — are experienced lawyers appointed by the court to review costs agreements that have been challenged.²³ Following an application by a client, costs

²² See, for example, *Legal Profession Uniform Law Application Act 2014* (Vic), Schedule 1, s. 172(2).

²³ For example, in New South Wales, under Section 1 of Schedule 6 of the *Legal Profession Uniform Law Application Act 2014* (NSW), only Australian legal practitioners with at least five years’ experience can be appointed by the Chief Justice as costs assessors.

assessors have the ability to set aside a costs agreement if they determine that it is not ‘fair or reasonable’, subject to the legislative guidance noted above.

While publication of cost assessor decisions may give rise to some concerns regarding privacy and commercial confidentiality, these could be allayed by anonymising details or providing aggregate data. Publication of these decisions (except where exceptional circumstances prevent it), categorised by broad dispute type, could provide consumers, practitioners and other costs assessors with useful guidance on the range of costs that are considered reasonable. For some consumers, publication could signal the overall costs they should expect, especially for those contemplating a challenge or complaint relating to their bill. For lawyers, observing past decisions may provide guidance on billing practices (for example, whether it is reasonable to, and how much to charge for photocopying). For costs assessors, transparency of assessments will improve accountability and should go some way towards improving consistency between assessors.

Such publication has been previously recommended by the Chief Justice of New South Wales (2013), who also noted that decisions (and their reasons) should be published in compatible formats to allow for comparison and aggregation. It is important that this is not done in a way that discourages alternate forms of billing — for example costs assessors requiring information from firms in terms of billable hours (when they were actually charged as a fixed fee) risks entrenching the use of billable hours in the name of reducing administrative costs (CIJ 2013).

In addition to publishing decisions, there would also be value in costs assessors developing and publishing guidelines themselves regarding how charges would be assessed (including what sort of charges would be included and excluded and if different weights are applied to different sorts of work). Developed by bodies such as the Costs Assessment Rules Committee (in NSW), publication of these guidelines would further assist consistency amongst the broad pool of costs assessors. Such guidelines would also provide additional information to lawyers and consumers, and be considered alongside broader guidelines for billing and conduct matters publicised by legal complaint bodies (below). Again, the concept of publishing cost assessment guidelines is not new, having been recommended by the Chief Justice of New South Wales (2013), and also put forward by a former president of the Law Society of New South Wales (Westgarth and Balachandran 2011).

Guidelines could initially focus on areas that generated some confusion. Westgarth and Balachandran (2011) suggested covering areas such as generally excluded categories (for example, photocopying), how an assessor should determine the fair and reasonable time required to undertake a task, and how the involvement of other solicitors in the practice should be treated.

Similarly, the Chief Justice of New South Wales (2013) suggested that the publication of costs assessors’ decisions be coupled with the development and promulgation of guidelines for assessors relating to what items should be allowed for party-party assessments (as distinct from solicitor-client assessments), including such items as office overheads, research time and filing fees.

In addition to introducing uniformity in cost assessment decisions, the publication of past decisions and of guidelines could have the effect of bringing forward the fair and reasonable requirements. If lawyers have a greater ex ante understanding of what is fair and reasonable, they are likely to align their behaviour accordingly in order to avoid cost challenges.

Although publication of such past decisions would be of clear benefit, differences between jurisdictions mean that this cannot, at present, be implemented in a uniform manner across the country:

While Western Australia does not have costs assessors, publication of decisions of Taxing Officers (Court Registrars) is supported. Similarly, the Australian Capital Territory and South Australia have informal costs approval mechanisms and, therefore, may face difficulty publishing guidelines or bills of costs. Victoria has established a costs court, and therefore already publishes decisions of the court with respect to costs. (Law Council of Australia, sub. DR266, p. 26)

While jurisdictions are at different stages in terms of their ability to publish past decisions, the Commission nonetheless considers that in those jurisdictions where formal costs decisions are already made (WA, Victoria, Queensland and NSW), the collation and publication of decisions should commence immediately (that is, the first annual summary should be published by October 2015). The Commission also notes that under s37(1) of Schedule 3 of the *Legal Practitioners Act 1981* (SA), clients can apply to the South Australian Supreme Court for an adjudication on all or part of their legal costs. These decisions could be similarly collated and published.

However, the benefits of guidance relating to fair and reasonable bills does not vary according to institutional frameworks in individual jurisdictions. Following the draft report, the Law Society of South Australia acknowledged the benefits of publication of costs decisions and guidelines:

Costs decisions in SA are a matter of public record but are not published and are difficult to access. We are in favour of ensuring that these decisions are reported and published. The development of taxation / adjudication guidelines has generally not been favoured because they run the risk of undermining the independence of the decision maker. However, it is conceded that consistency and certainty is in the best interests of the profession and consumers. ... The taxation decisions by Masters are not always reported and should be. Decisions should be a matter of public record. (sub. DR219, Attachment, p. 16)

Accordingly, the remaining jurisdictions should take steps now to establish formal records of decisions where bills have been revised by parties performing a costs assessment function in that jurisdiction, such as legal complaint bodies, tribunals, courts or court officers. The relevant bodies in each jurisdiction should also collaborate to produce guidelines of the sort discussed above. Where there is no relevant body (or bodies) in a jurisdiction, it may be appropriate for this role to fall to a legal complaint body, in line with the recommendations in section 6.4.

The publication of past decisions of ‘reasonable’ costs represents cases where previously excessive costs have been examined and adjusted to better reflect a fair value for the services provided. Given this, there would be value in jurisdictions considering incorporating the published costs assessment data into the data used to calculate typical costs for the online resource in recommendation 6.2. Over time, this should allow for the identification of, and adjustment for, outliers and so lead to a more reliable estimate of typical costs.

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.

6.4 Complaints avenues for legal service consumers

Regulations that clarify the upfront ‘rules of engagement’ between lawyers and clients can go some way in preventing wrongdoing and protecting consumers. However, not all transgressions can be avoided and the information imbalance described above makes it difficult for consumers to manage disputes that do arise.

Most retail consumers have limited knowledge about legal services and may not realise that a lawyer’s behaviour is inappropriate. For example, consumers may find it difficult to identify whether a lawyer is entitled to all of the items on their bill. Indeed, even lawyers can have difficulty with billing rules. Funds in Court, an office of the Supreme Court of Victoria, identified situations where lawyers had overcharged clients simply because they calculated fees based on outdated regulations (sub. 152, p. 6).

Even where consumers identify wrongdoing, they might have relatively limited experience and time available for interpreting rules and managing disputes — giving lawyers an opportunity to behave strategically. For example, if a dispute arises about a bill, the lawyer could threaten legal action against their client or hold a lien over documents received,

potentially making it very difficult for the client to change lawyers until fees are paid. Poorly informed consumers can be particularly vulnerable to such tactics.

This imbalance makes it especially important for consumers of legal services to have a visible, accessible and effective complaint avenue. And while each state and territory has a legal complaint body, more could be done to ensure effective redress is achieved for consumers.

Characteristics of disputes with lawyers

Commission estimates based on unpublished *LAW Survey* data found that just over 1 per cent of all respondents experienced a dispute relating to services provided by a lawyer.²⁴ While this is a small proportion of respondents, not all those surveyed would have engaged a lawyer. For comparison, a legal adviser was only consulted in around 30 per cent of all problems (Coumarelos et al. 2012, p. 111).

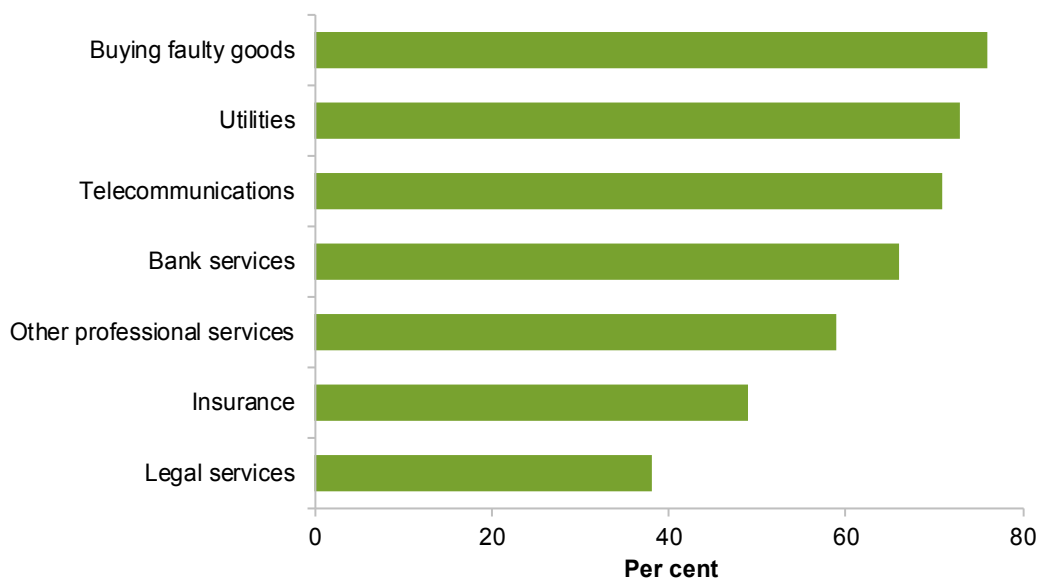
Around a third of problems with legal services were reported as having a severe impact on everyday life (compared to around a tenth for other consumer problems). This may be because a large sum of money was involved, or because the dispute with the lawyer compounded the original problem that led the consumer to seek legal advice.

Among consumer problems, problems with legal services were associated with the highest rate of seeking formal advice, particularly from a private lawyer. However, regardless of how the problem was handled, satisfaction with the outcome was lowest (figure 6.1). Moreover, respondents reported that the most useful adviser was a private lawyer, as opposed to the professional association or legal complaint body. This likely reflects that only a small number of complaints were finalised through such a body: 4 per cent through a complaint body; 6 per cent through another agency; and 3 per cent through formal mediation. In many cases the problem was finalised directly: 40 per cent of respondents reached direct agreement with the lawyer or did what the lawyer wanted.

²⁴ Around 263 of the 20 716 respondents said yes when asked if, in a twelve month period, they ‘had any problems or disputes related to inadequate services or any disputes related to the cost of services from a lawyer’.

Figure 6.1 **Satisfaction with the outcome of consumer problems**

Share of finalised problems where survey respondent was very or somewhat satisfied with the outcome



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

In a third of problems, those affected did not pursue the matter, with the more common reasons given that: it would make no difference; cost too much; information or advice was not needed; or they did not know what to do. While these reasons come from a limited number of respondents, they suggest consumers are not fully aware of the complaint avenues available to them. Consistent with this, the Queensland Legal Services Commissioner recognised that:

... there are many times more clients who may have been treated less than fairly and reasonably by their lawyers than there are complaints, very likely many tens of times more and perhaps even hundreds of times more, and many more lawyers who might reasonably be subject to complaint than actually are. (Briton 2014, p. 5)

As such, while some (for example Law Council of Australia (sub. 96)) have argued that additional regulation is not warranted due to a low level of *complaints*, formal complaints only represent a very small share of *problems* experienced by consumers.

Even when consumers do seek help from a complaint body, many factors can influence whether the assistance will be effective.

A framework for handling complaints effectively

Complaints about lawyers can be dealt with in many ways. However, not every mechanism is equally effective — the design of a complaint body can make an important difference to

whether it has adequate powers and whether it discharges them appropriately. The latter can be termed the complaint body's 'approach', which encompasses whether it is proactive or reactive, and whether it adopts a flexible or prescriptive interpretation of the regulation it enforces.

The NSW Law Reform Commission (NSWLRC), in its report *Scrutiny of the Legal Profession: Complaints Against Lawyers*, outlined the following set of 'best practice' principles for handling complaints about lawyers:

- independence and impartiality
- recognition of the multiple aims of a professional disciplinary system
- accessibility
- efficiency and effectiveness
- procedural fairness
- openness and accountability
- external scrutiny and review
- contribution to the general enhancement of professional standards
- proper funding and resources (1993, p. 42).

These principles remain highly relevant to considering the effectiveness of complaint bodies. Nonetheless, the Commission considers that a few important additions are warranted.

First, the NSWLRC noted that, in order to be efficient and effective, complaint bodies require a flexible range of sanctions and remedies. In addition to these reactive tools, complaint bodies need appropriate proactive tools to detect and investigate issues. Complaints bodies can encourage improvements in legal practice over time if they have the power and resources to initiate and conduct own motion investigations and systemic reviews. Similarly, complaint bodies should be able to act on repeated complaints against a particular law firm, or an increase in certain forms of misconduct.

Second, while the primary role of a complaint body is to facilitate consumer redress, this should not come at the expense of an unnecessarily large regulatory impost on lawyers. Specifically, complaint bodies need to have the discretion to rapidly finalise complaints that are straightforward, invalid or vexatious.

Additionally, it is important that the overarching objectives of complaint bodies are articulated either in public 'mission statements' or in their enabling legislation. Publication of objectives provides guidance to both the regulators and the regulated about the nature of conduct that will be targeted and how it will be dealt with, improving certainty for both consumers and lawyers. Indeed, as discussed below, the Commission considers that identifying, stating and supporting the correct objective is of particular importance in this sector.

A range of bodies handle complaints about lawyers

Each state and territory has a body charged by statute with receiving complaints about lawyers. These bodies can typically make lower level orders against lawyers, while more serious matters are prosecuted in disciplinary tribunals (table 6.2). The roles and powers of these bodies are broadly similar between jurisdictions and many appear to reflect considerations of the principles outlined by the NSWLRC — with a few notable exceptions outlined below.

The form of legal complaint bodies has changed over time with self-regulatory arrangements — where professional bodies (law societies and bar associations) handled complaints — gradually being replaced by independent bodies. This began in New South Wales with the establishment of the Legal Services Commissioner in 1994 (as recommended by NSWLRC (1993)) followed by Queensland and Victoria in 2004 and 2005 respectively, and South Australia in 2014.

Table 6.2 Legal complaint bodies in Australia

By jurisdiction

	<i>Legal complaint body</i>	<i>Disciplinary tribunal</i>
NSW	Legal Services Commissioner	NSW Civil and Administrative Tribunal
Vic	Legal Services Commissioner & Legal Services Board	Victorian Civil and Administrative Tribunal
Qld	Legal Services Commission	Queensland Civil and Administrative Tribunal
WA	Legal Profession Complaints Committee ^a	State Administrative Tribunal
SA	Legal Practitioners Conduct Commissioner	Legal Practitioners Disciplinary Tribunal
Tas	Legal Profession Board of Tasmania	Legal Practitioners Disciplinary Tribunal
ACT	ACT Law Society Complaints Committee	ACT Civil and Administrative Tribunal
NT	Law Society NT	Legal Practitioners Disciplinary Tribunal

^a A committee of the Legal Practice Board of Western Australia.

The move to independent arrangements has resulted from increasing recognition that professional bodies had a technical and inward focus on professional standards and were not providing protection for consumers; and that, more generally, the independence of complaints processes was important for public confidence. The issue was raised more recently during consultation with consumers for the *National Legal Profession Reform* project:

It was seen as important that complaints against lawyers were handled outside of the profession due to conflict of interest. In particular, consumers strongly believed that the professional associations such as Law Societies and Bar Associations should not be involved in handling consumer complaints. A number of advocates, as well as some consumers, referred to other national ombudsman schemes that were independent and working well for consumers, such as the Financial Services Ombudsman and the Telecommunications Industry Ombudsman. (ARTD Consultancy 2010, p. 12)

At present, complaints are still handled entirely by professional bodies in the ACT and NT — this may be because the relatively small number of legal professionals and the volume of complaints is insufficient to justify separate statutory bodies.

Where independent complaint bodies exist, they tend to operate in a co-regulatory environment, meaning some complaints are referred for investigation by professional bodies. In such cases, the independent body monitors the professional body and can also give direction, or take over an investigation. The independent body also makes the decision on how to proceed after the professional body reports on its investigation. Such controls are intended to allow delegation of matters while preserving the overall independence of the process.

Complaints bodies are also subject to reporting requirements, including maintaining a public online register of disciplinary action. Several complaint bodies have also recently made their enforcement policies public, for example, in Victoria the *Compliance and Enforcement Policy* (2012) and in Western Australia the *Disciplinary Applications Guidelines* (2013). The Queensland Legal Services Commission also publishes regulatory guides to clarify the factors taken into account in exercising its role in circumstances that involve uncertainties, for example in relation to advertising rules and billing practices. As noted above, the Commission considers this to be good practice as it improves understanding and certainty for both consumers and lawyers.

In addition to their investigatory and disciplinary roles, complaint bodies also seek to prevent disputes by educating the profession and community about areas of concern, and rights and obligations relating to lawyer-client relationships.

Not all enquiries lead to complaints

The volume of complaints varies substantially by jurisdiction. In the 2012-13 financial year the NSW Legal Services Commissioner received 2685 complaints, while the ACT Law Society received only 71 (Law Society of the ACT 2013; NSW OLSC 2013). Based on the annual reports of complaint bodies, only around 60 per cent of complaints come from clients. The remaining 40 per cent are made by clients' friends or relatives, officers of courts and lawyers, suggesting that in at least some of these instances the client was not adequately aware of their rights or avenues for complaint, or that they were not willing to complain about their lawyer. In all jurisdictions, complaints most often relate to alleged overcharging, poor communication and negligence. Overcharging and poor communication are often raised together in a single complaint (SA LPCB 2013). The majority of complaints in each jurisdiction relate to services provided in the areas of family law or probate. The Victorian Legal Services Commissioner explained:

Complaints most commonly arise from unsophisticated clients who do not deal regularly with the legal system. The context is usually highly emotional matters such as family law, probate, conveyancing, and small commercial transactions – often buying or selling a small business. (2011, p. 2)

Complaints bodies also receive many enquiries that do not result in formal written complaints. Enquiries are usually handled by providing information on the client's rights and options, contacting the lawyer on behalf of the client and, if necessary, providing a complaint form. Several complaint bodies actively intervene to stop enquiries from escalating into complaints, for example:

... when the caller says that they keep trying to contact their practitioner to get an update in their matter but the practitioner will not return their calls, or if the caller says that the practitioner has exercised a lien on their documents despite the fact that they have paid all their accounts. In these examples, a call by the Inquiry Officer to the practitioner to ask them to contact the caller to provide an update on their matter or ask them why they are retaining the documents if the accounts have been paid, may prompt the practitioner to respond to the caller's requests and may prevent a complaint being formally made. (NSW OLSC 2012a, p. 16)

The WA Legal Profession Complaints Committee also sends 'risk alert letters' to law practices that have been the subject of multiple enquiries or complaints. Because complaints are made against individual lawyers, practices may be unaware of the extent of enquires or complaints about their practitioners (WA LPCC 2013).

The Commission considers early intervention of this form to be beneficial as it minimises the time and cost involved for all parties in a dispute. It is important that such intervention provides genuine resolution for the complainant — in addition to rectifying any conduct issues on the part of the lawyer — and does not leave them feeling short-changed by the complaints process.

Some complaint bodies need stronger powers

While processes and terminology vary slightly between jurisdictions, complaints processes and the powers available to complaint bodies are broadly similar. Figure 6.2 depicts the general features of complaints processes.

When formal complaints are received, complaint bodies classify them into 'consumer matters', which relate to service cost or quality, or 'conduct matters', which involve the possibility of unsatisfactory professional conduct or professional misconduct by the lawyer. This can include being late to court, failing to complete expected work or, at the extreme, fraud or theft.

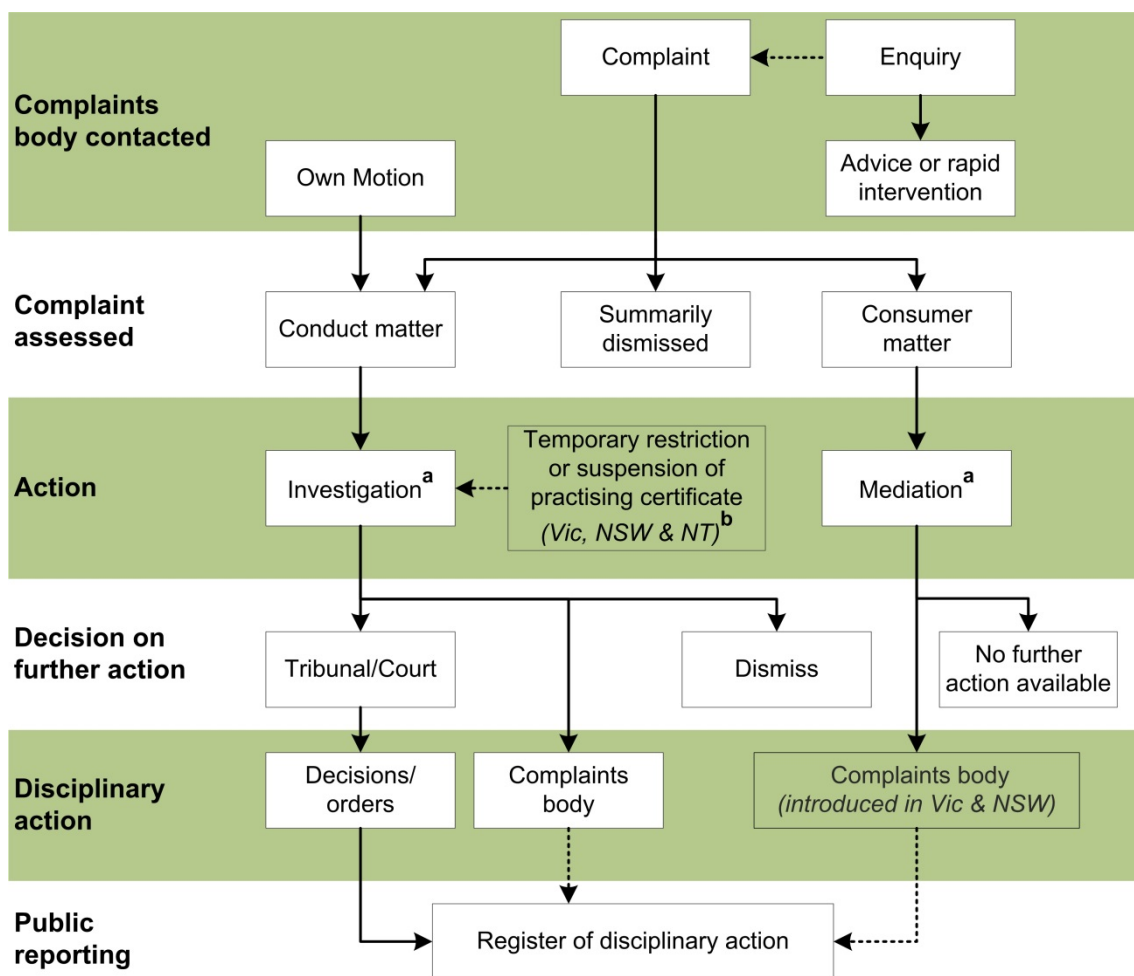
This classification determines the enforcement tools available for responding to the complaint. In relation to consumer matters, many complaint bodies are only able to facilitate mediation of the dispute and have no powers to discipline the lawyer. In most jurisdictions mediation can only proceed with the consent of both parties. For conduct matters, complaint bodies undertake an investigation to determine the appropriate disciplinary action.

In Victoria and NSW, under the uniform law, complaint bodies have disciplinary powers in relation to consumer matters, including the ability to: caution; require the work to be

redone at no charge; and order compensation. The absence of these powers was identified as a weakness during consultation for the *National Legal Profession Reform* project:

Although most jurisdictions have forums for accepting and mediating consumer complaints, they do not provide an opportunity for the complaints handler to provide a remedy where agreement is not achieved. ... This adds to costs for consumers pursuing complaints and lawyers responding to complaints, and provides no remedy in situations where a genuine complaint is nonetheless not serious enough to constitute a disciplinary matter and an agreement cannot be struck with the practitioner. (COAG CRIS 2010, p. 9)

Figure 6.2 **An outline of complaints processes**



^a Sometimes referred to a professional body and referred back for the next stage. ^b In Victoria, NSW and NT the complaint body can issue such orders, for other jurisdictions an order from the disciplinary tribunal or supreme court is required.

Outside of these two states, complaint bodies have no disciplinary powers where attempted mediation has failed to resolve a consumer matter. This situation does little to rectify any wrongs against the consumer, and also provides little in the way of a disciplinary ‘stick’ to

discourage poor behaviour by lawyers. Therefore the Commission considers that these powers should be extended to all complaint bodies, not only for the direct effect in individual cases, but also as the threat of their use can provide an incentive to improve lawyers' conduct (both in their legal practice, and when involved in mediation with clients).

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.

Further, in Victoria, NSW, and NT, the complaint body is able to independently order the immediate suspension of, or place restrictions on, a lawyer's practising certificate on public interest grounds while an investigation is undertaken. For example, they may restrict the lawyer from engaging directly with clients while still allowing them to practice. In other jurisdictions, this action requires an order from the disciplinary tribunal or supreme court.

In its draft report the Commission favoured this power being vested in the complaint body. Several participants, for example the Law Society of South Australia (sub. DR219) and the Law Council of Australia (sub. DR266), argued that it is more appropriate for this power to sit with a tribunal or court due to the potentially serious ramifications for the lawyer involved. While the ramifications can be serious, complaint bodies are capable of making these decisions in the public interest by considering the nature and extent of the alleged offences. Moreover, similar to the disciplinary actions above, the threat of exercising this power can be as valuable as its actual use — such a threat is substantively less effective when it is subject to the uncertainty and delay of obtaining orders from a tribunal or court.

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.

Own motion investigations should not be hindered

All complaint bodies are able to investigate legal practitioners and conduct reviews of legal practices on their own motion, where they have reasonable cause to suspect a problem. The number of own motion investigations initiated varies substantially between jurisdictions — for example, in 2012-13 there were 45 in Victoria, 108 in Queensland, five in Tasmania and two in the Northern Territory. These investigations can arise for various reasons including evidence from an existing complaint, a trust account report, or the media. For example, in Queensland, if a complaint about the lawyer was found to be correct, the Commissioner will investigate whether other clients were affected (Qld LSC 2013a).

While complaint bodies are not restricted from initiating own motion investigations, several have been frustrated by restrictions on their ability to obtain a meaningful outcome. The NSW Legal Services Commissioner noted the difficulty in undertaking systemic reviews:

The complaints process embodied in the Legal Profession Act in NSW largely allows the regulators to focus on how an individual legal practitioner has dealt with an individual client in a single matter. The investigation of complaints involving a pattern of conduct by an individual lawyer over multiple matters, or systemic issues within a law practice, is labour intensive and costly, and, depending on the case, may be impossible to prosecute. This has resulted in budgetary blowouts and diversion of resources from other complaint investigations. (sub. 36, p. 6)

The concerns of the NSW Legal Services Commissioner might be remedied for disclosure and overcharging matters if cost information across a range of clients were more readily available for inspection by complaint bodies. Where they seek to test whether a particular incidence of overcharging is part of a systemic billing pattern they may usefully draw on a lawyer's original estimates and final bills for other clients. While this is not sufficient evidence of a lack of disclosure or overcharging on its own, it can provide an insight.

These data already exist, and are retained by law firms in formal correspondence offering quotes and delivering final bills to consumers (and in some cases, interim bills or variations to bills may also have been recorded). The Commission considers that this cost information should be available to complaint bodies where an instance of poor disclosure or overcharging has already been found as a result of investigating a complaint. After having found overcharging, the complaint body could obtain the cost information from law firms, within a specified time. In its draft report, the Commission suggested that information be provided within five days. This was met with resistance from the profession. Of particular concern to the profession was the five day timeframe that they viewed as draconian:

The proposed five day timeframe is also manifestly inadequate. Lawyers, particularly sole practitioners and those in small or even medium sized firms, cannot be expected to have the resources to deal with such a request within the proposed timeframe. Absent any urgency for requiring the information, practitioners should have a reasonable time within which to provide the information. (Law Council of Australia, sub. DR266, p. 25)

In light of these concerns, the Commission considers it appropriate to extend the period to ten working days, but reiterates that lawyers would only be required to hand over this information following an initial finding of poor disclosure or overcharging. Lawyers would provide the complaint body initial estimates and final bill amounts, on a confidential basis, and would be free to submit additional information if they saw fit. It would be up to firms to choose the manner to convey the information — either in tabulated data form, or as copies of the original correspondence and bills (with parts, but not the totals, redacted if they saw fit). This requirement may encourage firms to improve their record keeping and enable them to identify trends internally.

Complaints bodies could then use the cost information to examine if the complaint was a ‘one off’ (and thus more likely due to natural variance in the legal matter), or if it represented part of a broader pattern of charging by the lawyer. This, in turn, could provide a basis for the complaint body to initiate an own motion investigation to examine the lawyer’s billing practices.

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.

The Queensland Legal Services Commissioner raised an additional problem, namely that its power to compel lawyers to produce information or documents, despite duty of confidentiality, only holds ‘if the client is the complainant or consents to its disclosure’. The Commissioner argued that:

This caveat on our powers of investigation can frustrate and even completely stymie any effective investigation of a complaint about a lawyer’s conduct in the course of his or her dealings with a client whenever the complaint is made by someone other than the client and the client declines to consent to the lawyer disclosing relevant information.

... The problem extends well beyond ‘third party’ complaints. It similarly compromises our ability to conduct ‘own motion’ investigations — investigations we commence on our own

initiative when we have reasonable grounds in the absence of a complaint to believe that a lawyer may have acted improperly. (Qld LSC 2013a, p. 5)

In principle, the nature and seriousness of a complaint does not vary depending on who reported it (be it the client in question, a third party, or commenced on the body's own motion due to reasonable suspicion of misconduct). Allowing complaint bodies to compel information regardless of how an investigation was initiated can help to avoid future costs by reducing repeated instances of the behaviour.

There are some privacy concerns in relation to equipping complaint bodies with the power to compel information that is otherwise confidential between lawyer and client. Several participants were opposed to allowing complaint bodies to override client consent, for example Kingsford Legal Centre submitted that:

Confidentiality is a fundamental principle of the lawyer-client relationship. It serves to build trust and confidence between lawyers and clients and without it clients may be reluctant to give full and honest instructions, which may result in adverse outcomes for the client. Clients often disclose information about themselves to lawyers that is deeply personal and traumatic, including domestic violence and child sexual abuse. We submit that even if the information obtained were used solely for investigating a lawyer's conduct, many clients would feel very uncomfortable knowing that other people, including investigative bodies, could access their information without their prior informed consent. (sub. DR242, p. 4)

These privacy concerns need to be balanced against recognition of the information imbalance described above — as noted, clients might not have enough information to recognise wrongdoing themselves, which creates the potential for the behaviour to continue and affect future clients. In these instances the complaint body may have grounds to override confidentiality concerns in the public interest.

Moreover, in jurisdictions where complaint bodies are able to compel such information, they are only able to do so subject to important limits:

... a client's legal professional privilege is preserved ... we can use any information obtained through the use of these powers only for the purposes of investigating a lawyer's conduct and any subsequent disciplinary action against the lawyer and for no other purpose. (Qld LSC 2013a, p. 6)

The Commission considers that such limitations strike an appropriate balance between empowering the regulator to address real issues and preserving the genuinely private aspects of the lawyer-client relationship.

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.

A greater focus on the consumer is needed ...

In the past, there has been some criticism of complaints processes. In several jurisdictions there were concerns prior to complaint bodies gaining independence. For example, the previous legislative arrangements in Queensland:

... had come under intense and very public and adverse scrutiny in 2002 and 2003 [when professional associations handled complaints] ... the process was insufficiently independent of the profession to give the community confidence that complaints about members of the profession would be dealt with thoroughly and impartially – the media characterised the process as ‘Caesar judging Caesar’. The publicity gave the impression not only that the profession ‘looked after its own’ as it were but that malpractice was commonplace. (Qld LSC 2005, p. 7)

This criticism led to the establishment of the Queensland Legal Services Commission. However, independence is not a ‘silver bullet’, and poor practices can still prevail within independent bodies. In 2008, the Victorian Ombudsman criticised the Victorian Legal Services Commission in an investigation of its complaints processes (McGarvie 2012). The Ombudsman initiated the investigation on its own motion because it had received 95 complaints about the Commission in the previous year (Victorian Ombudsman 2009).

The Ombudsman found poor practices including delay, poor handling of minor matters, poor investigatory techniques, denial of procedural fairness, inadequate documentation explaining decisions and a low number of substantive prosecutions. The Ombudsman made 28 recommendations to improve processes and the Commissioner has reported that these have since been adopted. One example was the introduction of a Rapid Resolution Team in 2010 to expeditiously handle straightforward service matters (McGarvie 2012). While the Commission sought access to this confidential Ombudsman report from the Legal Services Commission, it was instead only provided with the Legal Services Commission's response to the recommendations. As such the Commission has not been able to independently verify whether the improvements have adequately addressed the underlying concerns raised by the Ombudsman.

In light of the fact that there have been attempts to address past criticisms, the Commission sought information in its draft report on whether legal complaint bodies are performing their role effectively at present. Responses suggested that there remains room for improvement, especially in relation to providing redress for consumers. Specific issues not only related to complaint bodies having limited powers, but also adopting an overly timid approach in discharging them. While the Commission has sought to address the former problem in its recommendations above, the latter is more difficult to remedy as it may require changes in regulatory culture.

Participants raised concerns about the visibility of complaint avenues. Some, such as the Medical Consumers Association (sub. DR177) and Insurance Council of Australia (sub. DR193), suggested that consumers are not aware of complaint bodies. While others said that, even where they are aware, they can be surprised by the limitations of the process, as explained by QPILCH:

Some of our clients are frustrated by the length of time taken to investigate a complaint and can be dissatisfied with the outcome of the process. In many cases, this arises from a lack of understanding of what the Legal Services Commission can and cannot do, with many clients wanting some form of monetary compensation. Often clients seek additional advice about pursuing professional negligence claims against solicitors. (sub. DR247, p. 16)

A number of individuals that had made complaints about lawyers also argued that the process lacked transparency:

I was denied access to a copy of the staff report presented to the Board. Legal professional privilege was the reason given (staff of the Board are solicitors, so somehow the Board is deemed to be their client). I understand that the Board has defended this position in the Courts. Irrespective of the legal technicalities, it seems a clear denial of natural justice if complainants do not know what is being put before the Board, and therefore have no right of reply. (Peter Johnson, sub. DR187, p. 7)

You give us your complaint. We will stir it around in the black box and then, after a period of time, we will form the view that it is not a matter for further investigation and we will dismiss it under 4210(1)(f)(ii). (Andrew Watkins, trans., pp. 828–9)

While these comments often arose in relation to complaints that were dismissed or were unsuccessful, transparent communication with complainants in these circumstances is as important, if not more so, than where the complainant is successful.

Arguably the most troubling issue raised by participants was that complaint bodies only act on the most serious matters and provide little protection for consumers whose complaints are comparatively minor but have nonetheless caused harm. Consumer Action and CCLC submitted that:

... there are gaps in the protections available to consumers in their dealing with the legal profession compared to other service providers. (sub. DR202, pp. 10–11)

This view accords with current arrangements where legal complaint bodies have very limited powers in relation to consumer matters (the new arrangements in Victoria and

NSW are yet to be tested). Moreover, consumer protection agencies such as the ACCC and fair trading offices play a very limited role in the legal services market because they tend to focus on systemic consumer problems rather than individual complaints. Complaints data provided to the Commission by several of these bodies indicates that, over recent years they have received very few complaints about lawyers (generally a few per month) and have usually referred these to the legal complaint body in their jurisdiction. This suggests there may be a gap in consumer protection, which is problematic since, when regulatory bodies are unable to assist, the consumer's only alternative option for pursuing a dispute against a lawyer might be engaging another lawyer at their own expense.

The threshold for disciplinary action appears high when considered from a consumer protection perspective. For example, in all jurisdictions' Legal Profession Acts, conduct such as breaching the act, charging excessive legal costs and being convicted of a 'serious offence' is only *capable* of constituting misconduct — meaning that it won't necessarily amount to misconduct and therefore may not be pursued by the complaint body.

Similarly, in a recent speech the former Queensland Legal Services Commissioner outlined questionable billing practices, including providing examples from real complaints in relation to no win no fee agreements where the law firms (as standard practice):

- charged clients the maximum premium for accepting the risk of losing their claim, where there was no risk of losing at all
- charged clients the maximum premium for risk and mitigated the risk of losing by defining a 'win' in the solicitor-client contract as *any circumstance* in which the firm recommends accepting an offer to the client (2014).

The Commissioner went on to note:

... in our view the conduct of the lawyers in each of these scenarios once again exposes them not only to complaint and to having their costs reduced on assessment but potentially to disciplinary action for charging costs to which they are not entitled and/or for charging excessive legal costs.

The latter scenario in particular involves a host of nuanced and complex ethical questions arising not least from the fact that the firm has mitigated its risk by exaggerating the conflict of interest that is already inherent in the situation. Lawyers in this and like scenarios need to think very carefully about how they can best manage that conflict. (Briton 2014, p. 14)

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)

For example, in *Bar Association of NSW v Ward* (2011) NSWADT 33 the tribunal dismissed an overcharging application, noting that the overcharge of 63 per cent was not ‘grossly excessive’ as it fell ‘significantly short of doubling’ the standard fee. Such a high bar can have a precedent effect on subsequent decisions of complaint bodies. Indeed, in most jurisdictions, complaint bodies are compelled by their Acts to have regard to the reasonable likelihood of the disciplinary tribunal finding either unsatisfactory professional conduct or professional misconduct when considering whether to dismiss a complaint.

Moreover, even where wrongdoing is serious, and even blatant, the process for achieving redress can be very protracted. Several participants raised the Keddies example, in which the practitioner was found to have grossly overcharged and misinformed over 100 clients but punitive action and compensation took several years. Eqalex Underwriting argued that:

The Keddies case demonstrates that in NSW as the most populous State, the complaints system is a ‘toothless tiger’ in respect of the powers available to the LSC against solicitors and the Bar Council against barristers. ... it appears as the most glaring example in recent years of how even legal services regulators have been powerless to respond to serious complaints of over-charging and opacity of billing. ... It also demonstrated how law firms can use technicalities to delay or evade disciplinary proceedings within the regulatory system. (sub. DR278, p. 5)

The NSW Administrative Decisions Tribunal made note of the delays in its decision:

Having regard to the fact that the matter was investigated at length by the LSC before Applications were lodged in the Tribunal, it is concerning that these matters have taken so long to reach a final hearing. ... it can no longer be regarded as appropriate or in the public interest for even complex matters to take so long to be determined. In these cases the expert evidence was completed approximately 15 months after filing although the issues were well exposed through the investigation conducted by the LSC: yet, it took a further 18 months to reach a hearing. (*Legal Services Commissioner v Keddie* (2012) NSWADT 106)

The decision further noted that ‘excessive delays’ in the Tribunal’s Legal Services Division, though sometimes legitimate, were in part caused through ‘routine failure to abide by directions made by the Tribunal for prompt and effective disposition of matters’ by lawyers that are the subject of disciplinary proceedings:

It is rare for a Reply to be filed within the 21 days required by the *Administrative Decisions Tribunal Act 1997* - this should not be an extended process having regard to the fact that there has usually been a substantial investigation prior to the commencement of proceedings in the Tribunal and the fact that practitioners are normally well aware of the issues and the defences to be relied upon. (*Legal Services Commissioner v Keddie* (2012) NSWADT 106)

This experience is not unique to New South Wales. Legal practice matters, when compared to other matter types, took the longest to resolve in the Queensland Civil and Administrative Tribunal and were by far the most costly (on average) in the Victorian Civil and Administrative Tribunal (chapter 10). This highlights that, even in escalated proceedings involving tribunals, it is difficult to effectively enforce orders against lawyers. In turn, this suggests poor outcomes — and prospects — for consumers.

That the conduct described above does not of itself constitute unprofessional conduct and lead to disciplinary action highlights that regulation of this market is insufficiently focused on the consumer and instead displays a technical and inward focus on the profession.

The objectives of complaint bodies need to be reoriented ...

In light of the concerns outlined above, it appears that current regulatory arrangements fall short of the protection that consumers of legal services need. Warne noted that ‘retail’ consumers have been particularly let down:

It is this class of consumers of lawyers’ services in civil litigation – the ad hoc individual and small business non-institutional purchaser of litigation services, often in times of crisis or misfortune – which is at the forefront of my mind when I say overcharging is rife. (2012, p. 12)

One of the key reasons for such failure is the focus of the regulation of legal services on professional standards instead of effective service provision. Sir David Clementi highlighted the profession’s attitude in his review of legal service regulation in the United Kingdom:

... I have learnt that certain lawyers dislike being described as part of an industry. They see a conflict between lawyers as professionals and lawyers as business people. The idea that there is a major conflict is in my view misplaced. Access to justice requires not only that the legal advice given is sound, but also the presence of the business skills necessary to provide a cost-effective service in a consumer-friendly way. ... Research shows that complaints arise as much from poor business service as from poor legal advice. If certain lawyers continue to reject the notion that they are in business, such complaints will continue until they are indeed out of business. (2004, pp. 5–6)

While poor business practices might drive providers out of other markets, limited competition in the legal services market means that poor behaviour can persist if it is not held in check by effective regulation. At present, while there are multiple bodies charged with professional regulation, the effectiveness of the regulatory system is stifled by a pronounced lack of consumer representation, as noted by the Centre for Innovative Justice:

... it is important to remember that, while professional associations act in the interests of their members, as well as in the interests of the rule of law; and while Legal Service Commissions act as independent bodies to investigate concerns about the legal market, there is no person or body directly charged with considering, or advocating for, the interests of legal consumers (2013, p. 15).

Indeed, the information imbalance faced by consumers is not corrected where complaint bodies act as independent arbiters of disputes. The purpose statements outlined in Legal Profession Acts tend to include providing a means of redress for complaints alongside the enforcement of professional standards. Given this dual objective, it is understandable that complaint bodies focus their limited resources on serious disciplinary matters. However, under present conditions, lawyers are able to maintain the advantage afforded by their knowledge and experience and outcomes may be more likely to fall in their favour.

The Commission considers that the stated purposes of complaint bodies need to be recast. Complaints bodies should have a primary objective — stipulated in their enabling legislation — of aiding *consumers* to achieve timely and effective redress. Importantly, this objective needs to be factored into their approach to dealing with complaints in practice.

... and other improvements can help operationalise this

A number of changes to the operation of complaint bodies may assist in embedding a more consumer-focused approach. In this regard Australian complaint bodies may usefully draw on some of the practices of the United Kingdom (UK) Legal Ombudsman.

First, Consumer Action and CCLC advocated improved transparency in relation to outcomes achieved for consumers:

Complaint handling bodies should also be required to report publicly on outcomes achieved. Currently, the Legal Services Commissioner releases statistics in its annual report about complaints received, but little is reported except whether the Commissioner was able to resolve the dispute or not. Public reporting on substantive outcomes achieved, not only through determinations, but through mediation and settlement agreements (at a macro level, not to identify parties), would improve accountability of the complaint handling bodies and help in determining effectiveness. (sub. DR202, pp. 13–14)

The registers of disciplinary action maintained by complaint bodies generally only publicise actions in relation to discipline of serious misconduct matters, while only resolution rates are reported for other matters. Some complaint bodies, for example in New South Wales and Queensland, also publish the number of lower level disciplinary outcomes — including orders to apologise or pay compensation. In addition to reporting on outcomes, the UK Legal Ombudsman publishes results from surveys on consumer experience and satisfaction with the complaint process. While some complaint bodies in Australia collect this type of information periodically, it does not tend to be reported publicly. The publication of information on all types of disciplinary action, mediation outcomes and user satisfaction is useful as it provides a sense of the results achieved for consumers and more generally improves the transparency of complaints processes.

Second, there is limited involvement of lay members in legal complaint bodies. The Law Council of Australia identified lay representation in only two jurisdictions:

- In Tasmania, two of the six members on the Legal Profession Board must be lay persons without legal qualifications (as required in the *Legal Profession Act 2007* (Tas)).
- In the Northern Territory, there is lay representation on the Law Society's ethics committee which considers reports of investigators and makes recommendations to the Council (there are no lay members on the Council itself). (sub. DR309, p. 13)

There are no statutory requirements for lay representation in complaint bodies in other jurisdictions.²⁵ While in some, such as Queensland and South Australia, tribunal panels include lay members, the majority of complaints do not escalate to tribunal proceedings, meaning that lay involvement on tribunals may be ‘too little, too late’. If lay representation were involved within the complaint bodies themselves, some cases may be more effectively dealt with earlier, and may avoid escalation to a tribunal in the first place. For example, lay involvement might result in better communication of decisions, improving the complainant’s understanding of the process, and making them less likely to appeal a decision.

However, some participants argued that lay representation was not appropriate for complaint bodies. The Law Council submitted that ‘the suggestion that there be lay representation on regulatory bodies is largely irrelevant’ in jurisdictions where they are statutorily independent (sub. DR309, p. 13). The Commission disagrees. Statutory independence and lay representation are not substitutes — with the former intended to avoid (the perception of) bias, and the latter intended to encourage a consumer focus by including a perspective from outside of the profession, ultimately making the system more approachable.

Further, the newly appointed SA Legal Profession Conduct Commissioner submitted that the profession could not be overseen by a lay person:

He or she wouldn’t have the experience to be able to assess what amounts to ‘the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner’ [statutory definition of unsatisfactory conduct], so as to be able to determine the most common types of alleged misconduct, which are mostly at that lower end of the misconduct scale. (sub. DR313, p. 4)

These views point to a significant incongruity given that ‘unprofessional conduct’ is defined by reference to the expectations of a member of the public. It is important that regulation is not solely informed by the profession’s view of itself.

Indeed, the value of lay representation was raised by consumers during consultation for the *National Legal Profession Reform* project:

Contributors believed that consumer representation on the NLSB [National Legal Services Board] would benefit the profession and provided examples of how consumer representation in the regulation of the electrical, banking, building, financial industry and medical sector had made the profession more aware of consumers and the wider community’s needs and perceptions. ... there was strong overall support by consumers and consumer advocates for the membership of the Board to comprise half consumers (or lay consumer representatives). Consumers felt that having only one consumer on the Board would be tokenistic and unacceptable as it would result in a Board that was not independent of the profession. (2010, p. 8)

²⁵ In Victoria there is no requirement for lay representation within the Legal Services Commission, however, the Legal Services Board, which works with the Commission to regulate the legal profession, includes three lay members (alongside a chairperson and three practitioner members).

Unlike in Australia, the UK Legal Ombudsman scheme has an explicitly stated purpose in the Legal Services Act 2007 ‘to enable complaints to be resolved quickly and with the minimum formality and by an independent lay person (legally qualified or not)’. Involving lay representatives earlier in the complaints process is likely to foster a more consumer-focused approach and make the process less daunting for consumers. While some legal training may be required to investigate (and prosecute) a complaint, the involvement of lay members in the supervisory structure²⁶ of complaint bodies can provide oversight to ensure that their approach does not ignore consumers in favour of technical, professional issues. Such representation is important for both statutorily independent bodies and professional bodies who perform similar functions. To be effective, it is important that this lay representation is not a ‘lone voice’ — at a minimum, complaint bodies should include two lay representatives.

Finally, it appears that some issues remain in the legal grey area for too long because of reluctance on the part of complaint bodies to bring test cases in tribunals and courts. For example, several complaint bodies have identified questionable practices in relation to the terms in ‘no win no fee’ agreements. However, the behaviour might persist for long periods before it is tested on legal grounds. The Queensland Legal Services Commissioner noted that regulatory guides are made public to alert practitioners to the factors that will be taken into account by the Commission where the interpretation of rules is unclear:

... with matters that are untested and yet to be judicially determined. ... Our responsibilities require us to take a view, and lawyers and users of legal services alike are entitled to know what it is. ... We will do our very best to get it right but it is always possible that the disciplinary bodies and the courts will tell us in due course that we have got it wrong. (Briton 2014, p. 7)

On the one hand, providing ample warning about potential disciplinary action to lawyers is a commendable and transparent approach. On the other hand, many consumers are left subject to potential harm while the legality of the behaviour remains untested.

While there is ample evidence of complaint bodies drawing attention to bad practices through guidelines and speeches, it is equally important to follow through with test cases to ensure that future speeches are bereft of such examples. As such, complaint bodies need to be forthright in testing questionable behaviour as it emerges.

Moreover, complaint bodies need to be subject to periodic external review to verify whether they are meeting their objectives. There is benefit to such reviews being undertaken nationally, as benchmarking the activities of the complaint bodies can facilitate successful approaches being highlighted and adopted. Accordingly, there should be a national review to assess the effectiveness of legal complaint bodies in adopting a consumer-focused approach. The review would assess areas including appropriate use of sanctions and other powers and the effectiveness of public reporting on outcomes. The

²⁶ The appropriate position for lay representatives to oversight complaints processes will vary due to the differing structure of complaint bodies across jurisdictions — in some cases they may sit on a board or committee while in others they could instead be appointed as assistant commissioners.

review would also provide an opportunity to revisit whether the regulation of legal services by both consumer authorities (such as fair trading offices) and legal complaint bodies is operating effectively.

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 complaints regimes in three years, including their interaction with the Australian Consumer Law.

7 A responsive legal profession

Key Points

- An efficient and responsive legal profession improves access to justice.
- There are several elements that affect the quality of, and competition in, legal services markets — the education and training of lawyers, their entry into the profession, and the regulation of the profession itself.
- The education and training of law students influences the future legal profession.
 - Despite concerns about a potential oversupply of graduates, there is no policy rationale in the legal market — beyond ensuring baseline quality standards — for restricting numbers.
 - While there are examples of leading practices in various institutions, a systemic review of the legal education system is overdue. More emphasis should be placed on skills, rather than accumulating knowledge. The systemic review should examine:
 - ... the need for each of the current 11 Academic Requirements
 - ... including alternative dispute resolution as a required area of study
 - ... practical training, including pro bono placements, interpersonal skills and business management courses
 - ... the necessity, role and conduct of separate admission and practising certificate requirements.
- More radical changes in legal education would only be effective if coupled with reforms to the profession.
 - Building on existing examples, ‘limited licences’ should be implemented to allow appropriately qualified professionals to perform select tasks in particular areas that are currently the exclusive domain of lawyers.
- Specific advertising restrictions appear unnecessary given broader economywide regulation and general legal professional standards of conduct.
- While restrictions on professional indemnity insurance can be justified on consumer protection grounds, they should be subject to periodic independent review to ensure they remain a targeted and proportionate response to the problem.
- Implementation of the National Legal Profession Reform, which was initiated in 2009, has been stymied by jurisdictional differences.
 - Progress made by Victoria and New South Wales provides other jurisdictions with a ‘preview’ of the benefits of reforms. Further gains depend on evaluation of these reforms.

Legal services exist as part of a market. In theory, a competitive market should ensure that the legal profession is efficient, responsive and innovative. Such a well-functioning market would assist access to justice by minimising barriers relating to the cost and range of services. It is not just the competition between firms currently in the market that leads to efficient outcomes, but also the threat that other firms may enter the market if they believe they can make a profit. In many sectors of the economy, factors such as natural market size, high fixed costs of entry, behaviour of those with market power and government regulations inhibit competition or provide barriers to entry that limit (or eliminate) the threat of new entrants.

Without such competitive disciplines to motivate them, firms may be able to use market power to increase their own returns at the expense of consumers, competitors and the community as a whole. Beyond prices, there is also limited pressure to innovate, meaning that suppliers become unresponsive to emerging (or indeed long standing) consumer needs.

This chapter discusses structural aspects that affect the efficiency of the supply of legal services. Section 7.1 discusses characteristics of the legal profession in Australia, section 7.2 looks at the education and training required to become a lawyer, section 7.3 examines the current regulation of the profession, and the need for any reform, and section 7.4 examines the scope to expand the concept of specialisation in particular areas of law through the use of ‘limited licences’.

7.1 Characteristics of the legal profession

Nationally, the legal services market is large. Based on 2007-08 data, the Australian Bureau of Statistics (2009) estimated that the legal services sector²⁷ generated \$18 billion of income, and contributed \$10.9 billion of industry value added to the Australian economy. More recent figures estimated that total revenue in the legal services industry was around \$21 billion in 2012-13 (IBISWorld 2014b). By comparison, revenue in the accounting services industry was \$17 billion in the same year (IBISWorld 2014a).

A national profile of solicitors showed that in 2011, there were 59 280 practising solicitors in Australia (Urbis 2012). Almost three quarters (73 per cent) of solicitors were in private practice (that is, in law firms), nearly 15 per cent worked as solicitors within corporations (in-house counsel) and just over 9 per cent worked within government. In 2014, according to the Australian Bar Association (sub. DR286, p. 4) there are 5756 barristers in Australia.

The Urbis profile revealed an experienced profession, with 37 per cent of solicitors having been admitted for 15 years or more. There was also substantial new entry into the profession; just under one third (31 per cent) had been admitted for 5 years or less, and roughly 10 per cent had only been admitted to practise in the past year (Urbis 2012).

²⁷ The ABS used a broad definition including not only barristers and solicitors, but also legal aid commissions, community legal centres, Aboriginal legal services, government solicitors and public prosecutors.

From a user’s perspective, not every law firm will be able, or appropriate, to meet their needs — someone with a family dispute in Geraldton is unlikely to consider a firm of environmental law specialists in Sydney as an option to assist with their dispute. Therefore, while it is possible to refer to the concept of a national ‘legal services market’, it is more relevant to consider sub-markets that are geographic, and to a lesser extent, functional in nature.

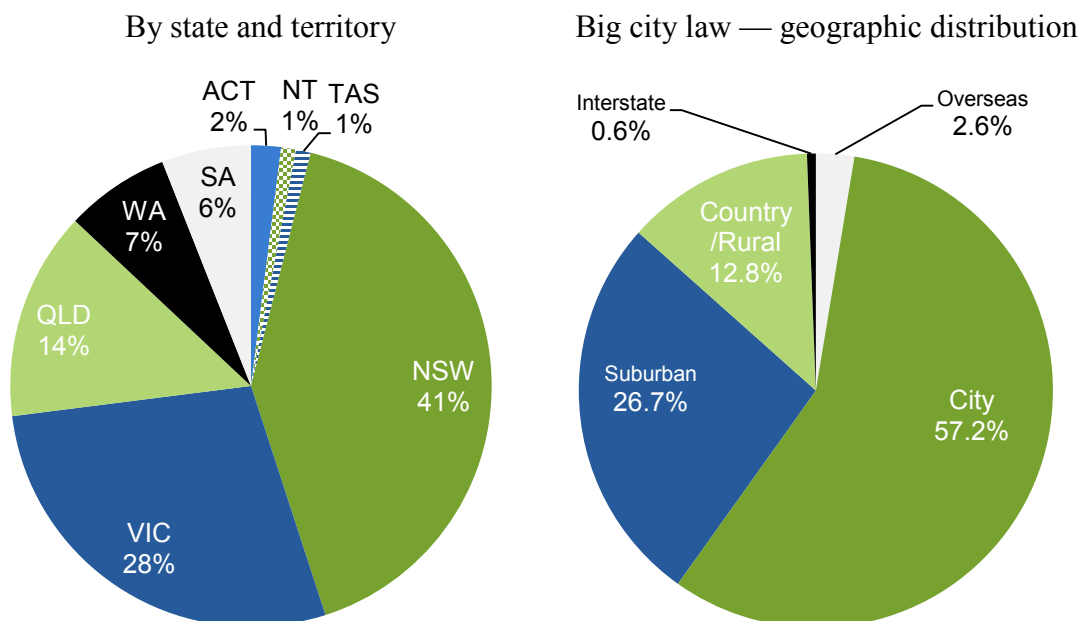
There are many different legal markets

For many users, the decision about which legal services provider to use will be based on location or area of specialty. For example, advertising or reputation may suggest that a particular firm is ‘the personal injury specialist’.

Firms exist in different locations, but are concentrated in the big cities

Law firms are concentrated in populated areas, as greater population density (and commercial activity) typically means more transactions and more disputes. In Australia, the legal profession is concentrated in the largest states, with nearly 70 per cent of solicitors in New South Wales (NSW) and Victoria alone (figure 7.1). Barristers are similarly concentrated, with slightly over 70 per cent registered in NSW and Victoria (ABA, sub. DR286, NSW Bar Association 2014; Victorian Bar 2014).

Figure 7.1 **Workplace location of solicitors**
2011



Data source: Urbis (2012).

More specifically, solicitors tend to be concentrated in major cities, with over half practising in the central business district of the capital city of their jurisdiction, and a further quarter practising in a suburban location.

To a degree, and especially for smaller matters, the location of a law firm effectively grants a natural advantage in capturing the business of those in the geographic area. As discussed in chapter 6, consumers of legal services do not often undertake thorough searches for alternative providers and tend to engage the first firm they consult, particularly when urgent assistance is needed.

Different firms practise in different areas of law

‘The law’ is multifaceted and has many areas of speciality. Reflecting this, lawyers earn income from various types of civil matters (table 7.1).

Table 7.1 Income of solicitors and barristers by area of law^a
2007-08

<i>Area of law</i>	<i>Solicitors</i>	<i>Barristers</i>
	per cent	per cent
Commercial	34	31
Property and estates (wills)	23	8
Personal injury	8	25
Family	6	6
Intellectual property	5	4
Industrial relations	4	6
Administrative/Constitutional	2	5
Environmental	2	3
Other	16	12

^a Civil matters only.

Source: ABS Cat. no. 8667.0.

Many smaller law practices, particularly in regional areas, may (by necessity) operate as ‘general practitioners’, dealing with whatever legal issues arise in their town or surrounds. Conversely, some of the largest firms are big enough to have separate divisions in different areas of law. In addition, while the market for criminal law can be considered separately, there are consumers and legal service providers who are involved in both civil and criminal matters.

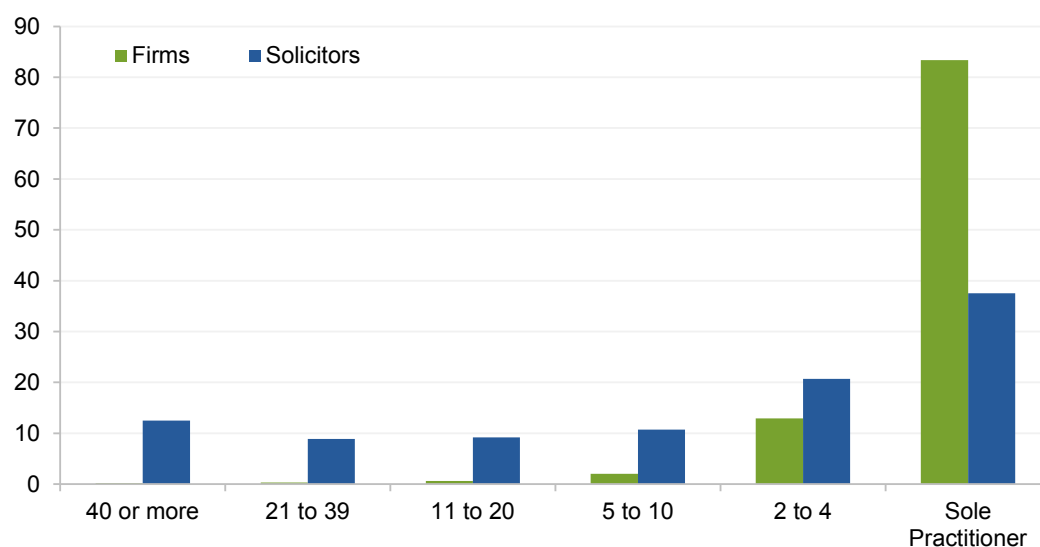
There are also firms that either fully or partially specialise in certain areas of law. Typically, such firms will develop a reputation (perhaps fostered by advertising) as specialists in a certain area such as family, personal injury or entertainment law. Where consumers are unwilling or unable to effectively search and compare services, an immediate association based on a firm’s reputation can be a powerful way to capture a share of the market.

A further division in the market is between the specialist advocacy services of barristers, and the more general role of solicitors. Generally, consumers will only engage a barrister through a solicitor (though recent reforms have allowed ‘direct briefing’ by corporate or government in-house counsel, as well as certain professional bodies, such as those representing architects or tax accountants).²⁸ As table 7.1 shows, typically ‘transactional’ services (such as property and estate services, and some commercial matters) are a more important source of income for solicitors, while those matters that are more likely to proceed to court (personal injury) are a more important source of income for barristers.

There is a big, and a small, end of town

Despite some perceptions of monolithic, marble-lobbied corporate law firms, it is more common for solicitors to work for small firms. Based on data from the Law Society of NSW (Urbis 2012), 38 per cent of solicitors worked as sole practitioners, with a further 21 per cent in firms with two to four partners (figure 7.2). Only 12 per cent of solicitors worked in firms with 40 or more partners.²⁹

Figure 7.2 Proportion of firms and proportion of solicitors^a



^a All states and territories, excluding Victoria.

Data source: Urbis (2012).

²⁸ In many Australian jurisdictions, including Queensland, Western Australia, South Australia, Tasmania and the Northern Territory, the legal profession is ‘fused’ and practitioners can be admitted and granted practising certificates as a ‘barrister and solicitor’, and may practise as both.

²⁹ These figures exclude Victoria, the second largest jurisdiction. Assuming Victoria displayed a similar industry structure to NSW, its inclusion could further skew the data towards a bifurcated profession, with a higher proportion of solicitors working as either sole practitioners or within large firms, and relatively few in the middle.

Statistics on overall firm and employee numbers do not reveal the relative financial activity within the legal services market. While information on revenue levels is limited, particularly for smaller firms, available data illustrate the size and earning capacity of the ‘big end of town’ (table 7.2), with the largest firm earning over half a billion dollars in revenue in 2011-12, and the top 25 firms together earning over \$5 billion (Business Review Weekly 2012).

Table 7.2 Top 10 law firms by revenue
2011-12

<i>Rank</i>	<i>Firm</i>	<i>Revenue</i>	<i>Partners</i>	<i>Lawyers</i>	<i>Graduates</i>
		\$ million			
1	Freehills	565	185	729	90
2	Clayton Utz	455	197	575	75
3	Allens	440 ^a	175	635	87
4	King & Wood Mallesons	424	158	541	89
5	Minter Ellison	419	193	575	53
6	Ashurst Australia	398	182	581	88
7	Corrs Chambers Westgarth	265	122	371	61
8	Norton Rose Australia	250 ^a	140	395	42
9	Slater & Gordon Ltd	217	na ^b	436	19
10	Gadens Lawyers	207	137	346	0

^a Estimate by Business Review Weekly. ^b ASX listed company, does not have partners.

Source: Business Review Weekly (2012).

These large firms practise across a range of areas of law, and often across the country. They compete for the valuable business of large clients such as corporations and governments. For the majority of solicitors in small firms, however, their market is more limited by specialty and location.

7.2 Becoming a lawyer — education and training

As befits the level of knowledge and skill required to navigate the legal system, becoming a lawyer is not a simple or quick task. Typically, it requires three steps:

- university education to obtain a law degree
- practical legal training focused on procedures and skills required to work as a solicitor, culminating in admission as a lawyer in the local Supreme Court
- obtaining a practising certificate from the relevant professional body (a law society or bar association) and undertaking continuing professional development.

Each of these steps, and any potential reforms that could improve access to justice while preserving the quality of new entrants to the legal profession, are discussed in turn below.

University education

There are currently 33 law schools in universities across Australia — ten in NSW, six in Victoria, six in Queensland, four in Western Australia, three in South Australia, one in Tasmania, two in the ACT, and one in the Northern Territory (CALD 2013).

Law degrees require a minimum of three years' study, though many students choose to undertake a combined degree — some 27 per cent of law graduates in 2013 undertook a combined degree, compared with an average of over 10 per cent for all graduates (Graduate Careers Australia 2014). For graduates to qualify for admission as Australian lawyers, their degrees must cover the so-called 'Priestley 11' core areas of knowledge (or 'Academic Requirements for Admission') (box 7.1). While these requirements provide a strong base knowledge of the law, they have the potential to limit the flexibility of universities to compete and innovate in offering more tailored degrees.

Box 7.1 The 11 Academic Requirements for Admission

The following areas of study constitute the 11 Academic Requirements, also known as the 'Priestley 11':

- Criminal Law and Procedure
- Torts
- Contracts
- Property, both real (including Torrens system land) and personal
- Equity
- Administrative Law
- Federal and State Constitutional Law
- Civil Procedure
- Evidence
- Company Law
- Ethics and Professional Responsibility.

Sources: Legal Profession Admission Rules 2005 (NSW); Law Admissions Consultative Committee, sub. DR162.

A more recent trend is the offering of postgraduate 'Juris Doctor' (JD) degrees by Australian universities. As with undergraduate degrees, these vary across universities, but are all targeted at graduates (of non-law disciplines) seeking to obtain legal qualifications. At most universities, graduating from a JD is in effect equivalent to holding a bachelor's degree in law (LLB). Some law schools (such as the University of Melbourne and the University of Western Australia) have also ceased offering undergraduate law as an option, offering JDs for graduate students instead.

Practical legal training and admission

Following the completion of an LLB or JD, those wishing to practise as lawyers (either as a solicitor or a barrister) must also complete practical legal training (PLT) (though in some jurisdictions an alternative traineeship path is available). This period of training focuses on the skills and knowledge generally needed for an entry level lawyer, including:

- professional skills such as writing and drafting, advocacy, client interviewing and dispute resolution
- practical knowledge in areas such as civil litigation, commercial, corporate and property law
- work management and business skills
- trusts management and office accounting skills
- ethics and professional responsibility.

The training combines a traditional course work component with work experience. Overall, students can complete PLT in under six months if undertaken on a full-time basis. The courses are offered online and throughout the country by universities, the College of Law and other select training bodies. PLT is undertaken at the cost of a sponsoring firm or the student themselves (who may sometimes access assistance programs such as FEE-HELP loans).

On completion of PLT, candidates are admitted to the Supreme Court in their jurisdiction as an ‘Australian lawyer’. In each jurisdiction, the Supreme Court is the admitting authority, but is often assisted by a registry body, such as the Legal Profession Admission Board in NSW, or a professional regulatory body, such as the Legal Practice Board in Western Australia. Those who are admitted to practise as a barrister or solicitor (or both) in their state or territory’s Supreme Court are also eligible to practise in all federal courts, provided they have registered their name on the High Court’s Register of Practitioners. Admission processes include checks that applicants have completed the required academic qualifications, as well as certifying the character of the applicant, any criminal record and medical conditions insofar as they may affect the applicant’s ability to perform their duties (see, for example the Law Foundation of South Australia (2013)).

Obtaining a practising certificate and continuing professional development

Once they are admitted to a Supreme Court, lawyers who wish to practise must apply for a practising certificate (it is an offence to engage in legal practice without one). Generally, professional bodies (such as law societies) administer matters relating to practising certificates, though there are two notable exceptions. First, in Victoria, practising certificates are formally a matter for the Legal Services Board, which delegates some functions. These functions must be performed in accordance with policies set by the Board. In the case of practising certificates, the Board delegates to the Victorian Bar (for barristers) and the Law Institute of Victoria (for solicitors) (Vic LSB 2012). Second, in

Western Australia the Legal Practice Board administers both admission (in an advisory role to the Supreme Court) and practising certificates, as well as being responsible for complaints handling (chapter 6).

Requirements for granting a certificate are set in law and include that the practitioner holds professional indemnity insurance, is a ‘fit and proper person’ (essentially a character check), has contributed to fidelity funds,³⁰ and undertakes continuing professional education on an annual basis.

The professional associations are authorised by statute (for example, section 53(1) of the *Legal Profession Act 2007* (Qld)) to place ‘reasonable and relevant’ conditions on practising certificates. The ability to impose them is relatively unfettered, but such conditions can include restrictions on the areas of law practised or the operation of a trust account, requirements for supervision, and the completion of specified training (including continuing education).

Reflecting these conditions, there are a number of categories of practising certificate that vary in the degree of supervision and breadth of practice. From unsupervised ‘principal’ certificates (for sole practitioners and principals or partners of a law firm), ‘non-principal’ certificates (employees in firms), through to work within government or corporations and certificates for volunteer work (discussed in chapter 23).

Certificates must be renewed annually at a cost to practitioners. The renewal process provides an opportunity for a ‘check’ on continuing education and ‘fit and proper person’ requirements.

Those seeking to work as barristers must meet additional requirements. While the process varies slightly between jurisdictions, applicants typically undertake a ‘Readers’ Course’, incorporating an examination, for example in NSW:

Candidates must achieve a 75 per cent pass mark in the three bar examinations, and successfully complete a formal Bar Practice Course. ... The course is run twice a year and currently runs for four weeks, full-time. (NSW Bar Association, sub. 34, p. 15)

On completion of the course, applicants are issued with a conditional practising certificate and undertake a period of ‘reading’, when they are mentored by a senior barrister. The length of this period varies — for example in NSW (and the ACT) it is ‘at least 12 months’ (NSW Bar Association, sub. 34, p. 15), while in Victoria it is nine months (including the two month readers’ course). In Queensland, new barristers undertake one year’s ‘pupillage’, and within the first six months may not take briefs directly from clients without written approval from their ‘Senior and Junior masters’ (Australian Bar Association, sub. 149, p. 11). The Tasmanian Bar does not conduct bar examinations or practice courses, but new barristers must complete at least two years of pupillage (Australian Bar Association, sub. 149).

³⁰ Typically established by law societies, fidelity funds pay compensation to users who have suffered financial loss due to a lawyer’s (or firm’s) dishonest acts or omissions relating to trust money or property.

In this way, the legal profession has evolved to incorporate specialisation not only between barristers and solicitors, but also through tiered practising certificate types.

A lawyer's training does not conclude once they have obtained a practising certificate — they are also required to undertake continuing professional development (CPD) on an annual basis. Broadly, CPD covers ethics, legal knowledge, professional skills and practice management, with a focus on updating practitioners on the latest knowledge, maintaining skills and improving their function in day-to-day practice. Although they can vary between jurisdictions, CPD requirements can be met through attending or presenting seminars, private study, publishing articles in journals, or membership on relevant legal committees.

As the Law Council of Australia noted, while there will be uniform requirements and standards for CPD in Victoria and NSW following the introduction of the *Legal Profession Uniform Law* ('uniform law'):

... there are no national mechanisms for CPD to determine whether the appropriate knowledge of competencies to be developed by CPD (apart from including ethics and some other competencies as 'mandatory' components to be completed each year), to accredit CPD providers and programs or monitor, review and reaccredit CPD providers and courses. (sub. DR266, p. 29)

The Law Admissions Consultative Committee (LACC, sub. DR162) also supported the development of nationally comparable requirements and standards.

As such, there is scope to examine the standards of, and appropriate role for, CPD as a component of the broader legal education and training system. Given its role in maintaining and updating skills, CPD would be an appropriate mechanism for ensuring that all lawyers, rather than just new ones, are up to date on evolutions in law and practice. As the LACC and the Law Council (sub. DR162 and sub. DR266) suggested, alternative dispute resolution (discussed below) is one area that would warrant inclusion in CPD from an access to justice perspective. Guidance for lawyers in dealing with self-represented litigants as opposing parties (chapter 14) would also be a worthwhile inclusion. Such guidance could be based on the materials already used by the Bar Association in NSW (sub. 34).

Is there a need for reform?

Are there too many law students?

Australian universities operate on a demand driven funding model for all courses except medicine. Essentially, universities decide how many places they offer in courses based on demand from students and employers (although the Commonwealth Education Minister may place an upper limit for Commonwealth Grants for particular courses in order to slow expenditure growth). This system was recently reviewed (Kemp and Norton 2014). Broadly, the review recommended that the system continue (with some changes and extensions), and noted that the demand driven system had 'prompted considerable

innovation in the public university sector’ (Kemp and Norton 2014, p. x). The Australian Government responded to the review as part of the 2014-15 budget process, continuing the demand driven system and expanding it to sub-bachelor courses and non-university higher education providers (Pyne 2014).

As part of this inquiry, some stakeholders have raised concerns that there is an ‘oversupply’ of law students. For example, the Law Society of SA submitted:

... there is an oversupply of law graduates who wish to practise law and this has led to adverse impacts on graduates, law students and the legal profession. ...

With law schools producing more graduates than can possibly find work in the legal profession, the Society has observed law students and graduates desperate to break into the profession offering their services for free to an established lawyer. ... the Society is concerned at this rising trend in recent years and how a ‘race to the bottom’ could have adverse impacts on innovation and competition. (sub. 139, pp. 4–5)

Recent data reported in the media also point to significant entry into the profession, with the number of law graduates more than doubling between 2001 and 2012, and more than 12 000 graduates (roughly one fifth of the profession) entering the market in 2012. This was primarily driven by a sharp increase (330 per cent) in postgraduate degrees (such as JDs), particularly since 2010 (Tadros 2014).

The Australian Law Students’ Association (2013) argued that oversupply can lead to detrimental effects including that:

- student expectations before enrolment are not met, and this can trigger stress, anxiety and depression in ‘high achievers’
- students are unable to recuperate their investment in their education
- students have reduced bargaining power in the employment market on graduation.

While it may be true that not all law graduates are immediately employed, recent survey data from Graduate Careers Australia (2013a) showed that some 83 per cent were in full-time employment, and a further 10 per cent were seeking full-time employment while working in a part-time or casual role. Although the (full-time) figure was below some professions such as medicine and pharmacy (98 per cent) and civil engineering (90 per cent), it compared favourably to the average for all graduates (76 per cent).

Further, not all graduates seek to work in the legal sector:

... a law degree has become a generalist degree, the ‘new arts degree’, and that not every law student aspires to practise law. (Law Society of SA, sub. 139, p. 5)

This sentiment was echoed by Geoff Bowyer, the President of the Law Institute of Victoria:

The law degree is changing from being a career-specific to a broad degree ... Law degrees are seen in corporate and government [fields] as a good base for making good administrative people. Arts used to be seen as that generalist field. In a society where regulation is increasing, being able to [understand the law] is a skill. (Tadros 2014, p. 3)

Indeed, just over 80 per cent of graduates of ‘law and justice studies’ in 2012 self-reported that their field of study was at least somewhat important to their job (Graduate Careers Australia 2013b). In 2012, 55 per cent of law graduates reported that their degree was a ‘formal requirement’ in their main paid job (suggesting they practised as lawyers), a further 22 per cent reported that their degree was important, 11 per cent reported that their degree was ‘somewhat important’, and 12 per cent reported that it was ‘not important’ (Graduate Careers Australia 2013a). These results suggest that law graduates enter employment in a range of roles, from practising lawyers, in roles directly involving law in firms and government, to roles where knowledge of law is useful but not core to the job.

Daly (2012) observed that the proportionate increase in law graduates was substantially larger than the increase in graduates across all disciplines, but also noted that graduate numbers were not the sole determinant of the supply of lawyers — other factors such as net migration and retirement need to be considered. The increase in graduates also generally reflected broader economic conditions:

There is therefore an element of luck involved in the timing of graduation in relation to the business cycle as to whether new graduates find work easily or not. ... [the increase in law graduates] has occurred at a time of rising demand for legal services. (Daly 2012, pp. 447, 449)

The same research also revealed that the income (starting salary) of law graduates grew by approximately 16 per cent over a ten year period from 1999. This was in line with the growth for starting salaries for all graduates, meaning that in 2009, median starting salaries for law graduates of \$50 000 remained higher than the \$48 000 median for all graduates (Daly 2012). Despite the growth in starting salaries over the ten year period, there was a decline (between the 2001 and 2006 censuses) in the median salaries of all people with legal qualifications (including practising lawyers and those working outside the legal profession). Daly noted that this decline was not sufficient to regard as a long-term trend, and that it may have been:

... in response to a number of factors, including the shift in the view of law as a purely vocational degree to being a more general degree, the increase in women with a law degree and increases in part-time work. (2012, p. 453)

Daly concluded that there was limited evidence to support an argument of excess supply, and noted that:

In a labour market such as this, much of the burden of adjustment is likely to fall on new entrants. Evidence presented here on the unemployment rate of new graduates shows the cyclical nature of unemployment and an unemployment rate which is below that of graduates as a whole. Starting salaries of new law graduates have kept pace with those of all graduates. (2012, p. 453)

While it is clear that graduate numbers are increasing, the Commission does not see that this justifies any constraint on student numbers for law degrees. The available evidence indicates that this increase in graduates may not equate to an excess supply in the legal market, that law students do not necessarily enter the legal profession and that incomes of starting graduates are relatively unaffected by growth. Indeed, increased entry fosters competition in the profession and therefore improves the responsiveness of firms. This can improve access to justice.

The solution to address concerns that the prospects of law graduates may not align with student perceptions does not lie with capping entry. Rather, as the Law Society of SA noted (sub. 139), improved information to prospective students should enable them to make more informed choices about their future study and career.

Embedding alternative dispute resolution into the legal psyche

The current education and training undertaken by lawyers reflects a court and statute focus on formal, rights-based law. There is no specific requirement for the study of alternative dispute resolution (ADR) and in some cases lawyers are not fully informed about the range of dispute resolution options available (chapter 8). As such, changes to legal education and training requirements are needed to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.

The need for increased ADR was noted by the former National Alternative Dispute Resolution Advisory Council (NADRAC):

NADRAC's view is that law schools should increase the amount of compulsory ADR teaching contained in law degrees. Lawyers in practice are becoming increasingly engaged in ADR, either as providers of ADR services or as representatives of or support people for clients in ADR processes. (2012a, p. 18)

The Attorney-General's Department also noted the potential to increase the use of ADR through 'increased opportunities for ADR education and training for law students, the legal profession [and] judicial and court officers' (sub. 137, p. 22).

This is not to say that law schools do not currently offer ADR training. Indeed, the Commission is aware of law schools that devote some training to the full gamut of dispute resolution techniques. For example, the University of NSW School of Law has introduced a new core course in 2013 aimed at strengthening the dispute resolution 'tool-kit' of legal professionals, so they can be equally competent in invoking the court system or employing negotiation, mediation or arbitration (UNSW School of Law 2013).

As is the case at the University of NSW, law degrees should include a core subject that trains students to identify clients' needs, and offer a range of solutions, including ADR where appropriate. As LACC (sub. DR162, p. 12) noted, one element of PLT requirements for admission is 'assessing the merits of a case and identifying dispute resolution options' (including arbitration and mediation). This requirement has been in place since 2003. Therefore, as LACC suggested, there may also be a need for an increased focus on ADR in the continuing professional development stage of legal education, to cover those who completed their education before 2003 and to ensure that practitioners continue to develop and maintain their ADR knowledge and skills (sub. DR162, p. 13).

Rather than simply adding to the existing workload of law students (and thus potentially increasing the cost to graduates), this change should be introduced as part of other, wider reforms to legal education focusing on skills-based degrees and considering the balance between the three stages of legal education.

Clinical legal education can provide more practical training

Clinical legal education is a focused, practical and intensive method of learning that involves students taking on professional tasks under supervision, including giving legal advice, preparing documents, meeting clients, conducting research and developing materials for community legal education. Clinical legal education courses aim to provide a 'real world' education for the student while meeting the needs of clients. These courses are commonly delivered in partnership with community legal centres, and involve:

... a system of self-critique and supervisory feedback so that law students learn how to learn from their experience. The high staff-student ratio and collaborative learning environments support a climate in which each student is ... motivated by the inescapable personal responsibility of working with and being accountable to those clients, to perform to the best of their ability. The result for participating students is a profound consolidation of substantive legal knowledge with the practicalities, compromises and successes of contemporary legal practice. (Evans et al. 2013, p. 6)

In this way, clinical legal education attempts to teach students legal 'content' concurrently with the interpersonal and business management skills that are required in day-to-day legal practice, including consideration of costs to clients:

... [with clinical legal education] the whole costing explanation or understanding will become understood to an undergraduate from the earliest days when a client comes in and says, 'Yes, I've got to go court. I've been charged with such and such a matter. It's a pre-committal mention' and they will be present when that conversation is had, so as they work their way through law school and black letter law they will also at the same time have an understanding about ... the real-life practice of law and the need to treat your clients as consumers as opposed to separate clients. (Law Institute of Victoria, trans., p. 668)

Advocates of clinical legal education also believe it can assist with professional ethics, instilling students with a sense of social justice as they witness the impact of pro bono work on (often disadvantaged) clients:

... clinical experience helps law students identify themselves as able to play a role in improving access to justice and strengthens their determination to ensure that ordinary Australians have that right of access. ... serious investments on clinical methodology and underlying ethical assessment are likely to positively address and support future lawyers' attitudes to access to justice, so that more lawyers value such access at least as much as they do their opportunity to earn an income. (Adrian Evans, sub. 114, p. 1)

Although it has benefits, clinical legal education is very intensive in terms of staff resources, and is therefore relatively expensive when compared with more traditional university-based methods for teaching law. Its advocates argue that such costs could be recouped by society in the long-term:

... students' (clinical) education, when conducted in accord with [identified best practices] ... represents a cost-effective strategy over time for the community and profession because their skills and ethical understanding are far more likely to be retained within legal practice than those without such law school experience. (Evans et al. 2013, p. 14)

The Commission notes that there are already institutions offering clinical legal education as an integral component of their law degrees, for example the Newcastle Law School JD program:

... includes an embedded Graduate Diploma of Legal Practice. All students are mandated to undertake intensive 'live client' clinical legal education experiences which are fully integrated into their degree and PLT diploma. Students can choose from a list of clinical courses in their second and third year; electives include refugee and asylum law, environmental and natural resources law, civil justice, commercial transactions, and criminal advocacy. (Newcastle Law School, sub. DR283, p. 2)

While the Commission generally supports an increased focus on skills in legal education, it is wary of simply requiring clinical legal education as an 'add-on' to all existing law degrees (rather than integrated as part of the overall consideration of the best structure of a legal education). Given the increasingly generalist role of the undergraduate law degree, a focus on elements that are specific to practising in the legal profession (as distinct from corporate or government work) could be misplaced. However, in postgraduate study (such as JDs or PLT), the use of clinical legal education to concurrently develop knowledge and skills may prove a valuable means to expedite courses while still maintaining quality.

More fundamental reforms — balancing between the stages of training

The need for a greater focus on ADR and clinical legal education is indicative of a broader need to contemporise the way that legal education in Australia is structured and delivered.

While the Priestley 11 are important to ensuring a base level of knowledge across a range of topics, they stem from a time before advancements in information and communication technologies led to vast improvements in the ease of accessing information. Today, the challenge is not obtaining information, but rather knowing how to analyse it, use it, and

place it in context. In other words, the art of the professional lies less in an encyclopaedic memory and more in the skill of accessing, understanding and wielding the knowledge.

In line with this, several judges have previously suggested that there is a need for statutory interpretation courses to be included in lawyers' training. However, despite such calls, the body tasked with obtaining agreement between admitting authorities, on examining the issue, instead decided to issue a guideline statement:

In 2007, LACC was requested by the Chief Justice and the President of the Court of Appeal in Victoria, with the support of the Chief Justices of the High Court and the Supreme Court of New South Wales, to examine the way in which statutory interpretation is now taught in Australian law schools; and whether that area of knowledge should be substituted for an existing, or added as a new, Academic Requirement.

Despite the overwhelming contemporary importance of statutory interpretation to every person now working in a legal capacity (whether or not in legal practice) LACC has been reluctant to propose that it be added to the present Academic Requirements. Instead, it has issued a *Statement on Statutory Interpretation* which sets out a range of relevant knowledge and skills which will be expected of graduating law students, and has indicated to law schools that Admitting Authorities have agreed to take this Statement into account when accrediting, reviewing and reaccrediting law schools. (sub. DR162, p. 9)

The Commission acknowledges the importance of maintaining high quality entrants to the legal profession, and accordingly supports the retention of a set of training requirements. Without such requirements, there is a risk that consumers of legal services are harmed through sub-standard advice and representation, potentially denying them the ability to enforce their rights. In maintaining these high professional standards, however, it is important to minimise undue barriers to entry into the profession.

LACC (sub. DR162) argued that, as the 11 Academic Requirements did not stipulate subjects, they did not unduly limit the flexibility of universities to offer innovative courses. Instead, LACC suggested that the Australian Qualifications Framework's 'volume of learning' requirements had limited law schools' attempts to truncate the duration of law courses (sub. DR162, p. 5). LACC went on to argue that the Academic Requirements were administered by admitting authorities with a 'light hand', and so law schools were not, in practice, inhibited in their ability to innovate. While this may generally be true, the Commission has heard of some cases where admitting authorities have exhibited a degree of inflexibility, imposing general requirements that may be excessive for specific circumstances, such as admission of international lawyers (box 7.2).

Box 7.2 Barriers for barristers: admission of overseas practitioners

To be admitted to the legal profession in an Australian jurisdiction, overseas applicants must apply to an admitting authority for an assessment of whether their academic and practical legal training qualifications are equivalent to the qualifications required of local applicants, or what additional studies the applicant must undertake in Australia (in accordance with the 'Uniform principles for assessing qualifications of overseas applicants for admission to the Australian legal profession'). admitting authorities have the ability to dispense with some additional study or training requirements where practitioners have sufficiently relevant, substantial and current experience (LACC 2014).

Some participants suggested that admitting authorities can be too rigid in their application of these rules. Alistair Wyvill from the NT Bar Association cited the example an applicant, who specialises in criminal law and had thirteen years' experience at the English Bar. To date, the applicant has been unable to practise criminal law in the NT because the relevant Admitting Authority determined that she would need to complete additional academic studies and practical training before being eligible for admission to the legal profession in the NT.

In a letter to the Admitting Authority, Mr Wyvill argued that requiring further formal study would be of little if any benefit (particularly given that many of the subjects prescribed under the Uniform Principles are of little to no relevance to someone intending to practise only criminal law). He further argued the applicant could acquire relevant practical training during a period of supervised practice.

Mr Wyvill also noted that requiring further studies would deny the legal profession in Darwin a highly able and experienced legal practitioner:

I am anxious for [the applicant] to commence practice here as soon as reasonably possible. The Supreme Court list in the NT is dominated, regrettably, by criminal matters. Someone of her ability and experience is likely to make a significant contribution to the administration of justice, the profession and the community generally. The local Bar is small and will benefit considerably from her presence, particularly as we do not have any female barristers specialising in crime of her standing and experience. (pers. comm. 17 June 2014, p. 1)

According to Mr Wyvill, despite such arguments, the Admitting Authority advised the applicant in March 2013 that she would be required to successfully complete a wide range of practical training courses in professional responsibility, trust and office accounting, commercial and corporate practice, property law, and one of consumer law practice, employment and industrial relations practice, planning and environmental law practice and wills and estate practice. It also required her to complete a course in constitutional law.

In the Darwin public hearings, Mr Wyvill noted that the applicant spent the next year in protracted negotiations with the Admitting Authority, with the Authority eventually agreeing that she would only be required to study constitutional law. At the time of the hearings, she was studying constitutional law and thus still unable to practise.

Mr Wyvill suggested that the applicant's experiences were not unique, with other senior legal practitioners from the United Kingdom experiencing similar issues (trans., p. 1016).

Conducting and regulating the education and training of lawyers requires several elements outlined below.

- *Achieving a balance across the three components of legal education — university, practical training and continuing professional development.* Simply adding new elements to legal education (ADR, clinical legal education) risks driving up the cost and duration of education. Instead, the role of each of these stages in training professional lawyers should be examined. Such elements need to be incorporated or ‘embedded’ into the broader learning process. Given the tendency towards more ‘generalist’ undergraduate law degrees a tiered approach to education might be appropriate, with strengthened postgraduate or practical legal training for those who intend to practice.
- *Maintaining regulatory oversight while minimising regulatory burdens.* While the Commission appreciates the importance of an independent legal profession, the role of some professional associations in granting (and restricting) practising certificates, in the first instance, appears to duplicate elements of the admission process (such as ‘fit and proper person’ tests), creating burdens on applicants as well as those administering the duplicate tests. The Commission considers that, in principle, there is merit in the consolidated model of administering admission and practising certificates (as in Western Australia), or at the least regulatory oversight of a professional association (as in Victoria). It is worth exploring whether either of these models would provide the appropriate balance for other jurisdictions (bearing in mind differences in the size of the profession and existing regulatory structures). If so, they should be adopted.
- *Ensuring that a professional’s skills match the tasks they are allowed to do.* In examining the appropriate balance between stages of education, it is also important to consider the desired ‘output’ — that is, what tasks should a person who has completed a given stage be able to complete. Aligning educational requirements with the desired output should lead to a more targeted and cost-effective approach to education and training. Examples of this exist at present — a practising certificate is not required to provide internal advice when employed within a corporation or a government. However, there is scope to consider the exact nature of the tasks that a practising certificate is required for, and tailor the education (and regulation) accordingly.

Achieving these aims across the spectrum of legal education is no small task. However, it is important that they are considered as part of a single review of legal education and training to avoid the risk that changes in one element have unintended consequences on other parts of the legal education system. Mindful of this, in the draft report, the Commission recommended a holistic review of the stages of legal education and training.

There were differing views from participants on the necessity or desirability of the Commission’s recommended review of legal education. For example, LACC argued that, based on past experience, there was difficulty in obtaining consensus among admitting authorities across jurisdictions and that this ‘presented a reason for not re-opening [the Academic Requirements]’ (sub. DR162, p. 9).

Other stakeholders agreed that there was a need for a review of legal education. For example, the Law Institute of Victoria submitted that:

... there should be a greater emphasis on practical skills development throughout university and during practical legal training to ensure that graduates are equipped with the necessary skills to allow them to succeed in practice. (sub. DR221, p. 10)

Similarly the Australian Bar Association agreed that a review of the areas within the Priestley 11 and legal training more broadly was necessary, noting that the current model includes elements that would be unnecessary for many practitioners:

... the model we have now in our law schools is really just in case learning, so there's a lot that you learn that we know because of the structure of the profession will probably be irrelevant to your day-to-day work, and there's an enormous amount of stuff that you don't actually learn, and unfortunately that is a very expensive process and it also puts the emphasis on actually training people to be fit for practice on the profession itself which is a cost absorbed by the profession and ultimately passed on to consumers and also in many ways can distort the actual character of the profession itself. (trans., p. 789)

It is vital that the compulsory components of a legal qualification actually reflect what lawyers do and their required skills. The ABA notes that the LCA [Law Council of Australia] considers that there is an ongoing need for the Academic Requirements for Admission (The Priestley 11). There is definitely a need for agreed minimum standards but the structure of the law degree should be reviewed. (sub. DR286, p. 3)

As the Australian Bar Association also noted (trans., p. 790), there have also been recent reviews of legal education in the United Kingdom (LETR 2013) and the United States (American Bar Association 2014). The Canadian Bar Association's 'Legal Futures Initiative' — which is considering education and training alongside ethics and regulation and business structures and innovation — is also due to report in August 2014 (CBA Legal Futures Initiative nd).

Overall, the Commission remains of the view that a holistic review of the three stages of legal education is timely, and offers potential benefits in identifying opportunities to provide more streamlined and effective legal education and training. Action taken on the recommendations of the review should be a matter for decision by governments, acting through the Law, Crime and Community Safety Council, rather than by individual admitting authorities.

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.

7.3 Regulation of the profession

The theory and rationale for regulation of the legal profession

Though typically expressed in a professional and ethical obligation context, the primary reason for regulation (and certification) of the legal profession is one of consumer protection. As chapter 6 noted, consumers need protection in the legal services market due to information imbalances between most consumers and their lawyer, and the ‘principal-agent problem’ that this gives rise to. In the context of professional standards, this means attempting to (partly) rectify the information imbalance between consumers and providers by assuring consumers that all providers possess at least a minimum set of skills.

However, regulating quality is difficult, particularly when regulation is based on input standards for a service, rather than observable, quantifiable outputs (chapter 6). It carries with it risk at either end of the spectrum. That is:

-
- *if standards are too lax*: consumers may be exposed to ‘rogue’ operators who abuse their information imbalance. Further, the system, particularly courts, may bear additional costs as inappropriate cases are brought, or judges have to ‘pick up the slack’ in managing cases and assisting practitioners
 - *if standards are too strict*: while quality will be assured, the cost and effort required to meet standards will add directly to costs businesses face, and flow on to consumer costs. In the long term, stricter standards can also discourage innovation and entry into the profession.

While achieving this regulatory balance is difficult, there is a substantial body of literature devoted to best practices in regulation. As the Commission has previously observed, effectively targeted regulation can minimise regulatory burdens while still meeting the regulatory objective (PC 2007). In some circumstances, self-regulation will allow industries to find the level of regulation that suits them best, based on their own expertise. In other circumstances, allowing the incumbents in an industry to set standards can act as a barrier to entry, favouring incumbents at the expense of consumers.

Attempts at national regulation have stalled

The legal profession has been the subject of several rounds of reform, including moves towards consistent national regulation. However, rapid and pronounced changes in the way in which the profession is regulated have not been common.

The latest attempt was the Council of Australian Governments’ (COAG) *National Legal Profession Reform* project, which began in 2009 prompted by concern that the range of legal profession regulations imposed unnecessary costs on lawyers and did not provide adequate protection for consumers. Consultation documents were released in May 2010, including the draft Bill and associated rules, a consultation report by the reform taskforce, a regulation impact statement and a COAG-commissioned cost-benefit analysis, conducted by ACIL Tasman (2010), which estimated a net annual benefit from the reforms of approximately \$17 million.

In 2011, COAG agreed to legislation proposed by the reform taskforce. However, jurisdictions have progressively dropped out of the national project. Reflecting the relative concentration of the profession in some states, the potential benefits of the reforms were not evenly distributed across all states and territories. It has been suggested to the Commission during the course of this inquiry that distributional issues — and in particular the impact of removing a requirement for multiple trust accounts (discussed below) on the availability of ‘Public Purposes Funds’ — was a motivation for smaller jurisdictions withdrawing from the process.

The remaining jurisdictions, Victoria and NSW (which account for 70 per cent of the legal profession) have proceeded with the reforms by implementing a uniform law that builds on COAG’s work (Smith and Clark 2013). The scheme commenced on 1 July 2014, and key

reforms are outlined in box 7.3. The Law Society of Western Australia (2014) has recently started a consultation process to determine if enacting the uniform law in Western Australia would address concerns with the previous COAG proposals that had been identified by both the Attorney-General of Western Australia, and the Society itself.

Box 7.3 Reforms under the Legal Profession Uniform Law

The Legal Profession Uniform Law ('uniform law') is template legislation intended to be implemented in multiple jurisdictions in the same form. Victoria, as the first jurisdiction to pass it (in March 2014), will act as 'host'. NSW has also joined the scheme. The aim is that other states and territories will choose to join after having the opportunity to observe the scheme's operation in Victoria and NSW. In many respects, the law continues with the existing regulatory framework — for example in relation to professional indemnity insurance requirements. Some key reforms under the uniform law include:

- establishing new bodies, such as a single Legal Services Council and Admissions Committee to set and apply policy, as well as a Legal Services Commissioner for uniform legal services regulation
- simplifying and standardising regulatory obligations, cutting red tape for law firms, especially those operating across jurisdictions, through:
 - a single set of rules governing matters such as the requirements for maintaining and auditing trust accounts, continuing professional development requirements and billing requirements
 - a single set of admissions requirements
 - a simplified process for admitting foreign lawyers to practise Australian law.

Other reforms relating to new billing rules and consumer complaints about lawyers are discussed in chapter 6.

A mobile profession — is harmony necessary?

Although the national reform process has stalled, unanimous national agreement is not necessarily required for the process of reform to continue. Indeed, South Australia updated their legislation in October 2013, and as noted above, NSW and Victoria have gone ahead with the uniform law. This has bifurcated the regulation of the profession, between the approach in NSW and Victoria, and the remaining states and territories.

While some inconsistencies exist, their impact is not necessarily large. Other than some larger businesses and those in border communities (such as Tweed Heads and the Gold Coast), most consumers are unlikely to engage legal professionals across jurisdictions — for them, getting the 'right' regulation is more important than uniform national regulation. Similarly, sole practitioners and small firms may only have a small amount of work (if any) that involves multiple jurisdictions. For those practitioners that do work across borders, practising certificates are mutually recognised between Australian jurisdictions.

In addition to savings from the use of national trust accounts (see below), many of the purported savings from the reform come from reducing regulatory burdens by streamlining processes that were previously done on a jurisdictional basis. For example, nationally centralised admission was estimated to save \$2.45 million a year (ACIL Tasman 2010).

In this light, the reforms adopted by NSW and Victoria offer an opportunity to advance the regulation of the profession. The operation of the uniform law in those jurisdictions can serve as an experiment for other jurisdictions so that they can observe how the new regulations work, and how much administration should be centralised, or should remain with ‘local offices’. It is therefore important that the process in Victoria and NSW incorporates information gathering to gauge the benefits of the reform. This would inform a post-implementation evaluation of the reforms and provide other jurisdictions with an evidence base to act on, in order to determine which reforms should be progressed.

In the draft report, the Commission raised another issue of regulatory burden in relation to restrictions on business structures. Specifically, the Law Council of Australia’s (sub. 96) concern that limited liability partnerships (LLP) are not an allowed business structure. Feedback on this issue was mixed. Some participants, such as the Law Institute of Victoria (sub. DR221) and the Australian Corporate Lawyers Association (sub. DR263), noted that a lack of an LLP structure was a (partial) barrier to merging with international firms and supported allowing the new structure. Others, such as the Law Society of South Australia (sub. DR219) and the Queensland Public Interest Law Clearing House (sub. DR247), questioned the access to justice benefits from such reform.

While such restrictions are valid considerations for future reviews of regulation, judgments about allowing new business structures would require a more detailed analysis of their costs and benefits than is possible within the scope of this inquiry.

Preventing irresponsible advertising

The Australian Consumer Law (ACL)³¹ governs a range of business interactions with consumers, including, laws prohibiting misleading and deceptive conduct (which includes false advertising). As noted in chapter 6, these provisions (and the other consumer protections available under the ACL) generally apply to the provision of legal services.

In relation to advertising, lawyers are also subject to an additional layer of regulation. In all jurisdictions, legal practitioners are allowed to advertise their services provided that the advertising is not false, misleading, deceptive, offensive or prohibited by law (for example, as outlined in the Australian Solicitors’ Conduct Rules 2011). In Queensland, WA and the NT, there are further restrictions on advertising by legal practitioners that seek to encourage a potential client to engage that practitioner for a personal injury claim. There are also prohibitions against promoting services at hospitals or at the scene of an incident.

³¹ Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

Similar restrictions also exist in NSW under both the Legal Profession Regulation 2005 and the Workers Compensation Regulation 2010, which together effectively prohibit the advertising of personal injury services by restricting the range of words lawyers can use in their advertising (box 7.4).

Box 7.4 Prohibitions on advertising personal or work injury services in NSW

In NSW, clauses 23 to 40 of the Legal Profession Regulation 2005 and clauses 78 to 85 of the Workers Compensation Regulation 2010 effectively prohibit lawyers from advertising their services in relation to personal or work injuries.

In addition to the injuries themselves, the regulations extend the definitions of the prohibition to include:

... any circumstance in which work injury might occur, or any activity, event or circumstance that suggests or could suggest the possibility of work injury, or any connection to or association with work injury or a cause of work injury. (cl 79, Workers Compensation Regulation 2010 (NSW))

In advising its members of their professional responsibilities, the Law Society of NSW (2009)³² noted that the regulations ‘appear to prohibit’ a list of words and expressions in solicitor advertising, including:

- accidents
- asbestos litigation
- chemical spill injuries
- car accidents
- diving accidents
- driving accidents
- disability (subject to context)
- dust diseases
- hurt at work
- hurt on road
- injury law
- medical malpractice
- medical negligence
- motor vehicle accident claim
- motor vehicle collision claims
- motor vehicle accidents
- motor vehicle injuries
- occupier’s liability
- pain and disability
- personal injury
- public liability
- public place accidents
- shopping centre accidents
- slips, trips and falls
- toxic exposures
- victims compensation
- victims of crime
- work accidents
- work place injury
- workers compensation.

Some of these additional advertising restrictions were introduced to curb a surge in public liability claims (and a corresponding rise in insurance premiums) in the early 2000s. The restrictions are also aimed at preventing ‘irksome’ behaviour by some lawyers, such as ‘ambulance chasing’. Such behaviour can have negative effects, including exploiting

³² While the Law Society’s advice relates to the previous Workers Compensation Regulation 2003 (NSW), the definition of the prohibition on advertising in clause 79 has remained unchanged in the 2010 version.

vulnerable consumers, encouraging potentially vexatious claims and generally bringing the legal profession into disrepute. Some participants argued that removing these restrictions could result in socially detrimental practices. For example, the Johnson and Johnson Family of Companies (sub. DR239) argued that removing restrictions could lead to ‘predatory advertising’ by lawyers.

While the Insurance Council of Australia (sub. DR193, p. 5) supported measures to improve the transparency of legal fees for consumers, it raised questions about the effects on claims costs and the efficiency of personal injury schemes, particularly in NSW and Queensland.

The Commission has not found any evidence to suggest that ‘predatory advertising’, as described by Johnson and Johnson, is a significant problem in Australian jurisdictions that impose less stringent restrictions on the advertising of legal services (such as Victoria). To the extent predatory advertising (or other ‘irksome behaviour’) becomes a problem, such behaviour is more appropriately dealt with through general prohibitions on ‘dishonest and disreputable conduct’,³³ enforced by complaint bodies.

More importantly, limiting the advertising of legitimate services due to concerns about rising insurance claims costs — rather than reforming the public liability laws themselves to achieve an appropriate balance — amounts to ‘shooting the messenger’. Instead of dealing with the root of the issue, prohibitions on advertising risk limiting competition and inhibiting consumers’ attempts to search for the best service provider, which is already a concern in the legal services market (chapter 6).

Several participants endorsed the Commission’s draft recommendation to remove specific bans on advertising for legal services (and instead rely on the ACL), arguing that such bans reduce consumer choice and inhibit competition. In particular, the Australian Lawyers Alliance noted that legislative bans and prohibitions on advertising in personal injury cases in NSW and Queensland remove any capacity for law firms to advise consumers about their rights, or to compete on the basis of service costs. Maurice Blackburn (sub. DR197) also noted that differences in advertising restrictions caused compliance burdens for those operating across jurisdictions.

Having considered further evidence provided by participants, the Commission remains of the view that protections under the ACL, combined with disciplinary proceedings enforced by complaints bodies, are sufficient to ensure that advertising of legal services can foster competition and improve information for consumers, without causing unjustified and socially detrimental increases in legal claims. Accordingly, the Commission considers the sector-specific bans on advertising should be removed.

Lifting the existing prohibitions could lead to ‘teething problems’ as lawyers may be unsure of exactly what sorts of advertising are newly permitted, and what sorts remain prohibited (as misleading or deceptive conduct). Therefore, to assist lawyers and

³³ See, for example, Australian Solicitors’ Conduct Rules, rule 5 (Law Council of Australia 2011a).

consumers in transitioning to the new regulation, jurisdictional complaints bodies should formulate and publish guidelines for good advertising (in some cases this may only require updating existing guidelines). The complaints bodies should also draw on the expertise of their local offices of fair trading (or equivalent), and the Australian Competition and Consumer Commission in relation to the ACL, and consult representatives of the legal profession.

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.

Ensuring adequate professional indemnity insurance

To protect clients from professional negligence, legal practitioners are required to hold approved professional indemnity insurance as a condition of their practising certificates. Typically, the law society or bar association in the relevant jurisdiction approves the requirements³⁴ for, and terms and conditions of, insurance policies. Exceptions include in NSW and SA, where the relevant Attorney-General grants approvals, and in Victoria, where the Legal Services Board grants approvals.

Under the uniform law, the Legal Services Council may make ‘uniform rules’ relating to professional indemnity insurance for legal practitioners in participating jurisdictions (that is, Victoria and NSW) (box 7.5). However, the Legal Services Council has not yet been appointed, and as such has not made any uniform rules for professional indemnity insurance to date.

In addition to the requirements for coverage, the arrangements for provision also differ between jurisdictions. In some jurisdictions, a ‘captive insurer’ provides indemnity insurance to legal practitioners. In NSW and Queensland, for example, a wholly owned subsidiary of the relevant law society (LawCover Insurance in NSW and Lexon Insurance in Queensland) provides insurance to solicitors. In Victoria, a statutory authority (the Legal Practitioners’ Liability Committee) provides compulsory professional indemnity insurance to solicitors and barristers of the Victorian Bar.

³⁴ Requirements can include that legal practitioners obtain insurance from an approved insurance provider, insurance scheme or other approved arrangement.

Box 7.5 Minimum standards for professional indemnity insurance

In November 2009, the National Legal Profession Reform Taskforce proposed that minimum national standards for professional indemnity insurance be incorporated in National Rules, to be developed by the National Legal Services Board. The Taskforce proposed that these standards would act as rules that must be satisfied before a professional indemnity arrangement may be approved for the purposes of the National Law. Among other things, the proposed rules prescribed:

- a minimum level of cover (\$1.5 million for each and every claim, or each and every loss inclusive of claimant's costs and defence costs)
- run off cover (cover should provide indemnity for run off liabilities of a law practice that ceases by reason of death, retirement or otherwise, for a minimum of seven years)
- non-avoidance cover (cover should not provide the insurer with a right to avoid or cancel cover because of any innocent or non-fraudulent non-disclosure or misrepresentation by the insured).

Since then, the proposed National Law has developed into the 'uniform law' (which will apply in Victoria and NSW) and the proposed National Rules will be known as the 'uniform rules'. At the time of this report, the uniform rules had yet to be made. The proposed National Legal Services Board has been replaced by the (yet to be appointed) Legal Services Council.

Source: COAG NLPR Taskforce (2009).

In other jurisdictions, the relevant law society or bar association arranges for approved insurance cover from market insurance providers. Law societies and bar associations negotiate with insurance providers in relation to provision of indemnity insurance, in some cases negotiating a 'master policy' with one or several insurance providers on behalf of practitioners.

In the draft report, the Commission questioned the need for profession-specific requirements for professional indemnity insurance, noting that:

- there is established economywide regulation of insurance products, overseen by the Australian Prudential Regulation Authority (APRA)
- profession-specific regulations often amount to unnecessary regulatory duplication as many of the professional indemnity insurance products are provided by organisations who are already approved by APRA — this creates compliance costs on legal service providers and unnecessary expenditure by regulators in duplicating work that has already been undertaken.

Accordingly, the Commission suggested that regulation of providers by APRA would be sufficient for legal professional indemnity insurance and recommended that sector-specific requirements be removed.

The Commission argued that these actions could reduce the regulatory costs for the existing providers of professional indemnity insurance and allow the relevant regulators to each focus on their expertise — APRA on the financial viability of insurance products, and legal regulators on the standard and conduct of practitioners.

Some inquiry participants supported the draft recommendation on the basis that the proposed reforms could increase competition in the supply of professional indemnity insurance, thus reducing the cost. For example, the City of Sydney Law Society noted:

There are many members of our Society who have expressed concerns about the high cost of Professional Indemnity insurance in NSW and advocated that the current provider's monopoly be removed by opening it up to a number of insurance providers. (sub. DR249, p. 1)

Other inquiry participants were sceptical about the benefits from implementing the Commission's recommendation, arguing that the current supply arrangements in each jurisdiction are effective in providing access to comprehensive, high quality cover. Most of the evidence used to support the continuation of current supply arrangements related to the (captive insurer) arrangements in NSW, Queensland and Victoria (Law Council of Australia, sub. DR266; Law Institute of Victoria, sub. DR221; Legal Practitioners' Liability Committee, sub. DR178; Queensland Law Council, sub. DR267).

Advocates of current supply arrangements expressed concern that moving away from a single provider model by implementing the Commission's draft recommendation would result in higher insurance costs and lesser quality cover. For example, they argued that commercial insurance providers in a deregulated market could pick and choose firms with the lowest risk profiles and reduce coverage to a minimum, excluding features important to legal practitioners such as run off cover³⁵ (Law Council of Australia, sub. DR266; Legal Practitioners' Liability Committee, sub. DR178; Queensland Law Society, sub. DR267).

The Law Society of NSW (sub. DR174) expressed concern that premiums set by commercial insurers in a deregulated market could be expected to exclude some solicitors from practising. It suggested sole practitioners, small law firms and lawyers operating in high-risk areas could find it particularly difficult to obtain affordable insurance.

Several submissions pointed to the experience of lawyers in the United Kingdom as evidence of the adverse outcomes associated with moving from a single provider model for professional indemnity insurance to a multiple provider model. The Legal Practitioners' Liability Committee (sub. DR178) argued that since the Law Society of England and Wales migrated from a single provider model to a multiple provider model around a decade ago, the quality and availability of cover for lawyers has declined markedly, while the average cost has increased. The Law Council of Australia (sub. DR266) similarly

³⁵ In the legal profession, claims may arise many years after a practitioner or firm has ceased to practice. While a claim may relate to a period when a practitioner was insured with an insurer, the claim itself may not be made until after the insurer has ceased to provide the practitioner with cover. Run off cover provides indemnity for run-off liabilities of a law practice which ceases by reason of death, retirement or otherwise.

argued that reforms to the professional indemnity scheme in the United Kingdom have led to significant volatility in premiums and created uncertainty, particularly for small practices. It noted many small practices had to join an ‘assigned risk pool’ because they could not secure insurance coverage in the commercial market, while other practices closed.

The Legal Practitioners’ Liability Committee rejected the Commission’s suggestion that regulation of providers by APRA would be sufficient for legal profession indemnity insurance. They argued that, unlike state regulators of the legal profession, APRA has no role in prescribing terms and conditions for professional indemnity insurance cover and has no legislative mandate to do so. The Committee cautioned:

Removal of the requirement for regulatory approval in respect of insurance provided by single provider products for legal practitioners means there will be no minimum standards and will result in legal practitioners and their consumer clients suffering disadvantage with poorer quality cover with no guarantee of availability. (sub. DR178, p. 1)

The Legal Practitioners’ Liability Committee (sub. DR178) argued that other professions that buy insurance in the market from APRA-approved insurers (such as financial advisors and accountants) generally have inferior terms of cover to that provided by the sector-specific insurers for legal practitioners.

The Legal Practitioners’ Liability Committee noted that the current regulatory cost of sector-specific insurance for legal practitioners in each state or territory is negligible. Consequently, there would be little saving in the cost of regulation by adopting the Commission’s draft recommendation. However, such arguments ignore the additional costs — beyond just the cost to regulators in administering insurance schemes — such as the quality of the product in the absence of competition, the costs to lawyers and, ultimately, the cost to clients.

As noted by several participants, the National Legal Profession Reform Taskforce considered whether there was scope to remove regulatory barriers to competition in the supply of professional indemnity insurance in 2009. The Taskforce observed that previous independent reviews of the captive insurance arrangements in NSW (2001) and Victoria (2004) did not established a case for moving away from single provider arrangements and concluded:

The Taskforce does not consider the fundamentals of the insurance market or the arrangements for professional indemnity insurance have changed to warrant a re-examination. (COAG NLPR Taskforce 2009, p. 10)

While a detailed examination of the relative merits of different models for providing professional indemnity insurance is beyond the scope of this inquiry, the Commission does not accept the proposition that a single provider model is inherently superior to a multiple provider model. In its 2004 study on *National Workers' Compensation and Occupational Health and Safety Frameworks* (PC 2004), the Commission examined the relative merits of public monopoly provision of insurance and competitive private provision of insurance. It found that the literature did not provide a powerful case for either approach. There were examples of significant failures under each approach and those failures were not necessarily evidence of inherent flaws in public or private underwriting. Other factors, such as quality and culture of management, were found to have a major influence on cost-effectiveness.

Given the significant potential benefits of competition, such as increased innovation and operational efficiency, good regulatory practice dictates that regulation should not restrict competition unless:

- it can be shown that the benefits to the community from a restriction on competition outweighs the costs, and
- that the objectives of the regulation can only be achieved by restricting competition.

In the Commission's view, no jurisdiction (apart from possibly Victoria) has met this standard with regard to professional indemnity insurance for legal practitioners. Even in the case of Victoria, it has been ten years since the last independent review, during which time market conditions are likely to have changed and competitive supply arrangements may have become feasible. Indeed, the independent review of Victoria's supply arrangements in 2004, which recommended maintaining the existing single provider arrangements, also recommended that:

The Government should monitor changes in the market for [professional indemnity] insurance for other occupations, and for lawyers in other jurisdictions, arising from the introduction of professional standards legislation and other developments to determine whether the recommended approach continues to be the most appropriate approach in the future. (PwC 2004, reproduced in Legal Practitioners' Liability Committee, sub. DR178, p. 50)

The Commission agrees that it is important to periodically review regulation, especially where it restricts competition (and thus reviews must rebut the presumption that competitive provision will generally be best for the community as a whole). Accordingly, the Commission considers that jurisdictions should initiate an independent review of professional indemnity insurance requirements for the legal profession through the Law, Crime and Community Safety Council. The review could consider whether existing requirements 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.

The Commission acknowledges that the institutions in different jurisdictions have varying functions. Comparing which combination of institutional settings and functions is most effective and efficient is important in examining the best practice approach for the regulation of professional indemnity insurance. Further, given that insurance markets typically exhibit economies of scale (through greater pooling of risks),³⁶ and the move towards a national profession, it is timely for a review to consider the matter from a national perspective. Following the national review, it would be up to individual jurisdictions to determine if the recommendations should be implemented in whole or in part given their broader regulatory institutional framework (and market structure) for the legal profession. Given its independence, and role in many cross-jurisdictional reviews and COAG reporting functions, the Productivity Commission itself is well-placed to conduct such a review.

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.

Regulation of trust accounts

Lawyers' trust accounts are used to hold money on behalf of a client in connection with the provision of legal services, including holding the proceeds of a court action. The manner of handling money in a trust account is regulated by legal profession Acts in each state and territory, which cover how money must be deposited, recorded and disbursed (among other things).

Currently, firms operating across borders must keep separate accounts in each jurisdiction. The compliance cost savings of allowing single, national trust accounts was estimated to be a large share of the potential benefits of the *National Legal Profession Reform* process — some \$11.6 million of the roughly \$17 million benefits per year (ACIL Tasman 2010). These savings were attributed to larger firms — at the time, ACIL Tasman (2010) identified nine large and 75 medium firms that could benefit.

³⁶ In some other professions, such as engineering, professional indemnity insurance is offered on a competitive, and national, basis.

The Commission understands that a proposal for a national trust account was one of the more contentious issues in the national reform process. Smaller jurisdictions feared that firms might relocate their trust accounts to large jurisdictions, which would affect the amount of interest from trust accounts going to ‘Public Purposes Funds’ (PPFs) in each jurisdiction. During the reform process, the idea of developing a funding formula (to divide interest revenue between jurisdictions) was floated, but was not a feature of the draft National Legal Profession Legislation (AGD 2011a; The Law Society of WA 2009).

Even without moves to adopt a single national trust account there is potential to minimise costs through memoranda of understanding between regulators to mutually recognise audits of multi-jurisdictional firms’ accounts, particularly where these are conducted according to nationally agreed accounting standards.

A further concern relating to the compliance burdens from trust accounting was raised by smaller firms, who considered burdens to be disproportionate, particularly when dealing with small sums of money:

... [trust accounts] create a lot more work, particularly when we’re talking about small sums of money ... there are a lot of cases where the efficiency for legal practice would be enhanced if we didn’t need to have a trust account for certain amounts of money. I mean, I’ve just been doing trust account things this morning and it’s a headache for a small practice. We spend a lot of time on that, perhaps unnecessarily. (Law Council of Australia, trans., p. 1265)

Exempting small transactions from trust account requirements — and instead relying on the normal deposit-taking methods used by other professions (such as dentists) — could reduce compliance burdens, while still allowing for proportionate consumer protection.

Where larger amounts are involved, there is a consumer protection rationale for holding the funds on a trust basis. However, some participants, such as Chris Snow (trans., pp. 396–8) raised concerns that the current regulation of trust accounts fell short on consumer protection grounds, particularly in cases of fraud. Mr Snow instead advocated a ‘single national statutory, fully insured trust account’ (trans., p. 397). The nature of the funds as capped, last resort payments in some jurisdictions suggests a focus more on the financial sustainability of the fund itself than on the immediate protection and compensation of defrauded consumers.

Reforms to exempt small amounts and improve consumer protection and compensation could reduce the overall amount of money held in trust accounts, thus reducing the interest from the accounts available for PPFs. This would further contribute to a pre-existing trend, where the PPFs available have been declining, in part due to sustained low interest rates. Changes in technology have also contributed:

... there are also risks to PPFs arising from changing technology, such as e-conveyancing. The Law Council notes the possibility that under the forthcoming e-conveyancing regime, trust monies for property transfers could be deposited into a central account, rather than solicitor trust accounts, thereby potentially reducing the interest that could flow to PPFs. (Law Council of Australia, sub. DR309, p. 5)

Several participants also questioned the underlying need for such accounts, particularly given that changing technology has given rise to more convenient alternatives. The preference of users to avail themselves of these technological changes reduces the funds deposited in trust accounts. This in turn decreases the amount of funding available from the interest on these accounts in a manner that is neither smooth nor predictable. This volatility contributes to the funding uncertainty faced by legal assistance providers.

A further issue relates to the use of the funds obtained from the interest on trust accounts.³⁷ The manner in which these funds are distributed varies significantly between jurisdictions, and can be controlled by law societies, attorneys-general (sometimes oversighting law societies) or independent bodies. In some cases the distribution of funds are set out in legislation. For example, in Victoria funds are only available for distribution to community organisations after payments have been made to fund legal professional regulators, and to professional associations for continuing legal education programs (Vic LSB 2012). Funds can also be used for such things as:

- disciplinary costs
- regulatory bodies, such as professional boards and legal services commissions
- projects aimed at legal education and community awareness
- legal aid commissions and particular community legal centres
- compensation claims for defaults by law firms
- administration of the funds themselves, including auditing and staff costs.

This range of uses for PPFs, particularly in relation to disciplinary costs, stands in contrast to the approach generally used in North America. There, ‘interest on lawyers’ trust accounts’ (IOLTA) revenue is devoted to legal aid, education and research, rather than disciplinary costs (which are typically covered through practising certificate fees).³⁸ IOLTA also obtain their funds in a different manner to Australian PPFs — instead of acquiring all of the interest on the amount, IOLTA only gather funds where it would be impractical (due to transaction costs) to recover the interest for clients:

³⁷ The total amount in a fund can also include revenue from other sources, such as earnings from investment, fines, and, in some cases, contributions from practising certificate fees.

³⁸ For example, in the United States, the funds are directed to ‘enable nonprofit legal aid providers to help low-income people with civil legal matters such as landlord/tenant issues, child custody disputes and advocacy for those with disabilities’ (IOLTA.org 2014). In Canada, the Alberta Law Foundation, which administers the funds, has its objects defined in statute as conducting research into law reform and the administration of justice, maintaining law libraries, contributing to legal education and knowledge and providing assistance to native people’s legal problems. The fund is also required to contribute 25 per cent of its revenue to legal aid (Alberta Law Foundation 2011).

The program does not use interest money from all client trust deposits — only those that are nominal in amount or to be held for a short period of time. No client is deprived of any practicable income opportunity. If these deposits were placed in separate, interest bearing accounts, the administrative costs to the law firm and the service charges of the financial institution — coupled with the resulting tax liability to the client — would more than offset any income earned. (Arkansas Access to Justice Commission 2014)

Overall, while the Commission is mindful of issues of unnecessary regulatory burdens, the degree of regulation required for trust accounts is a function of their continued role. Given their receding importance as a funding source, the Commission considers that jurisdictions could investigate opportunities to reduce compliance burdens in relation to trust accounts, particularly by exempting small amounts from trust account requirements. The jurisdictional reviews should also consider removing any potential barriers to adopting new technologies (including new financial products) that facilitate the handling of clients' money, as well as the adequacy of consumer protections for amounts held in trust (or handled through new technologies). Such reviews would also afford an opportunity to consider the appropriate distribution of any interest from the trust accounts, be it back to the individuals on whose behalf funds are held, to legal aid and education, or to disciplinary functions.

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.

7.4 Limited licences

It is an offence for non-lawyers to provide legal services. This ‘reservation of practice’ rule exists to allow the profession to regulate itself on quality grounds. 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.

However, not all areas of the law remain the exclusive domain of lawyers. Industrial tribunals have always involved lay advocates, and patent attorneys have practised in patent matters since before federation. More recent reforms have led to the creation of particular ‘specialists’ who operate in limited areas, such as conveyancers, migration agents and tax agents, and are allowed to offer services within their designated area of expertise.

The Law Council of Australia supported the retention of the reservation of practice for a range of reasons (box 7.6). However, each of these grounds suggests that *some level* of regulation is required, but not that the *current* level of regulation is appropriate for every service.

Box 7.6 The Law Council’s grounds for reserving practice

The Law Council supported the retention of current arrangements for the reservation of practice on several grounds:

- (a) Australian lawyers are subject to the most extensive regulatory framework of any professional service provider in Australia. Non-lawyers are not subject to the same standards and expectations of ethical or professional conduct and are not subject to the same complaints handling and investigatory processes, and supervision by the court or legal services regulators;
- (b) Australian lawyers are subject to extensive education and professional training requirements both before and after they become eligible for admission as a legal practitioner. This requires specific knowledge about a broad range of legal areas (covered by the Priestly 11) ... expert knowledge about their areas of practice or specialisation and continuing education with respect to legal practice skills;
- (c) Legal practitioners are required to hold a high level of professional indemnity insurance, to ensure clients can be indemnified in the event of malpractice or negligence on the part of the practitioner. This is not a standard requirement for non-lawyers. All jurisdictions have a fidelity fund, the purpose of which is to provide compensation to clients who have lost trust money or property due to dishonest conduct by a practitioner or law firm; and
- (d) Legal practitioners owe specific duties to their clients and to related parties, including fiduciary duties and a requirement to observe confidentiality and client legal privilege. In broad terms, there is a duty for all lawyers to act in their client’s best interests, which is a professional obligation second only to the lawyer’s paramount duty to the Court and to the administration of justice. These obligations are unique to the legal profession and do not affect most non-lawyers. Breach of these obligations by lawyers can have serious professional consequences. (sub. 96, p. 105)

First, in relation to the regulatory framework, arguments that non-lawyers are not subject to the same standard as lawyers presume that any reforms would lead to an ‘open slather’ and any person could offer any service, unburdened by any regulation at all. This need not be the case. Indeed, careful consideration of the introduction of new specialities could afford an opportunity to consider appropriate and tailored regulation suited to that specialty — including the duration of training and level of insurance required by the relevant risk profile. While this does not mean that new specialities would go unregulated, equally it should not necessarily mean that new specialties are burdened with exactly the same regulation as generalist lawyers (unless their risk profile and a considered analysis of the costs and benefits to the industry and consumers suggests otherwise).

The profession currently incorporates ‘tiers’ of speciality in the form of the delineation between barristers and solicitors and, to a lesser extent, classes of practising certificates. Contemplating further delineation, and adjusting regulation in line with risk and responsibility, simply adds granularity to this pre-existing concept. Indeed, some tribunals in Australia (chapter 10) allow non-lawyer representatives (for example, in employment and work health and safety matters).

Second, as identified above, graduate lawyers commence in the workforce with a substantial degree of embedded ‘human capital’ (investment in their own education), and seek to recoup their costs through their work. More narrowly defined roles could allow for more tailored education with flow on effects for the prices of legal services:

Bringing down the price of legal help from a luxury good to a commodity can only promote planning, advice, and dispute resolution. That requires increasing the supply and lowering the cost of supply, by allowing more nonlawyer professionals to enter the field without first spending three years and six figures to acquire a full-fledged JD. Specialist professionals need not acquire that breadth of knowledge if they do not plan to be jacks of all trades. Perhaps law schools and colleges could develop shorter paraprofessional training, akin to paralegal courses, to prepare people to handle unemployment compensation, disability claims, uncontested divorces, estate planning, and similar specialized tracks. (Bibas 2013, p. 1306)

There are further precedents in other jurisdictions for considered and specific relaxing of the reservation of practice. In the United States, Washington State’s newly founded Limited License Legal Technician (LLLT) Board has developed rules that will soon lead to the start of the first class of LLLTs, focused on family law matters (Kittay 2013). The course will run for one year. While the process of implementing limited licences in Washington State has been arduous (box 7.7), it is seen as a model for other jurisdictions that are seeking to introduce similar concepts.

Box 7.7 Introducing limited licences: experience in the United States

In some jurisdictions in the United States, non-lawyers are allowed to perform some legal tasks. For example, in California, paralegals working under supervision can assist consumers in limited ways, such as helping to fill out forms.

Washington State has expanded on this concept by introducing limited licences for legal ‘technicians’, with clearly specified abilities:

... technicians must be trained and approved by the Limited License Legal Technician Board. They work independently and help clients with tasks including selecting and completing court forms, informing them of procedures and timelines and reviewing and explaining pleadings. They are not, however, allowed to represent their clients in court and cannot negotiate with opposing counsel on the clients’ behalf. (Yarbrough 2013)

The road to establishing limited licences has been a long one. While the first group of ‘technicians’ (focused on family law) take their licensing exams in September 2014 (Kittay 2013), its origins can be traced back to 2001, when the Washington State Practice of Law Board was established to, among other things:

... to issue advisory opinions about the authority of non-lawyers to perform legal services and to make recommendations to the Supreme Court about services that non-lawyers could perform to fill the need for legal services. (Yarbrough 2013)

After considering the issue of limited licences, the Board submitted a rule to the State’s Supreme Court in 2008. The rule was not approved until 2012, and only after modifications. In approving the law, the Washington Supreme Court explained that:

... the rule was necessary because the legal profession’s efforts to close the access to justice gap have not successfully stopped the growth of low and moderate income citizens who have no access to affordable legal assistance. (Rigertas 2013, p. 384)

Similarly, despite studies supporting the concept of licensing legal technicians in the late 1980s and early and mid-1990s, the State Bar of California has only recently decided to support limited licensing. This decision followed the conclusion of a State Bar working group that conducted hearings in 2013. In line with the experience in Washington State, the Californian proposal faced opposition that came ‘almost exclusively from lawyers’ (Kittay 2013). However, some also pointed out that limited licences were targeted in areas of unmet legal need, so in theory they should not detract from the existing caseloads of lawyers in the market. Additionally, there was recognition that sole reliance on the ‘full’ lawyer model did not meet the legal needs of the modern market, as members of the California State Bar remarked:

Despite fundamental changes in society and the needs of clients, the basic legal service delivery system we use today has not fundamentally changed for more than 150 years ...

Adding up what it costs for a fully licensed lawyer to deliver full-service legal services in today’s market, it is hard to deliver such legal services for less than \$100 an hour, a price many people cannot afford ... There’s a market below that to be served by trained professionals. ... Lawyers are not serving that market ... We have simply priced ourselves into oblivion. (Yarbrough 2013)

For example, New York State is examining the use of non-lawyers to provide some assistance in simple legal matters focused on the areas of housing, elder (that is, aged) law and consumer credit (Rigertas 2013). The New York City Bar Association (NYCBA 2013) also recommended the adoption of ‘legal technicians’ who could deliver certain services such as gathering facts and documents and completing forms, but not participate in judicial and administrative hearings. The NYCBA noted that some regulation would be required,

but that the ‘Creation of a regulatory regime that places undue burdens on those activities should be avoided’ (2013, p. 3). This focus on legal technicians operating in discrete subject areas is supported by the local judiciary, with the Chief Judge of the New York Court of Appeals recently stating that:

The high cost of legal services is a real barrier to a growing part of our population gaining access to justice. If lay persons with training in discrete subject areas can dispense legal information or assistance expertly and more cheaply, we should be exploring how best to accomplish that, without diminishing the great legal profession in our state. (Lippman 2014, p. 19)

Similar reforms are also being considered in California, where the State Bar (2014) established a Limited License Working Group in 2013. In line with the working group’s recommendations, the State Bar recently created a Civil Justice Strategies Task Force to further study the limited licence concept (among other potential reforms).

Analysts in the United States acknowledge that while limited licences do not resolve all access to justice issues, they nonetheless have a role to play:

Washington State’s legal technician program may not be perfect, and it will not solve the access to justice problem entirely. But the program does offer a well-regulated framework for enhancing access to justice meaningfully, and perhaps even equitably, by authorizing trained professionals to practice in discrete, limited areas of law. (Holland 2013, p. 128)

Examples of limited practice also exist in other countries. In the United Kingdom McKenzie Friends and lay advocates are allowed to provide assistance to those who would otherwise be self-represented (chapter 14). In several European countries, that operate under the civil law system, notaries serve as impartial, independent professionals who assist both parties (rather than representing the interests of only one party) in completing a range of transactions:³⁹

In five central European countries ... notaries handle real estate transactions and registries, security interests, corporate transactions from formation through liquidation, marital property contracts and arrangements, same-sex civil unions, uncontested divorces, probate and intestacy proceedings, consumer financial services, and alternative dispute resolution. In some cases, consumers may choose whether to hire a lawyer or a notary for the same type of transaction. In Germany, notaries handle real estate conveyances, mortgages, incorporations, wills, estate and tax planning, powers of attorney, and important contracts. (Bibas 2013, p. 1304)

Similarly, Japan allows many kinds of (non-lawyer) legal professionals to appear in court, including ‘... patent attorneys, administrative law specialists, judicial scriveners, tax

³⁹ Notaries in civil law systems (as in Europe) typically complete similar training to lawyers (including a university degree, professional training and ‘apprenticeship’ practice), with a focus on notarial law (primarily private transactions) instead of court-based skills such as advocacy, procedure and evidence. While the concept of notaries is common across civil law systems, the exact arrangements vary. For example, in some countries they work solely as notaries, but in Germany some ‘advocate-notaries’ practise as both lawyers and notaries. Similar to elements of legal professional regulation, some systems have anti-competitive restrictions on the profession, including limits on the overall number of notaries, and fixed fees set by government (Schmid 2012).

attorneys, social insurance and labour specialists, and in-house transactional lawyers’ (Bibas 2013, p. 1304).

Based on the pre-existing experience both overseas and in Australia, the Commission considers there is merit in further delineating legal specialties through limited licences.

The role of limited licences

Limited licences are targeted at priority areas of need in legal services provision. They should be seen as supplements to, not replacements for, existing legal services. In this way, limited licences can increase access to justice beyond the level that lawyers alone are able to provide. Importantly, this means that they would not automatically apply to each area of law, including those areas already well served by lawyers. For example, ‘no win no fee’ billing provides a private market method for consumers to access legal services in relation to monetary claims. As such, there is little need to contemplate limited licences in those well-served areas, allaying concerns expressed by some participants (Insurance Council of Australia, sub. DR193; NRMA Insurance, sub. DR238) of adverse effects on compensation schemes.

While they will not replace the core business of a lawyer, such new models can place some competitive pressure on the fringes, perhaps preventing high charges for relatively simple activities acting as cross subsidies for core legal services. Together with transparency requirements in billing regulation (chapter 6), this competitive pressure could help to ensure that lawyers’ service charges more closely reflect their costs.

As is the case with unbundling (chapter 19), governments and regulators can delineate the stages in legal advice by defining new specialties. Indeed, progressive introduction of limited licences is likely to facilitate further unbundling opportunities as properly informed consumers could use the services of particular specialists for certain stages of a legal process, and only engage the (expensive and skilled) barristers or solicitors (at the peak of the professional ‘pyramid’) when necessary. This has the benefit of reduced costs to consumers and would also free up the time of the more experienced practitioners to focus on complex matters. Allowing specifically trained professionals to perform limited tasks in this way is a concept that has been accepted in other professions, such as medicine:

In medicine, where lives are at stake, we let nurse practitioners, midwives, paramedics, and urgent care clinics provide certain routine services but refer more complex matters to doctors. ... So too the law could let paralegals, social workers, and court clerks assist and advise litigants in routine criminal and civil cases, as well as those contemplating routine wills, divorces, contracts, corporations, and the like. (Bibas 2013, p. 1305)

Understanding the role and nature of limited licences is key to understanding the risks and benefits that they present. In targeting a particular aspect of legal need, they allow an appropriately trained and regulated legal technician to perform a *limited* range of tasks in a *specific* area of law — for example, a family law limited licence holder would not be permitted to appear in court, nor would they be permitted to provide advice on personal

injury matters. Accordingly, the education and training needs, scope of regulation and level of insurance should be tailored to lower levels than ‘general practitioner’ solicitors, allowing for lower input costs for providers.

In their initial opposition to the concept, the Law Council of Australia appeared to ignore the tailored nature of the licence (and assumed that they would allow advocacy), and argued that limited licence holders should be subject to the same standards as lawyers:

Persons charged with the responsibility for advising on and advocating for individuals’ legal entitlements should face the same level of probity, regulation, liability and insurance as the legal profession. (sub. DR266, p. 38)

As the Law Council went on to note, this would likely eliminate most of the cost savings, and therefore competitive advantages relative to lawyers. The Commission rejects the notion that limited licence holders should be subject to the same standards as lawyers. While there will be complex cases that require the breadth of skills that only a fully trained lawyer possesses, particularly those that require advocacy in a court, these are not the sort of cases that a limited licence practitioner is intended to deal with. However, there will also be many matters of a more ‘procedural’ nature. In these procedural matters, a knowledge of rights and the ability to navigate a particular part of the legal system will be the appropriate level of expertise (for the appropriate price) to help many consumers.

Further, as a retired Chief Justice of the Supreme Court of Texas noted (in relation to limited licences in the United States), maintaining such absolute notions of professional ‘purity’ may be untenable in the face of a significant lack of access to justice:

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 nonlawyers 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 accessible to a wider class of society.’ (Jefferson 2013, pp. 1979–80)

As noted in chapter 14 (table 14.1), the Commission envisages that limited licences would exist on a spectrum of legal advice, between self-represented litigants and ‘full service’ lawyers. In a manner similar to unbundled services provided by lawyers, limited licences can benefit two broad categories of consumers who are currently forced to choose between either end of the spectrum. First, those who would otherwise entirely self-represent due to cost could be able to afford some trained assistance in navigating the system. Second, those who can afford a lawyer, but do not require advocacy, may be able to receive sufficient assistance at a lower cost, without needing to engage a traditional lawyer.

Designing limited licences

In formulating an appropriate pathway for the implementation of limited licences, the Commission has been guided by the considerations above. In doing so, it has identified priority areas of law, appropriate limits to the scope of allowed services, and, consequently, appropriate levels of education and regulation. These are discussed in turn below.

Priority areas of law

The first step in designing limited licences is to select the areas of law where they would be of most benefit. While areas of unmet legal need must be considered, this is just one of a number of considerations. Other relevant factors include the impact of the unmet legal need, and the nature of the area of law. In particular, the characteristics of some areas of law will be more amenable to ‘partitioning’ the legal process into stages such that a limited licence provider could be appropriately trained and make a valuable contribution.

The Commission has focused on family law as a potential priority area for developing a limited licence as family disputes have large impacts on the people involved, particularly in violence or child custody matters. As noted in chapter 24, family breakdown is often a trigger for the onset (or continuation) of deep and persistent disadvantage.

Some participants argued that the nature of family law was amenable to the use of limited licences:

... family law matters are well placed for limited licences because most of the initiating considerations are within one piece of legislation, the Family Law Act. Many ADR services providers need to be versed in the Family Law Act to provide their existing non-legal offerings effectively. But because of the phraseology of the Legal Profession Act, there remains a separation between legal work and non-legal work at the expense of the end-user through semantic double-handling. (Andrew Watkins, sub. DR308, p. 13)

Others urged caution, noting that some family matters can ‘spill over’ into a wider range of issues:

Non-lawyers are already being used in the family law system and their role should not be broadened to provide legal advice through a specific training process. The issues in family law disputes are complex and long-term especially where there is family violence. The suggestion that non-lawyers could be used in family law proceedings to provide legal advice is unsafe. (Women’s Legal Service Tasmania, sub. DR262, p. 5)

However, such concerns ignore the niche role of a limited licence holder. Limited licences are intended to supplement, not replace, existing private and legal assistance services. Limited licence holders would be regulated, consistent with international developments. Limitations on the tasks they could perform would ensure that more complex issues would still be handled by lawyers. Training should also include awareness of when and how to ‘escalate’ or refer an issue.

Overall, the Commission considers that given the experience overseas, the impact of unmet need and the relatively contained nature of the *Family Law Act 1975* (Cth), the development of limited licences should begin with a family law limited licence.

Importantly, while they may not be appropriate for many areas of law, limited licences should not be seen as isolated to the pilot area of family law. Other areas, such as consumer credit, housing and elder care (which are currently being examined in the United States) could be investigated and implemented at a later date, once family law limited licence holders have been in operation for at least two years. The development of those subsequent licences would use the same template and institutional architecture as the family law limited licence (below).

Periodic review should examine if there is scope to develop further limited licences. This is in line with the existing approach in Washington State, where limited licences will expand with new practice areas and corresponding training to be approved and developed ‘within the next year or two’ (Washington State Bar Association 2014).

Appropriate limits to the scope of allowed services

In each priority area, the scope of tasks that limited licence holders are able to undertake must strike a careful balance. On one hand, the scope should not be too narrow, and should ensure that valuable services can be delivered to consumers in a manner that could form a sustainable business model for a provider. On the other hand, too broad a scope would necessitate a corresponding increase in education and regulation requirements, and reduce the cost advantage relative to ‘general practitioner’ lawyers. Several factors provide guidance for the development of limits to the scope of allowed practice.

First, the intricacies of court process, and likely complexity of cases that eventually proceed to court, suggest that representing a client in court requires the specialist training of advocates. Therefore, as a general rule, limited licence holders should not be able to formally represent clients in court proceedings. This may vary by area of law and by jurisdiction. For example, in some areas it may be appropriate for licence holders to attend tribunals, just as planners do. Further, consideration should also be given to whether limited licence holders would have the appropriate expertise to directly instruct barristers (just as some professional associations can, such as those representing accountants, actuaries and insurers).

The model used in Washington State provides a starting point for considering the scope of tasks that should and should not be performed by licence holders (box 7.8). Once the role of limited licence holders is determined, clearly stipulating the scope of their licence creates certainty for governments, regulators, educators, those already in the market, and those considering undertaking the education and training required to become a limited licence holder.

Box 7.8 The scope of practice for limited license holders in Washington State

The scope of limited licenses in Washington State are clearly defined under rule 28 of the Washington State Supreme Court Admission and Practice Rules (APR 28).

What can limited license holders do?

In specifying the allowed scope of limited licenses, APR 28 states that a limited license legal technician (LLLT) must first ascertain if a matter is within their defined practice area (that is, family law). If not, they are to suggest the client seek a lawyer. If the matter is within their defined practice area, the rule states that LLLTs may:

1. Obtain relevant facts, and explain the relevancy of such information to the client;
2. Inform the client of applicable procedures, including deadlines, documents which must be filed, and the anticipated course of the legal proceeding;
3. Inform the client of applicable procedures for proper service of process and filing of legal documents;
4. Provide the client with self-help materials prepared by a Washington lawyer or approved by the Board, which contain information about relevant legal requirements, case law basis for the client's claim, and venue and jurisdiction requirements;
5. Review documents or exhibits that the client has received from the opposing side, and explain them to the client;
6. Select, complete, file, and effect service of forms that have been approved by the State of Washington, either through a governmental agency or by the Administrative Office of the Courts or the content of which is specified by statute; federal forms; forms prepared by a Washington lawyer; or forms approved by the Board; and advise the client of the significance of the selected forms to the client's case;
7. Perform legal research and draft legal letters and pleadings documents beyond what is permitted in the previous paragraph, if the work is reviewed and approved by a Washington lawyer;
8. Advise a client as to other documents that may be necessary to the client's case, and explain how such additional documents or pleadings may affect the client's case;
9. Assist the client in obtaining necessary documents, such as birth, death, or marriage certificates.

(continued next page)

Box 7.8 (continued)

What can't limited license holders do?

Just as it stipulates what LLLTs are allowed to do, APR 28 also explicitly prohibits LLLTs from performing certain acts. Specifically, the rule states that LLLTs shall not:

1. Make any statement that the Limited License Legal Technician can or will obtain special favors from or has special influence with any court or governmental agency;
2. Retain any fees or costs for services not performed;
3. Refuse to return documents supplied by, prepared by, or paid for by the client, upon the request of the client. These documents must be returned upon request even if there is a fee dispute between the Limited License Legal Technician and the client;
4. Represent or advertise, in connection with the provision of services, other legal titles or credentials that could cause a client to believe that the Limited License Legal Technician possesses professional legal skills beyond those authorized by the license held by the Limited License Legal Technician;
5. Represent a client in court proceedings, formal administrative adjudicative proceedings, or other formal dispute resolution process, unless permitted by GR 24(b);
6. Negotiate the client's legal rights or responsibilities, or communicate with another person the client's position or convey to the client the position of another party; unless permitted by GR 24(b).
7. Provide services to a client in connection with a legal matter in another state, unless permitted by the laws of that state to perform such services for the client.
8. Represent or otherwise provide legal or law related services to a client, except as permitted by law, this rule or associated rules and regulations;
9. Otherwise violate the Limited License Legal Technicians' Rules of Professional Conduct.

Source: Washington State Supreme Court Admission and Practice Rules, rule 28.

While the model used in the United States represents a starting point for the development of an Australian limited licence, changes could be made where, due to differences in Australian law, legal need and the legal market, certain prohibitions (or allowances) would not be appropriate. For example, as noted in chapter 24, the Commission considers that appropriately trained limited licence holders could participate in family dispute resolution for property and financial matters. The Commission notes that possible expansions to the scope of limited licences are contemplated in Washington State by making allowances for exceptions and exclusions under the definition of the practice of law (items 5-7 in box 7.8).

Appropriate levels of education and regulation

The cost savings from implementing limited licences come from their targeted education and regulatory requirements. Once the scope of practice for limited licence holders has been clearly identified, education and regulatory requirements can be tailored to that scope.

While it is important to ensure that limited licence holders are sufficiently trained to properly undertake the tasks that are within their scope of practice, it is equally important to ensure that they are not over-qualified. In addition to the relevant area of law, tailored education might involve: core skills necessary for delivering legal advice, including general civil procedure, basic contract law; ethics; ADR techniques and skills required for dealing with clients and running a legal practice (the education requirements for LLLTs in Washington State are detailed in box 7.9). Notably it would not include areas of law that are irrelevant to the practice area (for example, family law licence holders would not be required to understand the intricacies of international trade law), and especially matters explicitly outside of their practice area (such as detailed knowledge of superior court procedures).

Box 7.9 Limited license education requirements in Washington

Applicants for a limited license in Washington State must meet a three-tiered educational requirement. They must have completed:

1. an associate level degree or higher
2. forty-five credit hours of 'core curriculum' (described below) through an American Bar Association approved law school or paralegal program, and
3. 'practice area courses' with a curriculum developed by an American Bar Association approved law school. These courses represent tailored knowledge specific to the topic area, that is, family law. The current requirements are 15 credit hours in total: five credit hours in basic domestic relations, and ten credit hours in advanced and Washington State-specific domestic relations subjects

Core curriculum requirements

The core curriculum requirements are designed to ensure that license holders generally focus on matters of day-to-day legal service provision, with some basic core legal elements. To satisfy the forty-five credit hours of core curriculum requirement, applicants must take the following seven courses at an American Bar Association approved legal studies program:

1. Civil Procedure
2. Contracts
3. Interviewing and Investigation Techniques
4. Introduction to Law and Legal Process
5. Law Office Procedures and Technology
6. Legal Research, Writing, and Analysis
7. Professional Responsibility.

Source: Washington State Supreme Court Rules, Admission to Practice Rule 28, Appendix, Regulation 3.

Similarly, regulation should focus on identifying any risks particular to the limited licence. By tailoring the regulation to the level of risk, the regulation of limited licences can exist along a spectrum. While they would be far from unregulated, equally they would not be

subject to the same degree of regulation as ‘general practitioner’ lawyers (who, in line with their broader education and training can undertake broader tasks and so face broader risks).

Although there are benefits in terms of reduced costs of education and training and better access for consumers, introducing limited licences in Australia would involve some costs. In consultations with the Commission, concerns were raised that new classes of ‘technician’ (limited licence holders) could increase costs for legal regulators as they must be able to regulate, and handle complaints for, a range of specialties, potentially subject to a range of different regulations.

Broadening the regulators’ expertise would require effort (and expense) on their part. However, the Commission notes that a wide remit is not unprecedented — many regulators cover a range of professions. For example, the Australian Health Practitioner Regulation Agency oversees the national regulation of 10 health professions (PC 2012a), and state and territory offices of fair trading are responsible for regulating a diverse range of industries including tattooists, travel agents and funeral providers. While it is mindful of the expense of regulating new professions (in the form of requirements for additional funding), the Commission considers it is likely to be small when compared to the benefits that can arise to consumers, and the community as a whole.

Implementing limited licences

The benefits of developing limited licences are clear — access to justice can be improved, costs can be lowered and appropriate levels of regulation can be implemented. Accordingly, the Commission considers that development of a limited licence in family law should begin as soon as is practical.

Although the experience in the United States provides a good template, the design of an Australian limited licence for family law is nonetheless a detailed and important task. In line with this, the Commonwealth Attorney-General should establish a taskforce to design and implement a limited licence for family law. The taskforce should consist of representatives that provide a range of relevant expertise, including:

- 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.

To draw on existing expertise in consultation and producing considered reports, the taskforce should be lead and supported by the Australian Law Reform Commission. In order to ensure timely implementation of limited licences, the taskforce should report to

the Commonwealth Attorney-General within 12 months of the Australian Government's response to this inquiry.

The Commission notes that, after further considering the model in Washington State, the Law Council of Australia partially revised its opposition to limited licences and instead advocated delay:

... the LLLT scheme in Washington [should] be assessed after it has been operating for a reasonable period, to allow a consideration of whether the scheme has led to any reduction in standards of consumer protection or levels of client satisfaction; and whether it has improved access to justice in that jurisdiction. (sub. DR309, p. 8)

While the Commission is keenly aware of the importance of evidence-based policy, it considers that the evidence presented above is sufficient to commence a detailed investigation of the manner in which to implement limited licences. Further, the period of time between the completion of the Commission's inquiry and the completion of the taskforce's report should be sufficient to examine further evidence from the United States.

Importantly, as in Washington State, the task force structure established above should be used to investigate the implementation of other limited licences categories (identified above) once family law licence holders have been practising for two years. The membership of the taskforce could be tailored to each area to include, for example, consumer credit legal centres and representatives from small claims courts or tribunals.

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.

8 Alternative dispute resolution

Key points

- Alternative dispute resolution (ADR) provides parties with a range of dispute resolution options that are procedurally simpler and potentially less adversarial than resolution by hearings in courts and tribunals. Indeed, ADR is increasingly used by courts and tribunals as an alternative or complement to formal hearings.
- ADR covers a broad range of facilitative, advisory and determinative processes that can be tailored to particular dispute types and circumstances.
 - ADR is often a more efficient and effective method to resolve disputes and can lead to both lower cost dispute resolution and mutually beneficial outcomes being achieved. The parties involved also have more control over the process, which is undertaken confidentially.
 - However, it is not an appropriate mechanism for resolving all disputes and the use of ADR must be accompanied by safeguards that allow for litigation if a settlement cannot be reached. Further, there are concerns that a lack of transparency in ADR processes and outcomes may limit the identification and resolution of systemic legal issues.
- Despite the greatly expanded use of ADR in recent years, there is significant scope to increase ADR use across the civil justice system.
 - Government agencies need to continually improve their practices to attempt to resolve disputes quickly and without recourse to litigation. The development and implementation of dispute resolution management plans would promote certainty and consistency for both administrators and parties in dispute.
 - Courts and tribunals can improve incentives to better encourage disputes to be settled before determination.
 - State and territory governments should partially subsidise small business commissioners (or their equivalent) to provide ADR services to small businesses.
 - More broadly, organisations that resolve disputes should develop and use guidelines to allocate disputes to the most appropriate mechanism for resolution.
- Greater uptake of ADR also requires: improved knowledge and education about ADR in the wider community; triage and advice services that suggest ADR options; practitioners who are experienced and competent; and support to ensure services can cater for diverse needs.
- Evidence on the efficiency and effectiveness of ADR is patchy and would benefit from a standardised set of indicators. This should be developed as part of a broader approach to data collection in the civil justice system.

In the last few decades, alternative dispute resolution (ADR) techniques and processes have gained recognition as a way for individuals and businesses to seek to resolve disputes without recourse to traditional trial and hearing processes. ADR complements other forms of dispute resolution (such as early resolution and hearing processes) and is widely used across a range of civil law areas.

This chapter begins by examining how ADR can be used to resolve legal disputes, and the impacts of doing so (sections 8.1 and 8.2). It also considers the potential for ADR to be applied more widely and how this might be facilitated (sections 8.3 and 8.4). The final section briefly examines how to build a better evidence base in support of ADR activities (section 8.5).

While the work of government and industry ombudsmen makes use of ADR techniques, this work often extends beyond what is considered ADR by also including a level of independent investigation not normally associated with ADR. The unique challenges faced by ombudsmen in discharging their duties as external dispute resolvers are considered in the following chapter.

Other potential roles of ADR in improving access to justice are raised in a number of different areas in this report. There is potential for ADR to help tribunals deliver quick economic and inexpensive justice (chapter 10). The tailored use of ADR to aid in the early resolution of family disputes is more fully considered in a dedicated chapter on family law issues (chapter 24). The role of ADR as required or encouraged by pre-action protocols is further explored when considering duties on parties (chapter 12).

8.1 What is ADR and what role does it play?

ADR refers to a range of ways that people can resolve disputes without resorting solely to court and tribunal hearings for determination. Progressing disputes through formal court and tribunal processes is resource intensive and can be lengthy, costly and stressful for the parties involved (chapter 3). For some disputes, it is more appropriate for parties to seek a resolution through the use of ADR.

ADR methods are employed across the civil justice system to resolve a wide array of disputes and complaints. For example, parties in dispute may engage in ADR privately, supported by legal professionals or ADR practitioners. Indeed, it is not uncommon for companies to agree ADR mechanisms within contracts as their primary enforcement option. Alternatively, specialised dispute resolution bodies may facilitate ADR processes. Services may be publicly- or industry-funded and may operate as part of a larger suite of services to assist disputing parties (such as in the case of legal aid commissions (LACs)). Many government departments also use ADR techniques to lessen the uncertainty and costs associated with litigation. Finally, courts and tribunals often refer or require parties in dispute to participate in ADR, either before or as part of litigation proceedings.

In some cases, ADR is not used to resolve a dispute but rather to narrow the scope of issues in dispute for a court or tribunal to subsequently adjudicate. ADR can also provide guidance for the parties in dispute as to the case's merits and the likelihood of various outcomes if litigation were to proceed.

Given the disparate development and use of ADR across a wide variety of dispute types, there is a range of views as to what is and is not considered ADR and the characteristics of different types of ADR techniques. For the purposes of this report, there are three broad types of ADR processes — facilitative, advisory and determinative — with various specialised processes within each of these broad areas (box 8.1). Each of these vary in their formality, the extent to which outcomes are binding, and in their use of practitioners to assist parties towards a resolution (NADRAC 2012b).

Box 8.1 Exploring ADR processes

Unlike negotiation, where parties in dispute interact directly with each other, ADR involves an independent practitioner who assists parties to attempt to reach a resolution.

Facilitative processes assist parties in dispute to identify issues, develop options, consider alternatives and try to reach an agreement about some issues or the whole dispute. Examples of facilitative processes include mediation, conciliation and facilitated negotiation.

Advisory processes consider and appraise the dispute to provide advice on the facts of the dispute, the law and, in some cases, possible or desirable outcomes and how these may be achieved. Examples of advisory processes include case appraisal, conciliation (where advice is offered) and neutral evaluation.

Determinative processes evaluate the dispute, including the hearing of formal evidence from parties in dispute where appropriate, before making a determination. Examples of determinative processes include arbitration, expert determination and private judging.

Source: AGD (2013a).

In general, facilitative and advisory ADR processes are undertaken with the consent of the parties in dispute and are relatively informal, generally non-binding and seek mutually acceptable agreement based on the evidence, arguments and interests of participants. In contrast, determinative ADR processes are focused solely on the evidence and arguments, and are more formal and binding (but generally, subject to review or appeal).

This chapter considers the full range of ADR processes as described above, noting that some ADR techniques are more appropriate for resolving certain types of legal disputes, or in particular contexts.

8.2 The benefits and costs of using ADR

Why use it?

There can be a number of advantages for parties in resolving disputes through ADR compared with court and tribunal proceedings. ADR can produce overall results that are more satisfactory to all parties involved than through litigation, provided that both sides are willing to constructively engage in the resolution process.

The control that ADR gives people over their own destiny, its potential to repair damaged relationships and the ability to manage sensitive matters in private all offer incentives and good reasons for using ADR rather than courts ... (Cannon 2009, p. 8)

There can be significant savings in cost and time to all stakeholders if disputes can be resolved early and without the need for the dispute to escalate to a court or tribunal.

Even in cases where disputes involve courts and tribunals, ADR can be employed to promote early settlement and minimise hearing times, and so avoid significant costs. Stakeholders note that the time taken to resolve disputes is often more important than monetary costs, as prolonged disputes often restrict the activities of disputants and can result in missed social and economic opportunities.

The cost of a dispute for small business is not merely the financial cost of the lost business and the cost of pursuing resolution (such as legal costs), but also the opportunity cost and emotional stress involved. The opportunity cost includes what the small businessperson would otherwise have achieved for the business using their time and effort. For small business, resolving a dispute takes someone out of the business. (Australian Small Business Commissioner, sub. 23, p. 3)

By choosing to use ADR, parties in dispute have more control over the course of events and, to some degree, the overall outcomes. For example, parties can often choose who the ADR practitioner is and when it takes place. In addition, ADR can also be less formal or more culturally appropriate than a court or tribunal hearing, and this may suit some parties.

While some parties value their ‘day in court’ and derive non-pecuniary benefits from this process, others value the confidentiality of resolving a dispute in private and eliminating the public interest and scrutiny associated with a hearing. The creation of precedents is also avoided (which can be a positive or negative, depending on the circumstances).

Some ADR processes also allow parties in dispute to take an interests-based approach to dispute resolution — that is, the dispute resolution process takes into account participants’ underlying needs and concerns.⁴⁰ According to the (now dissolved) National Alternative Dispute Resolution Advisory Council (NADRAC):

⁴⁰ In contrast, court and tribunal hearings and determinative ADR take a rights-based approach to dispute resolution which considers only the participants’ legal entitlements.

The benefits of ADR in undertaking interests-based processes include people in dispute being able to reach agreements that they are more likely to comply with and which may be more likely to finally resolve the whole dispute. (sub. 109, p. 4)

Anecdotal evidence from consultations corroborated the notion that ADR agreements are more likely to be complied with than court and tribunal determinations.

While there are many benefits to ADR, the Law Society of South Australia noted that there may also be costs in relation to confidentiality and privilege.

There is an absence of ‘standard’ protocols for managing confidentiality and privilege in ADR processes: some lawyers/ADR practitioners are reluctant to recommend mediation and other forms of ADR process to their clients because of the potential exposure to the evidentiary downside if a dispute is not settled. (sub. DR219, Attachment, p. 39)

It was also suggested by the Consumer Action Law Centre (sub. 49) that confidentiality may do more harm than good for accountability and can make it difficult to identify and remedy systemic problems since settlements are not publicly available. It is also difficult to evaluate the quality of services and outcomes.

As discussed below, the Commission considers that these concerns can be managed.

What does the evidence say?

Many stakeholders argued that resolving disputes by ADR is beneficial, efficient and effective, subject to caveats about appropriateness.

It is widely accepted that if a dispute can be resolved quickly, cheaply and fairly through ADR, disputants are generally more satisfied with the outcome than if that dispute had been resolved through court process. (QPILCH, sub. 58, p. 4)

However, relatively few submissions provided robust evidence to demonstrate the benefits of ADR compared with other methods for resolving similar disputes. Quantitative analysis was particularly lacking.

There is a huge gap in information that must be addressed. Energy and resources need to be invested to answer this question [of how much ADR is used and whether it is successful]. (Negocio Resolutions, sub. 52, p. 18)

In part, a lack of quantitative analysis reflects the relatively recent emergence of more systematic and widespread ADR use. But in the main, analysis is limited by challenges in assessing the costs and benefits of ADR. Some benefits, such as harmonious ongoing relationships and the confidentiality of outcomes, are subjective and not easily quantified. Assessments of whether parties who use ADR are ‘better off’ also need to take into account the alternative courses of action. This assumes the counterfactual is known — whereas the outcome of an alternative course may be uncertain, or there may be a range of alternatives.

That said, settlement outcomes and satisfaction rates provide some insights into the effectiveness of ADR for certain types of civil disputes. Many stakeholders who undertake ADR provided the Commission with data on the success rates of ADR in their field of expertise (box 8.2).

Box 8.2 ADR success rates

Stakeholders and research studies indicate that the success rates of ADR across specific areas of law are relatively high. For example:

- Legal Aid NSW Family Dispute Resolution achieved a full or partial settlement rate of 81 per cent in 2012-13 (sub. 68).
- Annual reports of the Office of the Victorian Small Business Commissioner indicate that around 70 to 80 per cent of matters resolve at mediation (VSBC 2013).
- The Administrative Appeals Tribunal (AAT) reported that in 2012-13, 79 per cent of applications were finalised without a decision on the merits following a hearing (sub. 65). However, this figure may overstate the success of ADR as finalisations also result from dismissals, withdrawals and agreements reached without ADR.

More generally, ADR practitioners report that ADR is an effective means of settling disputes with 93 per cent reporting settlement outcomes in 50 per cent or more of disputes and 57 per cent reporting settlement outcomes in 75 per cent or more of disputes (Unpublished survey of ADR practitioners undertaken in 2013 by the Attorney-General's Department).

While high success rates of ADR are one indicator of the effectiveness of ADR, they may not tell the full story. On the positive side, ADR can be more accessible for parties who are not familiar with the formal procedural rules of courts and tribunals, and allows parties to work constructively on long-term solutions to their legal problems. These benefits are not captured in settlement outcomes. On the negative side, some argue that success rates may be high because some parties are inappropriately pressured into settlements, perhaps because of a power imbalance — though satisfaction rates give some indication of how people perceived ADR.

Analysis from the *Legal Australia-Wide (LAW) Survey* indicates that people who finalised their disputes by ADR (through, for example, formal mediation, conciliation or dispute resolution sessions) were 'very satisfied' in 34 per cent of disputes, relative to 44 per cent of disputes finalised in courts and tribunals. However, there was a similar proportion between the two methods (75 and 72 per cent, respectively) that expressed any form of satisfaction with the outcome of the dispute (stating that they were 'very' or 'slightly' satisfied) (Commission estimates based on unpublished *LAW Survey* data).

Rates of satisfaction appear to be higher among businesses. For example, satisfaction rates for the Victorian Small Business Commissioner's (VSBC's) mediation services were 93 per cent, with parties themselves more satisfied than their legal representatives (Sourdin 2012b).

A number of independent research studies have examined ADR practices in more depth and reported generally positive outcomes across a range of indicators.

Family dispute resolution services in LACs are quite successful with National Legal Aid (sub. DR228) reporting a full or partial settlement rate average of 77 per cent nationally in 2011-12. These results are particularly encouraging given that the family law matters that use these services involve complex issues and often highly conflicted parties in acute circumstances.

Further, previous cost benefit analysis suggests that LAC family dispute resolution programs deliver benefits that outweighed costs (KPMG 2008; PwC 2009b). This model for family dispute resolution was effective in avoiding high costs of litigation, enabled management of more complex legal and support needs, and was effective in identifying family violence and child abuse early in the process (KPMG 2008).

There has been a focus in recent years on encouraging parties to seek to resolve their disputes before approaching the courts, such as through obligations in pre-action protocols (including through ADR). These requirements (and assessments of their effectiveness) are discussed in greater detail in chapter 12. But overall findings indicate pre-action requirements that attempt to encourage the resolution of disputes using ADR work well, are effective in resolving disputes, are mostly regarded as procedurally fair and just, and could lead to cost and time savings even where litigation had commenced (Sourdin 2012b).

While this evidence shows that ADR can be effective in particular contexts, it should not be interpreted as support for the universal application of ADR. The nature of civil legal disputes varies, and so too does the suitability of ADR. This was borne out in research by Sourdin (2012b) who found that the benefits of pre-action requirements varied considerably according to the nature and characteristics of the dispute, and was predicated on parties having a genuine interest in settling prior to litigation.

Indeed, there are some circumstances where the use of ADR may not be considered appropriate. These have been identified by stakeholders as circumstances in which:

- there is an imbalance of power between parties because of socioeconomic disadvantage, or a history of violence between the parties
- there is an unwillingness of parties to engage in constructive ADR, or to acknowledge that there is a problem
- there is little or no prospect of a successful outcome, such as when claimants are unreasonable and inflexible or when disputes are vexatious
- it is in the public interest to set a precedent that can guide future dispute resolution, particularly if a dispute type is common and recurring
- one party wants to send a public message to deter future action (such as defending intellectual property rights)
- participation would result in personal or financial hardship

-
- time is a crucial factor and a party wants to stop a disputed action immediately, such as an interim injunction to prevent immediate environmental harm.

In these instances, mandatory ADR requirements prior to litigation may delay resolution and increase costs, and thereby inhibit efficient and effective resolution of disputes.

8.3 Can ADR be used more extensively?

While there are some circumstances in which the nature of the legal dispute and the individual circumstances of the parties involved mean that ADR is not an appropriate resolution mechanism, the available evidence suggests that, outside these circumstances, the use of ADR can be beneficial. And there are some areas — such as court and tribunal processes, government disputes and private disputes — where there is potential to better target and encourage greater use of ADR.

- For court and tribunal processes, broadly based ADR requirements — prior to approaching the courts, or prior to any hearing if parties have approached a court — may be appropriate so long as there are safeguards and exemptions that do not constrain access to justice. Alternatively, requirements to undertake ADR in the first instance may be justified where there is an evidence base to suggest good outcomes or where there have been good outcomes in a related field.
- For disputes with government, processes used by some government agencies seem to be working well and could be expanded and adopted by other agencies. Beyond encouraging government agencies to consider ADR, the diverse nature of government disputes means that individual agencies are best placed to know when and where to use ADR to best effect.
- For private disputes, there could be a role for assisting small businesses to resolve their disputes efficiently and effectively through ADR, where possible.

The above options will not cover all circumstances. Clear guidelines on the range of ADR mechanisms available, and on how and when to best use ADR, should continue to be developed by organisations involved in resolving disputes — including courts, tribunals and ombudsmen.

Encouraging ADR for court- and tribunal-based disputes

As in other forums, ADR has a place in the court and tribunal system as a way of facilitating the fair, efficient and effective resolution of disputes. Broadly speaking, ADR can be employed at two stages — before parties approach courts or tribunals to have their disputes heard, or as part of the court or tribunal process.

The first seeks to encourage parties to actively and seriously consider resolution before becoming entrenched in a litigious position.

In the second, where matters proceed to litigation, the aim is to ensure that the issues are properly identified and that early settlement is promoted. For matters that proceed to trial, ADR undertaken to narrow issues can reduce the time taken for a court or tribunal to determine the matter. There have been a number of efforts designed to promote the use of ADR at both stages.

ADR as part of pre-action requirements

In order to encourage the early resolution of disputes, some jurisdictions impose requirements on parties to consider alternative options for resolution prior to commencing formal proceedings. Some of these requirements are legislative, while others are prescribed by individual courts or tribunals.

In the federal jurisdiction, the *Civil Dispute Resolution Act 2011* (Cth) requires parties to file a 'genuine steps statement' as part of litigation proceedings and encourages parties to resolve disputes before commencing litigation. This explicitly includes consideration of, and participation in, ADR before commencing legal proceedings (OLSC 2012). The requirement extends to parties in certain types of legal disputes, including consumer protection, taxation, and intellectual property disputes.

The state and territory governments, however, have been more reluctant to embrace broadly based obligations requiring parties to seek to resolve their disputes before approaching the courts. Victoria and New South Wales considered introducing similar requirements to the Commonwealth, but these attempts proved controversial (Sourdin 2012b). Neither jurisdiction currently has legislated broadly based pre-action requirements and they are reluctant to enact them until they are shown to improve the process of civil disputes.

While the Australian Government has examined the effectiveness of its pre-action requirements, the results are not yet public. Some state governments, such as New South Wales, intend to use this evaluation in deciding whether or not to implement similar requirements (Smith 2012).

The Northern Territory Supreme Court has implemented broadly based pre-action requirements whereby parties are expected to exchange early and full information, and engage in 'good faith, genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings'.⁴¹

Pre-action protocols are explored in more detail in chapter 12.

⁴¹ NT Supreme Court Practice Direction No. 6 of 2009: Trial Civil Procedure Reforms.

ADR in the litigation process

In addition to pre-action ADR, a wide range of ADR processes and referral options operate in Australian courts and tribunals once a matter has commenced (Sourdin 2012a). These include mediation, arbitration, case appraisal, neutral evaluation, referral to a referee or conference (box 8.1). These different processes are used to different degrees, and courts and tribunals are adopting increasingly innovative ways of incorporating ADR into their processes, and matching processes to the needs of disputes.

Mediation is the most popular form of ADR. In the Supreme Court of New South Wales, 4570 civil cases were filed in 2012 for which mediation was considered generally applicable.⁴² Of these, 1092 were referred to mediation, representing 24 per cent of civil cases. Approximately 65 per cent of referrals were to court-annexed mediation conducted by the Court's registrars, with a settlement rate of 54 per cent for these referrals (Supreme Court of New South Wales 2012).

The Local Court of New South Wales has entered into a memorandum of understanding with community justice centres, which provide mediation services in a range of matters, including civil proceedings, in locations across the state. In its small claims division, the Court is required to use its best endeavours to bring the parties to a settlement before determining the proceedings. Proceedings are first listed for a pre-trial review where the parties must explore the prospect of settlement (Local Court of New South Wales 2012).

In the Magistrates' Court of Victoria, obligations to use ADR are commonly applied to small claims. This follows a successful pilot in 2007 of compulsory mediation for civil disputes for all defended claims under \$10 000. The pilot revealed that compulsory mediation delivered high resolution rates (greater than 75 per cent), speedier turnaround times for civil disputes, fewer court attendances by litigants and equivalent disposals of cases, using less expensive resources (Transformation Management Services 2008).

Also in the Magistrates' Court of Victoria, a court registrar in the Early Neutral Evaluation (ENE) List of the civil jurisdiction reviews cases that are amenable to ENE using case characteristics checklists developed by experienced magistrates and registrars in the Court. ENE involves an experienced evaluator (often a magistrate or senior registrar) providing a non-binding evaluation of the case on a confidential and 'without prejudice' basis. The Court has reported that ENE has proven successful in resolving disputes early in the litigation process (Magistrates' Court of Victoria 2011). As a result, the ENE program has been made a permanent feature of the range of ADR processes available in that court.

⁴² The Court views mediation as generally inapplicable for cases where no defendant contests the claim, routine probate applications, applications for adoption of children, applications to wind up companies, applications for recovery of proceeds of crime and applications that require administrative processing only. For other civil cases, while mediation is considered generally applicable, individual cases may have circumstances that make mediation inadvisable or inappropriate.

In selected Family Court registries in New South Wales, Legal Aid NSW provides the Court Ordered Mediation Program (COMP) for urgent and other family law matters that may initially appear unsuitable for mediation. In 2012-13, 44 per cent of the 172 mediations conducted achieved full agreement while a further 44 per cent achieved partial agreement (Legal Aid NSW, sub. DR189, p. 16). This resulted in considerable savings to Legal Aid NSW, the court system and the broader community.

The Land and Environment Court of New South Wales has described itself as a de facto 'multi-door courthouse'. It offers, under one roof, an array of dispute resolution services (adjudication, conciliation, mediation and neutral evaluation), which facilitates the court being able to 'fit the forum to the fuss'. The different services can also be individually tailored. For example, the forum for adjudication in certain types of matters can be an onsite hearing or a court hearing. Dispute resolution services can be combined, such as conciliation-adjudication (Preston 2011).

The Victorian Civil and Administrative Tribunal (VCAT) recently established the Short Mediation and Hearing (SMAH) listings as a permanent program following a pilot in 2010-11. SMAH listings are a shortened form of mediation where the parties can explore options to resolve their dispute. If the parties are unable to resolve their dispute, the matter proceeds to hearing on the same day. SMAHs are conducted by accredited VCAT staff mediators and are available for proceedings in the Civil Claims List. Approximately 60 per cent of SMAH listings are resolved without a hearing (VCAT 2013).

Experience from overseas also points to the benefits of court-ordered ADR. The AGD (sub. DR300) highlighted the continued success over the last 15 years of the Ontario Mandatory Mediation Program, which gives parties an opportunity to discuss the issues in dispute early in the litigation process. In addition to having a positive impact on the court by reducing backlogs, this program has firmly entrenched referral to mediation into the local legal culture.

While ADR is increasingly being used by Australian courts and tribunals, sometimes in quite innovative ways, the Commission considers that there continue to be opportunities for expanding its use in particular areas. For example, private parties and the wider community may benefit from greater mediation for contested disputes of relatively low value, where this is not already occurring. This reflects the principle that the method of dispute resolution should be proportionate to the value or importance of the matter in dispute.

Legal Aid NSW also identified some potential applications:

There are a number of areas of civil law where compulsory mediation would have merit in providing a low cost forum to resolve disputes and narrow issues, subject to appropriate protections for people who lack capacity to represent themselves. Examples include, consumer matters, insurance matters, mortgage repossession, wills and estates matters, such as family provision claims for low-valued estates and guardianship matters. (sub. DR189, p. 19)

Stakeholders have also suggested that family law property matters (including spousal and dependant maintenance and property divisions) and will and estate matters, are areas of civil law that may be amenable to greater resolution by ADR. Will and estate matters can be considered somewhat natural extensions of family law, where disputes are often protracted and tensions between parties run high. Given the apparent success of ADR in resolving other family law disputes, there appears to be value in extending ADR requirements in these areas. Chapter 24 recommends that the requirement to undertake family dispute resolution before taking a parenting matter to court should be extended to family law property and financial matters.

A number of stakeholders, such as the Law Council of Australia (sub. DR266), LEADR (sub. DR205), Negocio Resolutions (sub. DR198) and Professor Noone (sub. DR186), were broadly supportive of the increased use of mediation and other ADR techniques, suggesting that they should be employed as a default mechanism for early dispute resolution with judicial discretion to exempt parties where circumstances dictate that it is clearly inappropriate.

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.

In addition to requirements to consider ADR in certain circumstances, courts can offer other incentives to encourage parties to settle or reduce the scope of disputes. The Commission's proposals to reform court fees (chapter 16), such as introducing staged fee structures and increasing the level of cost recovery, are intended to ensure that parties fully consider alternative mechanisms for resolution both before litigation and throughout the litigation process.

More broadly, court and tribunal processes should continue to be reformed to facilitate the use of ADR in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of ADR best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

Encouraging greater ADR use by government

The administrative functions of government give rise to a significant number of civil disputes across a range of legal areas. For example, disputes may arise because of planning decisions, service contracts and administrative decisions related to welfare and immigration. Indeed, the *LAW Survey* reported that almost 11 per cent of people over 15 years of age experienced a government-related problem in a 12 month period (Coumarelos et al. 2012). As governments, their departments and agencies are relatively intensive users of the civil justice system, they are prime candidates for more actively employing ADR to resolve disputes early and more efficiently.

Most jurisdictions have developed civil procedure legislation, model litigant policies, guidelines or engagement strategies as a means of reducing the need for litigation to resolve disputes with government. At the Commonwealth level, all agencies are required to act in accordance with the Legal Services Direction 2005 and the *Civil Dispute Resolution Act 2011* (Cth).⁴³ These require agencies to take genuine steps to resolve disputes early, and to act as model litigants by trying to avoid, prevent and limit the scope of legal proceedings wherever possible. Model litigant guidelines are further discussed in chapter 12.

However, there is little available information or analysis on how different agencies have implemented these requirements, and how successful they have been in settling disputes early and avoiding litigation.

A 2012 survey of the use of ADR to resolve disputes involving Australian Government agencies found that only 37 per cent of responding agencies used ADR regularly (Allen 2012). Further, 85 per cent indicated that negotiation and inclusion of effective dispute resolution clauses in contracts was a priority but only 45 per cent agreed that their agency had effective measures in place to identify potential disputes as and when they arise.

It is apparent that some agencies are doing better than others at implementing efficient and effective dispute resolution mechanisms. For example, only three agencies, the ATO, the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator, are reported to have dispute resolution management plans (AGD 2014).

The Commission understands that other agencies are in the process of developing their own plans but are yet to release them. In the interests of providing clarity and consistency for staff and disputants, the Commission considers that it would be beneficial for all agencies, particularly those with high numbers of disputes, to finalise and release tailored dispute resolution plans as a priority. This is consistent with NADRAC's 2009

⁴³ The *Civil Dispute Resolution Act 2011* (Cth) places pre-action requirements on all parties involved in disputes to take genuine steps, not just private parties. Indeed, government agencies have an important lead role in promoting greater use.

recommendation that ‘ADR can be significantly strengthened by enhancing the obligations of government agencies’ (sub. 109, p. 7).

Having found ADR to be effective in reducing the costs of resolving disputes, the Australian Taxation Office (ATO) has undertaken its own analysis to improve its ADR processes. The ATO deals with a significant number of disputes relating to individual and corporate taxation and seeks to use early resolution techniques (such as direct negotiation) and ADR in most matters, except where there may be benefit in clarifying tax law through a test case (box 8.3). Direct negotiation and mediation are reported to work well for low-value disputes where there is an experienced, independent ADR practitioner involved, but less well for high-value disputes where neutral evaluation is undertaken to give both sides a clearer understanding of the merits of their cases before commencing litigation (ATO, sub. 150).

Box 8.3 The ATO’s approach to ADR

The ATO takes an active approach to resolving disputes early and at the most appropriate level. Disputes with the ATO are not common, representing less than 0.2 per cent of all returns. While direct negotiation is the ATO’s preferred approach to resolution, ADR techniques are routinely used where appropriate, and litigation only resorted to when necessary.

In the last few years, the ATO has completely reviewed and updated its approach to dispute management with the aim of resolving disputes earlier, reducing legal costs for taxpayers and the ATO, and reducing resources devoted to dispute management in the ATO and in the community.

As part of this initiative, the ATO has adopted the approach that all disputes are suitable for ADR except where it would be clearly inappropriate (for example, where cost and delay are disproportionate to benefit, there would be clear benefit in judicial determination and/or there are genuine concerns of serious criminal fraud or tax evasion). Processes for data collection and the independent evaluation of ADR services have been established, and a ‘Plain English Guide to ADR’ has been developed to improve understanding about ADR and the processes used in tax and superannuation disputes.

According to the ATO, it has:

... a strong commitment to the use of ADR to resolve disputes without recourse to litigation. ADR is not our first option to resolve disputes. We prefer to exhaust direct engagement and negotiation as a means of resolving the dispute with the taxpayer before considering ADR. Engaging an external ADR practitioner will not be a proportionate response to most smaller high volume disputes prior to litigation commencing. We are increasingly using ADR at early stages of our large business and high risk disputes. Our dispute management plan sets out our approach to management of disputes and ADR. Although not all disputes are suitable for ADR, ADR should be considered in all disputes to assist in resolving disputes earlier and to minimise cost. (sub. 150, p. 13)

Source: ATO (sub. 150).

The experiences of individual stakeholders appears to reflect different attitudes and cultures towards dispute resolution in Commonwealth agencies. Peter Johnson (sub. DR187) commented that in relation to the ATO:

... I commend them on their positive approach to dispute resolution, and, based on my experience, can confirm that they ‘practised what they preach’ with me. (sub. DR187, p. 4)

In contrast, one participant suggested that Centrelink exhibited a cultural reluctance to resolve disputes early:

... the [Centrelink] staff themselves are overwhelmed by an unwieldy oppressive regime ... in terms of their operational procedures and social security guidelines.

... there was one guideline that made me realise that, in actual fact, they just take a position where they just say no and 99 per cent of people will walk away. That is guideline 1.3.5 which says:

A person affected by a decision of an officer under the Social Security Act may apply for a review of the decision. Liability should not be accepted if an incorrect decision has been made under the Act and there’s a right of review [available to the person]. (Carrigan, trans., pp. 1078–1079)

While the Commission acknowledges that ‘frontline’ agencies are likely to have competing pressures on resources to balance service delivery and compliant resolution, this does not mean that agencies should not seek to resolve disputes with clients early and quickly. Indeed, it would appear that putting dispute management plans in place to achieve these aims, where possible, would improve transparency and set expectations.

Outside Commonwealth departments and agencies, information on the legal activities of other levels of government is scarce and not consistently reported. As such, there is no reliable evidence on the extent to which they use ADR to resolve disputes, and its relative efficiency and effectiveness.

Stakeholders have also indicated that local governments are keener to resolve disputes through litigation than through alternative mechanisms. The NSW Ombudsman observed that this may be because:

... local government agencies consider themselves unable to undertake any steps which may potentially impact on their insurance coverage. (sub. DR295, p. 15)

A further concern of some stakeholders was the focus of current requirements for the government to be a model litigant (chapter 12), rather than model dispute resolver. LEADR, for example, contended that broadening this focus:

... would emphasise the expectation that agencies should aim to resolve disputes as early and as quickly as possible, using litigation as a final rather than first resort. (sub. DR205, p. 8)

A failure by government departments to resolve their disputes internally means that they can be referred to external review. Somewhat ironically, ADR is being employed in these later stages of dispute resolution to good effect. As the AAT observed:

The integration of ADR as part of the broader process for independent review of government decisions also has distinct advantages. In most cases, applicants will have been dealing with a decision-maker through primary decision-making and internal review processes. The involvement of an independent ADR practitioner ... can help to address issues relating to actual

and perceived imbalance of power between citizens and government. It also creates efficiencies by enabling an assessment to be made of the likelihood of an agreed resolution and, where this cannot be achieved, allowing a case to proceed more quickly to hearing and determination. (sub. 65, p. 7)

As part of the development of dispute management plans, agencies need to be cognisant that clear and appropriate communication with disputants can significantly reduce the number of appeals and, as a result, the time and costs associated with dispute resolution.

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.

Avoiding litigation by further encouraging private ADR

While the Commission understands there is a significant level of ADR undertaken in the context of private dispute resolution, it is unclear exactly how much occurs and what potential there is to encourage more. It is also unclear what appetite there is for using ADR to resolve commercial disputes.

For many medium and large businesses that have the resources to pursue disputes in whatever way they see fit, ADR may be attractive in that settlements can be confidential and evidence can be presented away from the public eye. As noted above, often the obligation to undertake an ADR process prior to commencing court proceedings is a contractual requirement. Submissions did not indicate that medium and large businesses have general access to justice issues.

In contrast, small businesses are generally constrained in their capacity to pursue disputes through litigation and are particularly sensitive to the impacts of legal disputes on their business activities (SBDC, sub. 76). In the absence of appropriate resolution mechanisms, disputes can go unresolved for extended periods and negatively impact on business activities and the wellbeing of owners and staff.

As outlined in chapter 4, private bargaining between parties is strengthened by having a range of credible but appropriate options for resolving disputes that include both formal

and informal mechanisms. This can make it more likely that property rights and contracts are respected and reduce the incidence of legal problems arising in the first place.

Adequately resourced advice and resolution services that cater to the needs of small business, such as small business commissioners, have the potential to quickly and fairly resolve many legal disputes and allow small businesses to avoid the uncertainty and hiatus associated with being involved in a protracted, formal dispute.

In this context, the Australian Small Business Commissioner noted that:

... alternative dispute resolution (ADR) is a key feature of the justice system for small business. In particular, ADR allows businesses to retain control of disputes and can provide for commercial outcomes. This means that there can be two winners in a dispute and, given the nature of an approach like mediation, the business relationships may be maintained. (sub. DR185, p. 1)

Small business commissioners (or their equivalent) operate in some states to assist small businesses resolve disputes with other businesses or governments (table 8.1). In other states and territories, there are limited avenues for small businesses seeking to resolve disputes in an efficient and affordable way.

Table 8.1 Avenues for small business dispute resolution

	<i>Small Business Commissioner (or equivalent)</i>	<i>Other Resolution Avenues^a</i>
Commonwealth	Yes	
New South Wales	Yes	Community Justice Centres
Victoria	Yes	Victorian Civil and Administrative Tribunal, some Magistrates' Courts
Queensland	No	Queensland Civil and Administrative Tribunal; Magistrates, District and Supreme Courts
Western Australia	Yes	Magistrates Court
South Australia	Yes	Magistrates Court
Tasmania	No	Magistrates Court
Northern Territory	No	Community Justice Centres; Magistrates and Supreme Courts
Australian Capital Territory	No	Conflict Resolution Service; ACT Civil and Administrative Tribunal; Magistrates and Supreme Courts

^a Although not listed, each jurisdiction also has dedicated resolution services for specific dispute types (such as fair trading and retail leases) which may be incorporated in, or separate to, the organisations listed in the table.

Source: Australian Small Business Commissioner (2013).

Each small business commissioner takes a different approach to assisting small businesses resolve their disputes.

The Western Australian Small Business Development Corporation (SBDC) ADR service (box 8.4) provides a partially subsidised ADR service which builds on the advice that the SBDC gives to small business through internal guided resolution to also offer a low-cost, non-litigious means of resolving small business disputes with governments and other businesses, while preserving business relationships (sub. 76). The SBDC model is also able to identify systemic problems in the small business sector by using data from advisory and ADR activities to inform advocacy activities where there are patterns in disputes and recurring issues (sub. DR240).

The response from users has been positive and, based on their experience, the SBDC proposes that similar ADR services could be established in other jurisdictions and across the community to improve less well-resourced parties' access to justice (sub. 76).

**Box 8.4 Small Business Development Corporation ADR service
(Western Australia)**

The Small Business Development Corporation (SBDC) ADR service in Western Australia provides an avenue for small businesses to resolve disputes in a range of areas including retail and commercial tenancy, debt collection, contracts, franchises, intellectual property, trade practices, unfair market practices and professional and product liability.

The ADR service provides hands on, timely assistance to help small business owners resolve disputes quickly and inexpensively. It is an easy process to access and navigate and assists businesses get back to normal operations quicker, with business relationships still intact, and without costly legal fees.

The process commences with the SBDC providing information, advice and guidance to assist clients in understanding their rights and obligations, clarifying the disputed issues and identifying options.

If agreement is not reached through guided resolution, or if guided resolution is not appropriate for the dispute, parties can proceed to mediation when both parties agree to participate. The alternative resolution course would be through the Western Australian State Administrative Tribunal or relevant court.

The Small Business Commissioner of Western Australia will appoint an experienced mediator to facilitate the mediation, and a fee of \$125 per party applies for each mediation session. This subsidised fee covers the cost of one mediation session, with the balance of the cost of mediation (between \$650 and \$775) met by the Western Australian Government. For most disputes, it is anticipated that a mutually agreed outcome will be achieved within one mediation session.

The total cost of the guided resolution and ADR service to the Western Australian Government is estimated to be less than \$1 million per year. This figure does not include the cost of other services provided by the SBDC that are not directly dispute related but that assist in avoiding disputes.

According to the SBDC, feedback from small businesses that have accessed the ADR service has been positive and they support the service as a valid alternative for providing cheaper and quicker resolution to business disputes.

Sources: SBDC (sub. 76; pers. comm. 7 March 2014).

A similar model has been developed by the Victorian Small Business Commissioner (VSBC), which provides a low-cost resolution service for small businesses. A staged approach engages experienced dispute management officers early, and, if that fails, invites parties to mediation which is partially subsidised by the VSBC (Sourdin 2012b). In 2012-13, 83 per cent of mediations settled without the dispute progressing to VCAT (VSBC 2013).

The Office of the NSW Small Business Commissioner also provides ADR services. In contrast to arrangements in other states, recent changes to the *Small Business Commissioner Act 2013 (NSW)* allows the Commissioner to ‘require parties to attend mediation prior to initiating a legal process and impose penalties for any non-adherence to the requirements’ (NSW Small Business Commissioner 2013).

At the Commonwealth level, it is proposed that a Small Business and Family Enterprise Ombudsman (transitioning from the Australian Small Business Commissioner) will be a concierge for dispute resolution, a Commonwealth-wide advocate for small businesses and family enterprises and a contributor to the development of small business friendly Commonwealth laws and regulations (Billson 2014).

Regardless of the approach, the intervention of small business commissioners (or equivalent organisations) can reduce the cost, time and stress associated with resolving small business disputes. They can also provide an important dispute resolution option in those jurisdictions that lack a significant civil tribunal, such as Western Australia.

The Commonwealth, state and territory governments should ensure small business commissioners (or their equivalent) are appropriately funded to provide ADR services to assist small businesses to resolve disputes informally and cooperatively. As Queensland, Tasmania, the ACT and the Northern Territory do not have small business commissioners, those governments should consider how best to support the efficient and timely resolution of small business disputes. The Commission considers all jurisdictions should have either small business commissioners, or dedicated offices with relevant departments (in jurisdictions which are resource constrained), with capacities discussed in this report and previous reports of the Commission (PC 2012b, 2013e).

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.

8.4 Facilitating greater ADR

The capacity of ADR to resolve more disputes relies on improving general knowledge about ADR, providing triage and advice services, ensuring legal professionals consider and suggest ADR as an option to clients, and supporting the delivery of culturally appropriate and accessible ADR.

Improving education and information

Improving general awareness and education about different avenues to resolve disputes is an essential prerequisite for getting parties to think about how ADR might be usefully applied to their dispute.

Based on their experience operating the Magistrates Court Legal Advice Service (MCLAS) in South Australia, Caruso, Castles and Hewitt note that:

... information regarding ADR is not currently conveyed in an effective manner. Statements about the value of ADR do not address the mind-set of parties. Parties invariably need to be introduced to the ideas of compromise, reminded that there are two sides to every story, that the court will be required to see both sides and so too should they. (sub. 16, p. 8)

Basic legal information — whether provided by legal assistance providers, online resources or within courts and tribunals — needs to include elements of ADR to ensure that disputants know that there are alternatives to litigation and that, in some circumstances, interests-based ADR can result in better outcomes for all stakeholders (and the wider community). As Cannon observed:

Education of potential court users and lawyers as to alternatives to court proceedings is central to improving the whole system. (2009, p. 8)

There are a number of potential benefits that could arise from increasing the awareness of ADR services, as highlighted by Field:

First, users who suffer detriment are more likely to know that there are services that can be utilised to resolve their dispute, thus preventing the undesirable escalation of disputes. Second, awareness of dispute resolution services will make it more likely that users efficiently choose the most appropriate ADR provider. ...

Knowledge of ADR services can also have a positive effect on the market for civil justice — the better informed disputants are about the suitability of ADR, the more likely that they will express preferences that align with their actual needs for ADR, thus leading to efficiency improvements in the market for civil justice. (2007, p. 81)

NADRAC proposed a number of strategies that could be employed to increase public awareness about alternative avenues to accessing justice, including:

- identifying specific groups who are prone to disputes and providing targeted ADR information
- equipping legal professionals with ADR knowledge to assist them to inform clients
- identifying organisations within the community that provide support for parties in dispute and providing them with information so they can give comprehensive advice on ADR options
- increasing education about ADR within primary and tertiary curricula (sub. 109).

Stakeholders have also noted the potential for online resources to provide information and be a forum for disputes to be resolved. Online resources allow individuals to learn at their own pace and provide access to information at any time. They can also provide checklists and step-by-step guides to ensure that parties in dispute use a staged approach to escalation and reasonably exhaust all relevant options before progressing to the next level. Such resources can be targeted at various groups that may derive the greatest benefit — for example, small businesses should be able to access such assistance through small business commissioners or chambers of commerce. Similarly, Lawstuff is a dedicated resource for children and young people that helps them to understand their rights, resolve disputes themselves and build resilience (Lawstuff nd).

In order to fully capture the benefits of greater education and information, ADR educators and practitioners need to employ a standardised terminology. Work on the definition of ADR was an ongoing research task undertaken by NADRAC throughout its existence. This

work should be revisited and form the basis of an agreed terminology. Without this, current inconsistencies in the use of ADR terminology will continue and are likely to generate confusion.

Consistent with recommendation 5.1, the Commission considers that organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate ADR as a central platform in those materials.

Triage and advice to guide disputes to the most appropriate forum

Providing information and education about ADR in the context of resolving disputes may open up a range of options. However, some stakeholders indicated that information by itself may not be enough to persuade parties to opt for ADR. Rather, efficient triage processes are required to filter and direct disputes to the most appropriate forum.

Triage is a key to delivering effective access to justice. Triage needs to embrace all methods of [dispute resolution] and assist parties to choose and engage whether that is in collaborative problem solving or adversarialism. (Negocio Resolutions, sub. 52, p. 17)

The concept of triage is not new to dispute resolution and is a feature of the information and advice services discussion in chapter 5. Fundamental to any system of legal dispute triage should be a consideration of ADR options and whether they can potentially resolve the issues in dispute.

The provision of advice and triage services requires knowledgeable and experienced practitioners who understand the needs of clients, can quickly evaluate the dispute, and recommend an appropriate course of action. The development of well-recognised entry points, which deliver legal information and advice for consumers as proposed in recommendation 5.2 should seek to ensure relevant material on resolving disputes informally through ADR is provided. In addition, Legal Aid NSW contended that ‘Triage should always include an assessment of whether ADR is appropriate’ (sub. DR189, p. 20).

In addition to triage services for individuals to help them understand the nature of their legal problem and what is the most appropriate forum for resolution, there is also a role for developing and implementing processes to guide administrators and decision makers in organisations that use ADR as part of a wider range of resolution processes — including courts, tribunals, ombudsmen and government agencies. A number of stakeholders, including the Law Council of Australia (sub. DR266) and Negocio Resolutions (sub. DR198), also indicated that appropriate training would be required for administrators and decision makers.

The AAT has already developed a set of process models and guidelines to assist conference registrars and tribunal members to determine when it may be appropriate to refer an application to a particular type of ADR process.

The AAT has developed process models for each form of ADR that is used. Each process model sets out a definition of the process and then provides a range of information relating to the conduct of the process including:

- the stage of the proceeding at which the process is likely to be undertaken;
- a description of the way in which the process will proceed;
- the role of the person conducting the process as well as the role of the parties and their representatives; and
- what is likely to occur at the conclusion of the process.

The AAT has also developed a set of guidelines designed to assist Conference Registrars and Tribunal members to determine when it may be appropriate to refer an application to a particular type of ADR process. The guidelines set out a range of considerations to be taken into account, including such things as:

- the capacity of the parties to participate and their attitudes;
- the nature of the issues in dispute;
- the likelihood of reaching agreement or reducing the issues in dispute; and
- the cost to the parties. (sub. 65, pp. 7–8)

These materials assist to reduce the subjectivity of referral decisions and provide clarity for participants, particularly when they are unfamiliar with the process.

Such process models should not fix the range of circumstances in which ADR is considered suitable. Changes in the way in which ADR is delivered can expand the range of situations in which it is appropriate. For example, the use of ‘shuttle mediation’, where parties negotiate from different rooms, or video conferencing may provide a more ‘user friendly’ process where parties affected by power imbalance can safely and comfortably participate in ADR. Such practices are already being employed with some success by LACs in family mediation where violence has occurred (National Legal Aid, sub. DR228).

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.

Ensuring practitioners are competent and experienced

It is not enough for consumers to be informed about and/or directed to ADR. Greater use of ADR also needs to be supported by quality practitioners.

ADR services are provided by a range of professionals and organisations, depending on the context. For example, court-mandated ADR is generally facilitated by qualified court registrars, while commercial arbitration may be undertaken by experienced judges or former judges. ADR services in family matters can be provided by family relationship centres, legal assistance services, or private service providers (including lawyers) (chapter 24).

A research report on ADR by the National Pro Bono Resource Centre highlighted that the independence, professionalism and skill of the ADR practitioner may be the most important factor in ensuring a fair and effective process and that these traits should be developed through appropriate training and experience (sub. 73).

While it appears that legal assistance service providers are well versed in ADR and use it effectively, stakeholders indicated that many qualified legal professionals have no or limited experience in the application of ADR.

The potential for ADR to improve access to justice could also be strengthened through promoting awareness amongst legal practitioners of available ADR services and an understanding of the different ADR processes, which would improve their confidence in both participating in, and assisting parties to participate in, ADR processes. (QPILCH, sub. 58, p. 36)

This may be related to the training of legal professionals. While law graduates are meant to be familiar with a range of ADR processes, a 2011-12 survey of law schools by NADRAC found that a number of Australian law degrees do not contain any ADR-related subjects and provide only limited exposure to informal means to resolving disputes (ALTC 2010; NADRAC 2012b). This appears to be a significant barrier to the wider use of ADR.

Indeed, the importance of ADR training for legal professionals was echoed by the Public Interest Advocacy Centre, which contended that:

... if lawyers are to be involved in ADR processes, they must be adequately trained for the task. The principles of dispute resolution and the skills required to act for a party in ADR are different to those needed in typical court proceedings. ADR training should be included as a compulsory component of law degrees and of mandatory continuing legal education. (sub. 45, p. 23)

The need to ensure that legal qualifications encompass the full range of dispute resolution options, including non-adversarial options, is discussed in chapter 7.

But many ADR practitioners are not professionally trained lawyers and need not be to resolve certain types of disputes efficiently and effectively. Indeed, NADRAC has previously noted that ‘Conflict management and resolution knowledge and skills are critical in many professional roles’ (2012a, p. 12).

Stakeholders supported the development and offering of courses that enable tertiary students and experienced professionals of non-legal disciplines to better understand legal disputes and avenues for their resolution. ADR is currently taught as part of some

engineering and psychology degrees, but stakeholders suggested that there may be value in targeting other professions, such as financial counsellors, accountants, community support workers and health professionals (LEADR, sub. DR205; PTO, sub. DR223).

The Commission considers that flexible options are necessary to ensure that mediators' skills and qualifications are relevant to the disputes they are employed to resolve. Options should not be limited to undergraduate university training but should also be available through post-graduate study and professional development courses.

Stakeholders also commented that the quality of ADR practitioners and services is variable and this can have a considerable impact on whether a dispute settles. The industry-led accreditation scheme for mediators — the National Mediator Accreditation Scheme — provides assurance to clients that practitioners are trained, assessed and qualified, and acts to improve the quality of services. However, this only applies to practitioners who voluntarily seek accreditation and clients who seek to use an accredited practitioner.

Voluntary accreditation standards have not been developed for other types of ADR practitioners, such as conciliators or arbitrators. Such schemes could ameliorate the need for regulations on the conduct of ADR professionals more broadly and work is currently progressing on a voluntary standard for conciliation (LEADR, sub. 205).

A number of stakeholders suggested that the government could be influential in encouraging the development and implementation of accreditation standards for all types of ADR practitioners. In this context, LEADR (sub. DR205) and *Negocio Resolutions* (sub. DR198) commented that:

- government bodies (including courts and tribunals) should be required to use practitioners with current accreditation under the National Mediation Accreditation Scheme or national conciliation scheme (when developed)
- government funding could be provided to assist ADR organisations to collaborate and strengthen the mediation accreditation regime (including audits of practitioners) and extending it to conciliation, arbitration and other processes.

The Commission considers that, at this stage, peak bodies covering ADR professions should continue to develop, implement and maintain standards that enable professionals to be independently accredited.

Responsive ADR to cater for diverse needs

Specialised services may be required to ensure that all client groups can fully make use of ADR as a mechanism to resolve their disputes. The Commission received a number of submissions that highlighted the diverse needs of particular client groups, including people with a disability, cultural sensitivities, non-English speaking backgrounds and those who experience socioeconomic disadvantage. For example, QPILCH suggested that:

ADR services could be strengthened by ... culturally sensitive services and mediators trained to recognise and deal with disadvantaged parties and power imbalances. (sub. 58, p. 36)

Culturally sensitive services are particularly important for Aboriginal and Torres Strait Islander Australians who are often reluctant to engage in ADR unless cultural protocols are observed. It is often necessary for ADR processes to be adapted to ensure participation and adherence with agreed outcomes. That said, the Aboriginal Legal Rights Movement felt that a program for training culturally safe mediation services in relation to Native Title disputes was very good and there was a role for more Aboriginal elders to be trained to provide such services more broadly (trans., p. 467). Recommendation 22.2 proposes a way forward for developing more culturally tailored ADR services for Aboriginal and Torres Strait Islander Australians.

The Australian Federation of Disability Organisations (sub. 24) is concerned about accessibility of ADR services for people with a disability. They suggest that staff involved in ADR services need to be familiar with access and communication needs, as well as ensuring that physical infrastructure is appropriate.

Submissions also raised the need for interpreter services to be available to allow participants from non-English speaking backgrounds to fully engage with the ADR process, understand the offers and implications of proposed settlements, and make informed decisions to resolve their disputes in these forums (for example, Peninsula Community Legal Centre, sub. 28).

8.5 Building the evidence base

As noted above, there is a lack of data and information on the use of ADR to resolve civil disputes. The data are often reported in an ad hoc way and cannot be collated or usefully compared. There appears to be an opportunity to develop a consistent framework to collect and disseminate data on ADR activities; appreciating that these activities themselves are disparate and occur across very different forums.

In some areas, current data reporting requirements could be better targeted to give a clearer picture of ADR activities. For example, legal assistance service providers should be required to provide publicly-available information on the provision of ADR services as part of their reporting requirements for public funding. ADR should form part of the measurement benchmarks proposed in recommendation 21.8.

Further, courts and tribunals should be required to report on how disputes have been settled and the role of ADR, if any, towards reaching a resolution. This view was supported by Negocio Resolutions:

An important data set is missing in most courts and tribunals. While courts record 'disposal rates' of cases they usually keep no record that allows us to find out how many or what

percentage of cases are settled as opposed to those that are determined by a decision or Order of the Court of Tribunals. (sub. 52, p. 5)

In relation to data collection, the Victorian Parliament Law Reform Committee recommended in 2009 that:

At a minimum, the Committee believes that there is a need for consistent data collection across ADR service providers about:

- settlement rates
- factors that may influence settlement rates, such as referral stage
- what happens when disputes are not settled at ADR
- participant satisfaction with ADR and perceptions of fairness the time and costs expended by participants and service providers. (2009, pp. 58–59)

While the Commission appreciates that relevant and reasonable data relating to all cases may not be able to be collected, concerted efforts should be made to collect and report at least basic data on how settlement outcomes were achieved.

ADR data collection is but one part of a much broader data collection proposal which is discussed in more detail in chapter 25. As in other areas of civil law, there are problems with inconsistent approaches to recording and reporting ADR activities. This is not helped by inconsistency in the use of ADR terminology. Hence, moves towards improving ADR data collection must include agreed ADR terminology.

In addition, more concerted efforts are needed to understand the impact of mandated ADR in improving access to justice, including for disadvantaged and vulnerable Australians.

As the Access to Justice Committee, Australian Law Reform Commission and the former National Alternative Dispute Resolution Advisory Council have stated, there is a critical need for ongoing empirical and in-depth research that not only provides data, but also looks at the quality of ADR processes and access to justice barriers. Evaluations of new developments must be regularly conducted and the processes reviewed. Most importantly, in recognition of the complex and paradoxical nature of access to justice developments, these evaluations must be rigorous and contextualised. (Noone, sub. 186, p. 3)

The need for rigorous and coordinated research and evaluation of various parts of the civil justice system, including the use of ADR, is addressed in recommendation 25.4.

9 Ombudsmen and other complaint mechanisms

Key points

- Ombudsmen provide independent, timely and accessible dispute resolution in particular areas and industries. Ombudsmen and other complaint bodies resolve close to 550 000 disputes each year, compared to around 1 million disputes resolved by tribunals and courts together.
- There are two broad categories of ombudsmen:
 - government ombudsmen that deal with disputes about the conduct and decision making of government agencies
 - industry ombudsmen that resolve disputes between consumers and businesses in particular industries such as energy and water, telecommunications and financial services.
- In addition to ombudsmen there are a range of other complaint bodies that do not meet the same criteria as ombudsmen but have similar complaint-handling functions. These include human rights commissioners, health complaint bodies and fair trading or consumer affairs offices.
- A significant proportion of unmet legal need could be served by greater knowledge of, and access to, ombudsmen and complaints services.
 - This could be achieved through better visibility, mandatory notification, improved referral processes and, in the case of government ombudsmen, by removing the requirement for complaints to be in writing.
- Ombudsmen and complaint schemes are free of charge but not costless. Indeed, costs ultimately get passed back to consumers (in the case of industry-funded bodies) or taxpayers.
 - Schemes should be designed to maximise the incentives faced by firms and government agencies to minimise complaints and resolve disputes efficiently and effectively themselves.
 - Stand-alone complaint schemes are not always the most efficient or effective way to resolve complaints, particularly where they are very small in scale. There appears to be some scope for consolidation across existing schemes.
 - Better data could also assist identifying areas of potential improvement.

The word ‘ombudsman’ comes from Sweden, which in 1809 established the position of Justitieombudsman to oversee government administration. The title loosely translates as ‘citizen’s defender’ or ‘representative of the people’. The first ombudsman in Australia was the Ombudsman of Western Australia, created in 1972 (Ombudsman WA 2014).

The Commission identified 26 organisations in Australia with the word ‘ombudsman’ in their titles, and a further 40 that have similar complaints functions but are called commissions or use other names.⁴⁴ Based on the available data, these organisations resolved around 542 000 complaints in 2011-12.

As ombudsmen and complaint bodies have grown in number and scope, they have filled an important gap in the civil justice landscape, providing a mechanism for resolving low value disputes. Their evolution is seen by many as a great step forward in promoting consumer rights and industry accountability. The Consumer Action Law Centre said that:

... in providing access to justice, the establishment of these [industry ombudsman] schemes has been one of the most significant advances in consumer protection of the past 30 years. (sub. 49, p. 14)

This chapter examines the role of ombudsmen and other complaint mechanisms. Sections 9.1 and 9.2 consider the role ombudsmen and complaint mechanisms play in the civil dispute resolution landscape, including their role in promoting access to justice. Section 9.3 assesses how they are performing with respect to cost, timeliness, informality and delivering just outcomes. Section 9.4 considers how ombudsmen and other complaint mechanisms might be able to reach more people, and section 9.5 considers some potential improvements in efficiency and effectiveness.

9.1 What do ombudsmen do?

Ombudsmen are impartial organisations that receive and resolve complaints, and conduct inquiries into individual or systemic cases based on those complaints. Ombudsman services are provided at no cost to the complainant.⁴⁵

According to the Australian and New Zealand Ombudsman Association (ANZOA), ombudsmen are characterised by six essential criteria: independence; jurisdiction; powers; accessibility; procedural fairness; and accountability (box 9.1). These criteria distinguish them from other complaint mechanisms, however the title ‘ombudsman’ is sometimes used where these core criteria are not met.

⁴⁴ A list of ombudsmen and complaint bodies covered in this chapter is available in appendix D. The number of tribunals captured in the 2011-12 data (see overview figure 3) is 58.

⁴⁵ Ombudsmen that satisfy ANZOA’s criteria (box 9.1) do not charge any fee to the complainant although not all complaint bodies offer a free service.

Box 9.1 **Essential criteria for describing a body as an ombudsman**

ANZOA highlights the criteria its members must meet to identify as ombudsmen.

Independence

- The Ombudsman must: be independent of the organisations being investigated; be appointed for a fixed term; not be subject to direction; be able to select his or her own staff; not be an advocate for a special interest group, agency or company; have an unconditional right to transparency; and must operate on a not-for-profit basis.

Jurisdiction

- The jurisdiction should be clearly defined in legislation or in the document establishing the office, and should extend generally to the administrative actions or services of organisations falling within the Ombudsman's jurisdiction.
- The Ombudsman should decide whether a matter falls within jurisdiction.

Powers

- The Ombudsman must: be able to investigate whether an organisation within jurisdiction has acted fairly and reasonably; have the right to deal with systemic issues or commence an own motion investigation; have power to obtain information or to inspect the records of an organisation relevant to a complaint; and must have the discretion to choose the procedure for dealing with a complaint.
- There must be an obligation on organisations within the Ombudsman's jurisdiction to respond to an Ombudsman's question or request.

Accessibility

- A person must be able to approach the Ombudsman's office directly.
- It must be for the Ombudsman to decide whether to investigate a complaint.
- There must be no charge to a complainant for the Ombudsman's investigation.
- Complaints are generally investigated in private.

Procedural fairness

- The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness.
- Parties involved must be given an opportunity to respond before the investigation is concluded.
- The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudice.
- Reasons must be provided for any decision, finding or recommendation.

Accountability

- The Ombudsman must be required to publish an annual report.
- The Ombudsman must be responsible to the relevant stakeholders.

Source: ANZOA (2010).

Ombudsmen and other complaint mechanisms operate to address a wide range of disputes. Disputes are typically handled through early resolution methods, such as initial assessments or referrals (including referral back to the service provider's complaints department), but may require conciliation, facilitation, investigation, or in rare cases, determination or recommendation.

Industry ombudsmen deal with disputes between consumers and service providers and receive industry funding to do so. They operate in key industries such as energy and water, financial services, public transport and telecommunications.

Government ombudsmen deal with disputes about the conduct and decision making of government agencies. Other government-funded bodies that have similar complaints functions to ombudsmen include:

- regulators that also receive complaints, such as fair trading offices and health industry complaints commissions. Another example is the Fair Work Ombudsman, which primarily receives complaints but also has some regulatory functions
- complaint bodies that are not fully independent, including those with an advocacy role such as anti-discrimination and human rights commissioners, state Small Business Commissioners and the proposed Australian Small Business and Family Enterprise Ombudsman.

Some regulatory bodies also accept 'complaints' for the purposes of enforcement rather than dispute resolution. These include the Australian Competition and Consumer Commission (ACCC):

While we don't resolve individual complaints, we will use the information you provide to help us understand what issues are causing the most harm to Australian business and consumers, and where to focus our compliance and enforcement efforts. (ACCC nd)

... and the Australian Health Practitioner Regulatory Agency:

The National Boards are 'notified' of an issue. The word 'notification' is deliberate and reflects that a board is not a complaints resolution agency. It is a protective jurisdiction. (AHPRA 2012, p. 80)

Hence, regulatory bodies such as the ACCC and the Australian Health Practitioner Regulatory Agency have been excluded from the scope of this chapter.

The difference between ombudsmen and tribunals is not always clear, however, in general, tribunals require an application to conduct an investigation and have the power to resolve disputes through rulings, whereas ombudsmen can conduct own motion investigations and most cannot make binding decisions. Some bodies are difficult to classify, for example the Superannuation Complaints Tribunal, which initially attempts to resolve complaints much like an ombudsman does, but, if that is not successful, will conduct a formal review of the complaint and issue a determination. The Superannuation Complaints Tribunal has been included in the list of tribunals for the purposes of this inquiry.

9.2 How do ombudsmen promote access to justice?

Providing a mechanism for resolving low value disputes

In order to deliver access to justice, it is necessary to provide mechanisms that deal with issues in a proportional manner. For example, a court or tribunal is not the appropriate forum to deal with a dispute over a train ticket. Addressing issues at this lower end of the spectrum is important because a number of people could suffer the same treatment, causing significant cost to society yet insufficient cost to any one individual to justify legal action. Further, early dispute resolution can prevent small problems becoming big problems.

As a number of stakeholders observed, the availability of an ombudsman creates a practical and proportional alternative:

Without industry ombudsman schemes, hundreds of thousands of people would have been left with no avenue for redress other than courts, or more likely, because of cost and other access barriers, would have been left with nowhere to turn. (Consumer Action Law Centre, sub. 49, p. 14)

Industry-based Ombudsman schemes are often referred to as an ‘alternative’ avenue for complaint. In the case of public transport, my office is often the only avenue of complaint. For many of the issues raised with my office, it is unlikely that a consumer would even contemplate court or tribunal proceedings. (Public Transport Ombudsman (PTO), sub. 118, p. 3)

Helping to overcome power imbalances

Some consumers may feel powerless to assert their rights when dealing with large service providers or government agencies. Ombudsmen can help overcome these power imbalances.

A survey undertaken by the Telecommunications Industry Ombudsman (TIO) highlights the difficulties faced by consumers in dealing directly with industry. For example:

- more than 50 per cent of consumers surveyed said that they had contacted their service providers five or more times to address their matters prior to coming to the TIO
- almost 50 per cent of consumers had interacted with more than 3 different contact points or departments at their service provider before lodging a TIO complaint
- nearly 27 per cent of consumers surveyed said they had spent between three and six hours trying to resolve their complaint with their provider, and another 20.3 per cent said they had spent more than nine hours before giving up and turning to the TIO. (sub. 134, p. 14)

Providing a process that is simple to use

Ombudsmen are independent and impartial, so they do not provide advocacy as such. However, they actively pursue the resolution of disputes rather than leaving primary control of the case to the parties, as has occurred historically in courts (and to a lesser extent, tribunals). This model removes the need for professional advocates or representatives:

The model for industry-based Ombudsman schemes is designed to address these power imbalances, without the need for either party to have legal representation. (PTO, sub. 118, p. 4)

It is unusual for a party to require representation by a professional advocate such as a legal representative, though complaints are lodged on behalf of customers by friends, family members or financial counsellors. (The Energy and Water Ombudsman Victoria, sub. 119, p. 6)

Ombudsmen typically provide easy options for individuals to lodge their complaints. Around 90 per cent of complaints are made by phone or electronic forms available on the internet. Complaints and enquiries can generally be made by fax, letter or in person. Accessibility is further promoted by the availability of interpreters via the National Relay Service (ANZOA, sub. 133).

Identifying and addressing systemic issues

A further way in which ombudsmen provide access to justice is through the conduct of systemic investigations. Ombudsmen are not limited to the investigation of individual complaints, but may instigate their own investigations in order to identify systemic issues. This generally occurs when a number of similar complaints are received:

The PTO [Public Transport Ombudsman], and other industry Ombudsman schemes, are required either through mechanisms such as their Charter and/or the National Benchmarks to identify, review, refer or resolve systemic issues facing the industry they oversee. (PTO, sub. 118, p. 5)

EWOV [The Energy and Water Ombudsman Victoria] also plays a key role in complaint prevention. EWOV has the power to investigate and seek redress to energy and water systemic issues. Performance of this role ensures that where an issue is identified remedial action can be taken by the relevant member to limit the impact of the systemic issue on its customers. (EWOV, sub. 119, p. 11)

Specific categories of systemic work include:

- complaint-driven systemic issues investigations
- own motion investigations
- public interest reports that use complaints data to inform the community and assist regulators and other bodies in performing their functions
- formal submissions to inquiries (ANZOA, sub. DR200).

Ombudsmen are particularly well-placed to identify systemic issues due to the large volume of complaints data they can collect and analyse. Systemic investigations can represent an efficient form of dispute resolution since they address all instances of wrong treatment in one investigation (box 9.2). Once identified, ombudsmen can raise systemic issues with the relevant stakeholders, such as identifying scams with the department of Fair Trading (Energy and Water Ombudsman NSW (EWON), trans., p. 312). Ombudsmen may also assist agencies in developing new policies, based on their knowledge of potential issues (trans. p. 313).

Box 9.2 Case study: systemic overcharging

The Public Transport Ombudsman (PTO) in Victoria gave the example of a train company's ticketing system inadvertently overcharging customers. The problem was that new fares were loaded into the ticketing system when they were announced rather than at the time they were supposed to come into effect.

The PTO conducted a systemic investigation, and the train company agreed that in the future it would not load new fares into the system until the date they came into effect.

The company identified that 1551 tickets had been affected over a period of seven years, with a total overcharge value of \$27 000 — the average overcharge being \$17 per ticket.

Given the lack of purchaser information and the disproportionate cost of advertising the mistake and offering refunds, the company sought advice from the PTO about alternative ways of redressing the issue. The PTO suggested that it explore opportunities for these funds to be used to provide services/assistance to regional commuters who experienced challenges with public transport accessibility, and also emphasised the fact that consumers who approached the company about being overcharged as a result of this issue should be appropriately reimbursed, where proof of purchase information is provided.

Source: PTO (sub. 118, p. 8).

Resolving both legal and non-legal issues

Ombudsmen are also able to resolve non-legal issues. Ombudsmen do not determine disputes based on the law alone — they also consider good industry practice and what is just, fair and reasonable, as well as whether the matter was within the service provider's reasonable control (ANZOA, sub. 133). The PTO said:

We are also able to seek fair and reasonable outcomes for issues where no legal entitlement exists but where redress is warranted. (sub. 118, p. 3)

9.3 How well are ombudsmen performing?

Where services are being used, outcomes are generally good

There is a general consensus among stakeholders that ombudsmen are effective in promoting access to justice.

SMLS [Springvale Monash Legal Service] feels that the Ombudsman role is effective and generally efficient in the services they provide. In particular, SMLS has had positive outcomes and experiences through matters handled by the Telecommunications Ombudsman. (sub. 84, p. 8)

ABA [Australian Bankers' Association] members and customers alike value the EDR [external dispute resolution] service as an alternative mechanism of access to justice. (sub. 121, p. 2)

There is no doubt that government Ombudsmen play an essential role in highlighting and addressing systemic access to justice issues in people's dealings with government. (North Australian Aboriginal Justice Agency, sub. 95, p. 23)

... the number of ombudsmen and the services provided by ombudsmen appears to be growing. This would indicate that ombudsmen are perceived as an efficient and effective way to resolve particular types of disputes. (Queensland Public Interest Law Clearing House, sub. 58, p. 37)

Industry external dispute resolution schemes offer all consumers, including disadvantaged consumers, a speedy, effective and inexpensive mechanism to deal with problems, most of which would not be appropriate to resolve via litigation. (Public Interest Advocacy Group, sub. 45, p. 25)

These views are supported by data on timeliness, user satisfaction and complaint numbers.

Ombudsmen resolve complaints relatively quickly. ANZOA reported that 80 per cent of complaints are resolved within one month, and 97 per cent within six months (sub. 133). This is considerably faster than courts and tribunals — for example, most tribunals resolve disputes within a median time of 6 months.

While 'just' outcomes are difficult to measure, some ombudsmen and complaint bodies collect information on consumer satisfaction through surveys. Survey content varies across organisations, but many surveys include questions about satisfaction with the complaints process, the outcome, or the service provided by the complaint body. EWON reports what people think of the ombudsman when they did not achieve the outcome they were seeking.

... 94 per cent of the people who did not receive a satisfactory outcome from us said that it was easy to make a complaint to us. (EWON, trans., p. 310)

ANZOA reported that six of its members undertake regular consumer satisfaction surveys, reporting that around 86 per cent of consumers were either satisfied or very satisfied with the overall handling of their disputes. As for industry ombudsmen, consumers usually rate their offices more positively than members (the companies being complained of) do, however, recent survey results showed increased member satisfaction (sub. 133).

There is also evidence to suggest that the systemic work undertaken by ombudsmen causes overall complaint numbers to fall. For example, the TIO provided data and made recommendations for increased consumer protection in the area of international roaming charges, after significant increases in related complaints in 2010-11 and 2011-12 (sub. 134). The implementation of these changes saw a 50 per cent decrease in these complaints in 2012-13 (TIO 2012b).

Concerns about the way police complaints are handled

One aspect of ombudsman performance that has come under particular criticism is the police complaints function of some ombudsmen, with concerns that ombudsmen have insufficient powers or make ineffective use of available powers (box 9.3). The NSW Ombudsman noted the limited role it plays in this regard:

Under Part 8A of the Police Act, the NSW Police Force ... is primarily responsible for investigating complaints made about the conduct of its staff. ... We oversee these investigations, and ensure they are thorough and appropriate. (sub. DR295, p. 3)

These concerns may warrant further investigation.

Box 9.3 Issues raised in regard to police ombudsmen

Some police ombudsmen were criticised for not conducting investigations but rather, in some cases, passing on complaints to the officers who were being complained of.

KLC [Kingsford Legal Centre] believes that the NSW Ombudsman's role in the oversight of complaints made about NSW Police is inadequate. Whilst the current system of complaints allows for some degree of independent oversight by the Ombudsman, the Ombudsman's role is essentially limited to oversight / review only. The Ombudsman's Office does less than 12 direct investigations per year. (sub. 53, p. 13)

The same issue was raised by the North Australian Aboriginal Justice Agency:

We regularly make complaints to the NT Ombudsman about police conduct. Unlike in other areas, the Ombudsman's role with police complaints is predominantly one of monitoring, rather than conducting, the investigation. (sub. 95, p. 24)

The Redfern Legal Centre provided the following case study:

Lucy (not her real name) had a series of issues with the Police over the course of 12 months. She made a complaint to the Ombudsman, and was surprised that it referred the matter back to the Local Area Command (LAC), the very people she was complaining against. This is standard procedure. The LAC conducted their internal investigation and provided their investigation to the Ombudsman. The Ombudsman reviewed the investigation and found no issues and that the Police had acted properly. ...

RLC [Redfern Legal Centre] noticed issues that had not been addressed by the LAC or the Ombudsman, including a prima facie case of unlawful arrest. (sub. 115, p. 27)

However, low visibility prevents many from using these services

Commission estimates based on unpublished *LAW Survey* data suggest that some of the key areas of unmet legal need (where people experienced legal issues but were unable to resolve them) do not represent gaps in the availability of appropriate dispute resolution services, but rather, gaps in community knowledge about those services (chapter 2).

The evidence obtained by the Commission demonstrates how difficult it is for members of the public to find the correct service to assist them. As a result many people do not receive the help they need while others are frustrated at being passed between services, often having to explain their complaint many times to different agencies. (Victorian Ombudsman, sub. DR176, p. 2)

Of the key areas of unmet legal need identified in chapter 2 and in appendix B:

- areas within the jurisdiction of government-funded ombudsmen and complaint mechanisms accounted for around 40 per cent of unmet need
 - of these, almost half were within the jurisdiction of rights commissioners, health complaint bodies and fair trading or consumer affairs offices
- 25 per cent of unmet needs were in industries such as utilities, telecommunications and financial services, where industry ombudsmen are available.

The suggestion that ombudsmen could address a significant share of unmet need received positive responses from some key ombudsmen, including the PTO and TIO. ANZOA said:

ANZOA supports the findings in the Commission's Draft Report about the opportunity for greater access to informal dispute resolution mechanisms, such as Ombudsman offices, to address a significant proportion of consumer issues, described in the Draft Report as 'unmet legal needs'. (ANZOA, sub. DR200, p. 4)

Any measures to address unmet legal need would have significant resource implications for ombudsmen. Given such a large prospective increase in workload, keeping costs in check would be essential, and further funding may be required.

[The Law Institute of Victoria] considers that if ombudsmen services are to be expanded to increase access to justice for the general public, that funding arrangements need to reflect such an expansion. (sub. DR221 p. 22)

Ombudsmen are free of charge but not costless

Estimating the cost of dispute resolution services and comparing their relative efficiency is complicated by a number of factors. While data on overall funding and complaints are publicly available, ombudsmen also conduct systemic investigations, which can vary widely in scope and in the resources required to complete them. Estimates are further complicated since most ombudsmen also conduct varying degrees of community education and interaction. Some ombudsmen have additional functions, such as the child death review function of the NSW and WA Ombudsmen, although compared to government

ombudsmen, the functions of industry ombudsmen are more contained. This is in contrast to tribunals, which tend to only hear disputes.

The OAIC [Office of the Australian Information Commissioner] has a range of other functions that are not easily accommodated in a breakdown of cost by dispute. A major aspect of the OAIC's work is in awareness-raising activities and policy development, including the development of guidelines, fact sheets, resources and reports to government. A significant proportion of the OAIC's budget is allocated to those activities. (sub. DR179, p. 2)

Ombudsmen and other complaint bodies also use different definitions and counting methodologies in reporting their workload. For example, some ombudsmen only count written complaints as 'complaints', while others count both written complaints and other contacts.

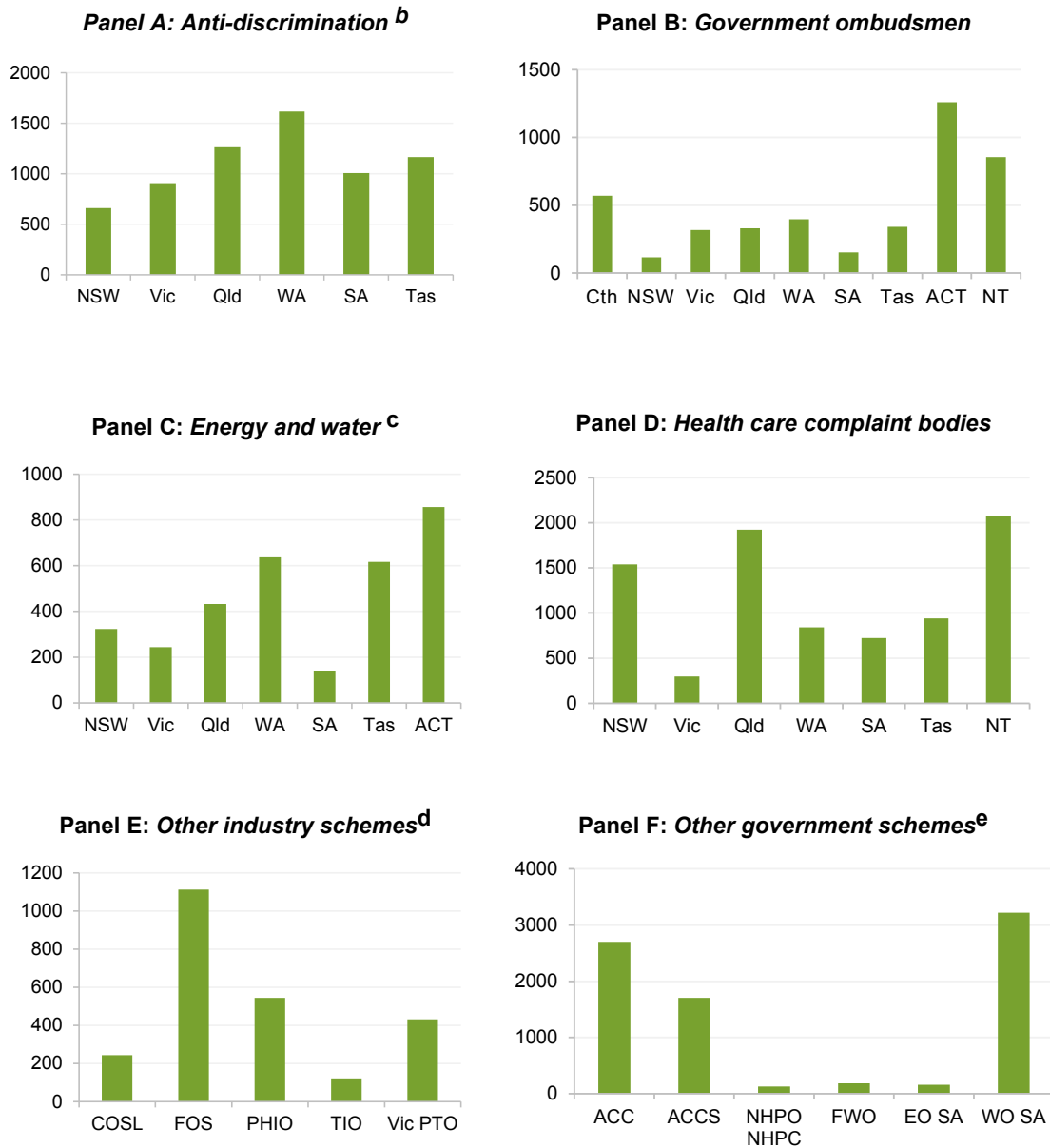
Additionally, matters which are counted as 'complaints' can vary greatly in the amount of time and resources required to resolve them. For example, some industry ombudsmen resolve most of their complaints by referring the issue to another body, usually the service provider. The TIO resolved 88.5 per cent in this way in 2011-12 (TIO 2012a). However, complex cases might involve multiple agencies, multiple issues, remote locations, significant documentation, interviewing witnesses and formal procedural fairness processes.

One of my senior staff has spent untold hours — I just cannot tell you how many hours she's spent — assisting a man on the autism spectrum who got into all sorts of trouble; his bills were wrong and he had a meter on his property that wasn't being used. ... At the end of it when we resolved that, we knew that as an ombudsman's service we had spent an enormous amount of resources on this one case, but we just asked ourselves if we had not done that who would have? No one would have. (EWON, trans., p. 316)

The Commission has sought to address some of these issues by estimating cost per contact rather than cost per complaint. Figure 9.1 shows the cost per contact for various complaint bodies. This avoids the issue that bodies define 'complaint' differently, and the issue that some bodies devote substantial resources to re-directing complaints that are not within their jurisdiction.

Cost per contact figures should be used with caution, as they do not take into account the non-complaints functions of ombudsmen and other complaint bodies. They can provide a proxy within a particular 'class' of ombudsmen, as other bodies within a particular industry will often have similar 'other' demands on their resources. However, cost comparisons between government and industry ombudsmen or between complaint bodies in different industries should be avoided in the absence of more detailed analysis.

Figure 9.1 Cost per contact of various complaint bodies^a
2011-12



^a Average cost per contact is calculated by dividing total expenditure by total contacts. ^b Anti-Discrimination Board of New South Wales, Victorian Equal Opportunity and Human Rights Commission, Anti-Discrimination Commission of Queensland, Equal Opportunity Commission Western Australia, Equal Opportunity Commission (SA), Anti-Discrimination Commission (Tas). Data were not available for the ACT or NT bodies. ^c The ACT Civil and Administrative Tribunal is the responsible body in the ACT. ^d Credit Ombudsman Service (COSL), Financial Ombudsman Service (FOS), Private Health Insurance Ombudsman (PHIO), Public Transport Ombudsman (Vic PTO), Telecommunications Industry Ombudsman (TIO). ^e Aged Care Commissioner (ACC), Aged Care Complaints Scheme (ACCS), National Health Practitioner Ombudsman (NHPO) and National Health Privacy Commissioner (NHPC), Fair Work Ombudsman (FWO), Employee Ombudsman SA (EO SA), WorkCover Ombudsman SA (WO SA).

Source: Commission estimates.

Commission estimates (based on available data) show a high volume of cases being resolved at varying levels of cost. In 2011-12:

- 12 industry ombudsmen resolved 343 000 complaints (431 000 contacts) at a cost of \$114 million (an average cost of \$260 per contact)
- 8 government ombudsmen resolved 52 000 complaints (152 000 contacts) at a cost of \$64 million (an average cost of \$420 per contact. Given some of these ombudsmen have significant other functions, these figures were calculated by excluding major functions that are not part of the traditional work of government ombudsman)
- Commissions that are responsible for privacy and freedom of information complaints received very small numbers of complaints (fewer than 500, on average). These exist in most states and territories and cost, on average, \$860 per contact. Anti-discrimination bodies exist in every state and territory. Those for which data were available received, on average, fewer than 900 complaints each, however the number of contacts was six times that (the average cost was \$1000 per contact, figure 9.1 panel A). All of these bodies have regulatory and other functions, the cost of which could not be excluded from the analysis
- The remaining organisations⁴⁶ resolved 51 000 complaints (836 000 contacts), at a total cost of \$227 million (\$270 per contact).

While most ombudsmen do not publicly report the cost of systemic reviews, some collect data in this area, and most report what reviews were conducted, the outcomes reached and any recommendations for further changes. The Victorian Ombudsman provided examples of systemic reviews costing between \$70 000 and \$205 000, noting that, ‘A definition of a ‘typical’ systemic review is particularly elusive in a broad jurisdiction such as mine.’ (DR176, p. 7). ANZOA provided some estimates based on information from four government and six industry ombudsmen:

The number of systemic issues investigations conducted annually by the Parliamentary and Industry-based Ombudsmen whose information we analysed ranged from 10 to over 50. In addition, some Ombudsmen monitor and informally resolve hundreds of less complex potential systemic issues each year. (ANZOA, sub. DR200, p. 6)

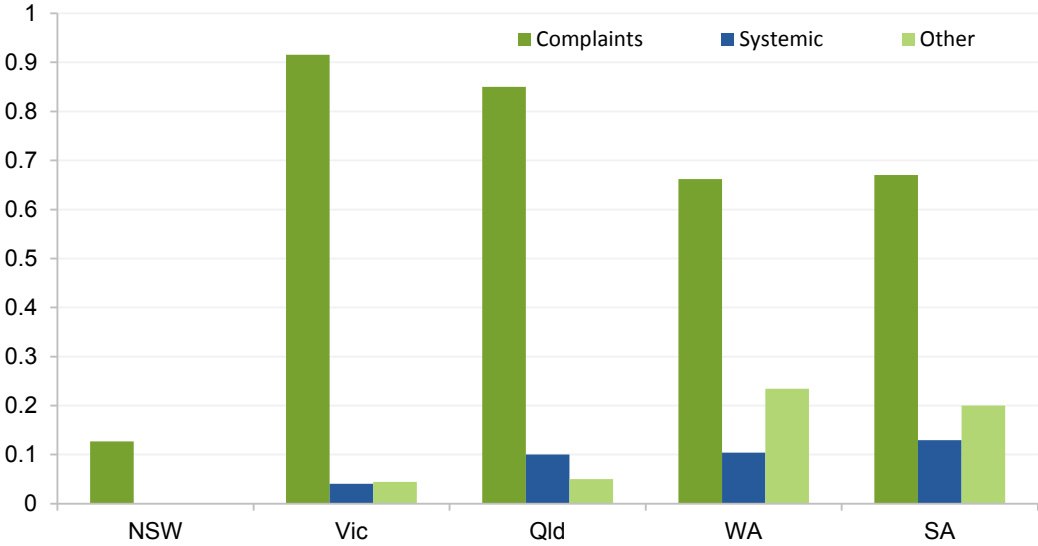
The PTO estimated that it spent 3.4 per cent of total resources on systemic issues in 2012-13 (sub. DR223) and EWON estimated its 2012-13 spending at 2.4 per cent of total resources (sub. DR190). At the other end of the scale, ANZOA estimates that some ombudsmen devote between 10 and 15 per cent of total resources to addressing systemic issues (sub. DR200).

The Commission asked each government ombudsman about the relative share of resources their offices devote to three core functions: responding to complaints and other requests for assistance; conducting investigations into systemic issues; and ‘other’ functions assigned under legislation but not usually part of the traditional functions of a government

⁴⁶ Including health complaints commissions and other national, government-funded schemes, but excluding state and territory fair trading agencies, which are primarily regulatory bodies.

ombudsman. Not all ombudsmen were able to apportion their costs in this way, but for those who could, figure 9.2 shows that dealing with complaints/requests generates the greatest costs. As mentioned above, some have significant ‘other’ functions. For example, the WA Ombudsman has responsibility for review of certain child deaths, and the NSW Ombudsman dedicates a significant share of its resources to non-traditional functions such as police behaviour, witness protection, deaths of certain children or people with disabilities, and public interest disclosures.

Figure 9.2 Proportion of resources allocated to various functions
Government ombudsmen; per cent of resources for 2012-13^a



^a The NSW Ombudsman policing and employment related child protection oversight and monitoring roles are included in ‘other functions’. Data in this figure are estimates because various functions overlap and often the same staff have multiple roles.

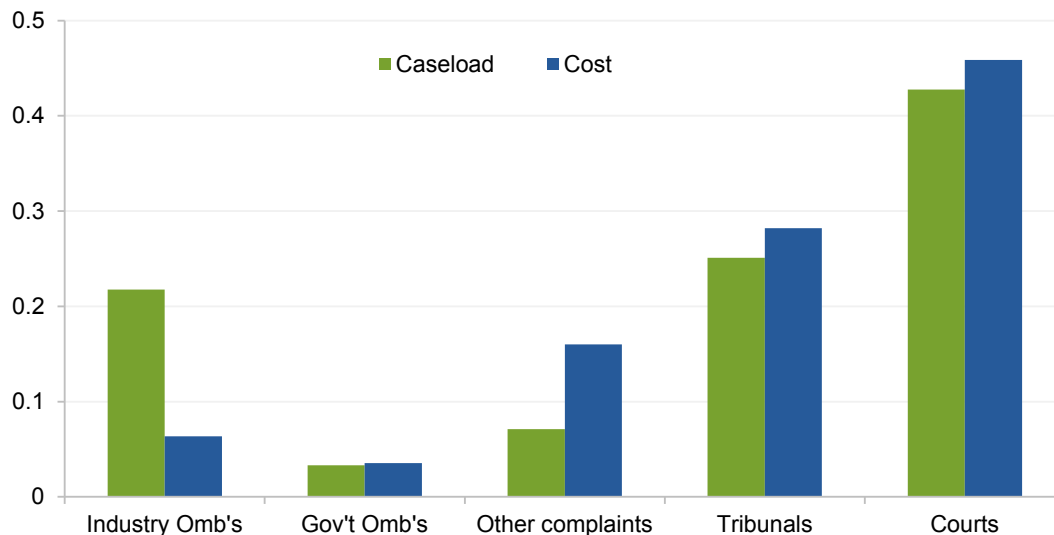
Source: pers. comms., (various).

In the context of the broader civil justice system, ombudsmen and other complaint bodies resolve a large volume of complaints at low cost. Figure 9.3 shows the share of all civil dispute resolution managed by the various ombudsmen and government funded complaint mechanisms compared to tribunals and courts, along with the share of costs incurred by these institutions.

However, in interpreting these estimates, it must be noted that private legal expenses are not incurred by complainants. Also, systemic work undertaken by ombudsmen is not captured in the number of complaints but can reduce the potential for complaints to arise, suggesting that ombudsmen represent even better value for money.

Figure 9.3 Share of civil dispute resolution caseload and costs ^a

Finalised complaints or cases; 2011-12



^a The proportions in this figure differ from the proportions reflected in overview figure 1 because it excludes the fair trading/consumer affairs bodies, which are predominantly regulatory bodies and do not separately report the cost of complaints functions. For government ombudsmen, activities not part of traditional complaint/systemic work have been excluded from cost estimates.

Source: Commission estimates.

There is also evidence that in some cases, costs are declining. The cost of running ombudsmen services in 2012-13 was \$656 per in-jurisdiction complaint based on data from 11 ombudsmen.⁴⁷ The average cost in 2012-13 was 18 per cent lower than the cost in 2008-09, and the number of disputes was 30 per cent higher (ANZOA, sub. 133). As noted by the PTO, ombudsmen are resolving more disputes within the limits of constrained funds:

Since being appointed in 2010, I have seen a 138% increase in enquiries and complaints to my office. This increase has been managed with only a 14.7% increase in budget. ... We offer excellent value for money for consumers and industry when compared to the costs associated with court or tribunal proceedings. (sub. 118, p. 6)

The PTO's average cost per complaint has fallen from almost \$1000 in 2008-09 to \$400 in 2012-13 (sub. 118).

⁴⁷ The average cost estimates provided by ANZOA capture both industry and government funded ombudsmen and relate to cost per complaint rather than cost per contact, so they remain broadly consistent with the estimates derived by the Commission.

9.4 Can ombudsmen play a bigger role?

If a significant portion of unmet legal need is to be met by existing ombudsmen and complaint bodies, reforms are required to increase community awareness of their services. This can be achieved, in part, through increasing the visibility of ombudsman services. Effective referral mechanisms — whereby bodies that consumers are likely to contact are informed and trained to refer consumers to the correct ombudsman — are also critical. Rationalising some services could also help in ensuring that the first point of contact is the ‘right’ one. Accessibility could be further improved by removing the requirement that complaints to some ombudsmen be in writing.

Increasing the visibility of services by providing information to the public

There are three key methods by which the visibility of ombudsmen in the community could be improved:

- direct outreach programs run by ombudsmen to increase community awareness
- publishing information about ombudsmen on complaints and consumer information websites
- service providers (whether industry or government) providing information on their websites and in correspondence to consumers.

In their submissions to this inquiry, many ombudsmen highlighted the significant efforts they have made towards increasing community awareness:

Over the past three years we have developed a regular program of community outreach activities, working with community groups, disability advocacy services, government agencies, PTO scheme members, universities and other dispute resolution services. We also work with operators to ensure that they are continually promoting awareness of our services in their complaint correspondence, publications and websites. (PTO, sub. 118, p. 4)

Enhanced awareness of the TIO within the community remains a focus of our three-year strategy, which includes initiatives to increase outreach activities targeting young people and Indigenous communities and to improve our online presence and accessibility. We ensure our Outreach program is a robust one, and reaches out to as many different communities as possible – in 2012-13 we attended or participated in 72 different outreach events. (TIO, sub. 134, p. 3)

ANZOA supports its members to work together on efforts to build community awareness (sub. DR200), given that running such programs in partnership can be more cost effective. However, in many cases awareness remains low:

Despite extensive community outreach, unprompted awareness about the existence of my office remains relatively low. (PTO, sub. 118, p. 5)

Certain segments of the community have particularly low awareness of ombudsman services, including Indigenous Australians, young people and people from culturally and

linguistically diverse (CALD) backgrounds (ANZOA, sub. 133). Thus, disadvantaged clients who stand to benefit most are often not well informed of ombudsman services. Redfern Legal Centre (RLC) said:

The clients we assist at RLC are predominantly low-income earners, or on Centrelink payments, and frequently from Aboriginal/Torres Strait Islander, CALD or non-English speaking backgrounds. In our experience, accurate awareness of the various Ombudsman services amongst our client-base is low. (sub. 115, p. 25)

Some ombudsmen invest significant resources in targeting information directly to disadvantaged groups or the services they are connected to. For example, when the PTO became aware of significant disability issues relating to public transport, she engaged with disability services and advocacy organisations to understand the issues and improve awareness and referrals (trans., pp. 617–618). EWON also noted its focus on disadvantaged groups:

EWON has identified a number of disadvantaged consumer groups that we target our outreach activities towards, including: Indigenous, CALD communities including refugee and newly arrived groups, seniors, people with disabilities or health issue and their advocates. (EWON, sub. 141, p. 18)

The Commission supports outreach activities as a means to raise the visibility of services, particularly for disadvantaged groups.

Another way to increase the visibility of services is to publish general complaints information websites. Several of these already exist — for example the ACCC website lists industry ombudsmen and dispute resolution organisations. The Commonwealth Attorney-General's Department *Access to Justice* website provides information on both government and industry ombudsmen and also provides information on where to seek advice based on an individual's location and the nature of the dispute.

The advantage of general complaints websites is that they provide a point of contact for every dispute type, although potential complainants may not know that such websites exist. Furthermore, not all these websites provide comprehensive or accurate advice. Therefore, some investment is required to raise awareness and to increase their effectiveness — one site that is better advertised would be likely to reach more people than many sites that are not well known.

The NSW and Victorian Ombudsmen expressed support for the idea of a one-stop shop, which could take the form of a holistic complaints system including common standards and processes (Victorian Ombudsman, sub. DR176), or more simply, a single point of initial contact:

One way of raising the profile of Ombudsman offices and other available avenues of complaint would be to establish a single point of initial contact for anyone wishing to complain about government or raise their concerns about possible misconduct or corruption. This would create an easily recognisable contact point for everyone in the community. (NSW Ombudsman, sub. DR295, p. 7)

However, other participants felt that there was limited value in creating a one-stop shop, and that referrals would be more effective (ANZOA, trans. p. 311). The TIO expressed a similar view:

I don't think that the best approach is to create a single access point. There is a real risk with this approach of increasing consumer 'run around' and resulting in a poor service experience and possibly poor centralised decision-making. Instead, my view is that a focus on increasing the profile of existing services and strengthening cross referral processes is to be preferred. This is likely to be effective both from an access to justice and from a costs perspective. (TIO, trans., p. 832)

The Commission has commented in chapter 5 on the desirability of a more centralised source of information about how and where legal issues can be resolved. Information about ombudsmen services should be available through these centralised points.

In addition to outreach and the publishing of general information, the provision of information by service providers themselves (be they telecommunications companies or government agencies) is a particularly important avenue of raising the profile of Ombudsmen and complaints services.

In some industries, service providers are required to give contact details for the relevant external dispute resolution service, generally on websites and sometimes on all correspondence or on correspondence relating to complaints. For example, NSW energy and water providers must include information about EWON on all overdue and disconnection notices (sub. DR190). Similarly, financial service providers must inform a consumer of the ability to complain if the consumer's issue has not been satisfactorily addressed (Australian Bankers' Association, sub. DR254). The PTO requires scheme members to include standard text in all complaint correspondence, however it has found that members do not always honour this requirement (trans., p. 607).

The TIO suggested that it would not be appropriate to require information to be provided on every bill or item of correspondence, as the client should contact the service provider in the first instance and to do otherwise could substantially increase the number of complaints they are not able to deal with (trans., p. 840). However, it is important to avoid a situation where a consumer accepts an unsatisfactory resolution from a service provider because the consumer has not been informed that an alternative dispute resolution option exists. A requirement upon service providers to inform consumers during the course of any complaint, even a complaint that does not involve written correspondence, would overcome this.

Currently, requirements on service providers to inform clients about the existence of relevant external dispute resolution options exist more for industry participants than government agencies. The Commission is supportive of similar requirements being developed for government agencies to assist in ensuring that clients are informed about their dispute resolution options. The NSW Ombudsman agreed that introduction of similar requirements was worth considering:

A number of NSW government agencies include information about our office and when people should approach us on their websites and in relevant publications. Others also have copies of our fact sheets available in their front offices. We will continue to encourage others to do the same, and feel that introducing such a requirement is worth considering. (NSW Ombudsman, sub. DR295, p. 8)

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.

Does the use or misuse of the term ‘ombudsman’ reduce visibility?

Some participants indicated some difficulty with the term ombudsman, in that it is not likely to be part of the vocabulary of many disadvantaged members of society. However, there were also indications that knowledge of the availability and role of ombudsmen has been increasing over time:

I think it is a difficult word for some people and I have just seen a study today about the levels of literacy and numeracy in our community ... [so in some cases] ombudsman would be a real challenge, I think. (ANZOA, trans., pp. 313-314)

... part of the survey responses - it was free text - I think we got around about 20, 25 different spellings of the word ‘ombudsman’, including one that said ‘on the bus man’. So the word is out there. It is known, I guess, and it’s more known now than perhaps it was 11 years ago when I started in this area. (PTO, trans., p. 610)

Another issue raised by participants was the increasing use of the term ‘ombudsman’ by organisations not satisfying ANZOA’s criteria (box 9.1). These include:

- the Produce and Grocery Ombudsman, which does not operate on a not-for-profit basis
- the Fair Work Ombudsman, because of the regulatory functions carried out by that service (Letter from ANZOA to the Minister for Employment and Workplace Relations, 17 March 2009).

In the past there were examples of internal ombudsmen within organisations such as private insurance companies or local governments, which lacked the core element of independence from the organisation against whom the complaint was made. ANZOA indicated that in some cases these organisations removed the title in recognition of these concerns (trans., p. 314).

The Commission considers that it is largely desirable that bodies utilising the title ombudsman meet ANZOA’s criteria. This will assist in shaping shared public

understanding about the role that ombudsmen play, as distinguished from other types of complaint bodies. Governments should consider these criteria when deciding upon the title of new complaint bodies.

Re-directing complaints

While information about the availability of ombudsmen services should be promoted as widely as possible, ombudsmen do not have the resources to reach the whole community. As happens now, individuals will continue to approach a range of other organisations for assistance. In addition to providing general information to the public, a more active strategy is utilising referrals between organisations.

... trying to make the entire community aware of you is, I think, an unrealistic expectation of an office like ours. We certainly focus our initiatives on those key intermediaries who are dealing with vulnerable consumers, so disability advocates, migrant resource centres, financial counsellors, Community Legal Centres and the like, because we think that that's likely to maximise the impact. (TIO, trans., pp. 835-836)

... I don't think [mass advertising is] really appropriate anyway because you could bombard people with those messages, but they only need an ombudsman when they need them and so it will go over their head. (ANZOA, trans., p. 311)

Referrals between ombudsmen and other complaint bodies are common. For example, the Victorian Ombudsman used 13 per cent of complaints-handling resources to redirect complaints that were not within its jurisdiction — almost half of all calls in 2012-13 (Victorian Ombudsman Working Group 2013).

... referral of out-of-jurisdiction matters is an established part of the role of all Ombudsman offices. Where someone contacts an Ombudsman office and the office cannot assist, the person is provided with detailed contact information for an appropriate dispute resolution service — be that another Ombudsman, Fair Trading or Consumer Affairs, a tribunal or court, or another body. (ANZOA, sub. DR200, p. 15)

Like other industry ombudsmen offices, my staff refer consumers to more than 40 organisations. (PTO, trans., p. 606)

The Victorian Ombudsman suggested that referrals between ombudsmen could be assisted by working toward complementary online complaint forms, so that complaints could be forwarded without requiring new forms to be filled in. This would involve standardised privacy/consent requirements, a consistent approach to the information sought from complainants, and some technical requirements for data exchange (sub. DR176). Given the significant effort currently involved in re-directing complaints, the Commission supports further investigation of the costs and benefits of this suggestion.

Many ombudsmen provide information directly to organisations such as community legal centres, fair trading offices, financial councillors and even Members of Parliament, for the purpose of enabling them to refer people who have complaints to the appropriate body.

This approach can particularly be used to assist disadvantaged members of the community, who tend to be even less aware of ombudsman services.

EWON has found one of the best ways to effectively raise awareness is through ‘gatekeeper services’ - those services that consumers will approach when they have a problem. (EWON, sub. DR190, p. 3)

Legal assistance providers in turn work in partnership with ombudsmen, both re-directing complaints to ombudsmen and also providing feedback on the emergence of systemic issues or areas of potential improvement for ombudsman services.

LAC [Legal Aid Commission] information and advice services have good referral data bases which are well maintained. (National Legal Aid, sub. DR228, p. 21)

The PTO considers that CLCs have a role in identifying systemic issues through their case work and other activities and referring ‘test cases’ (individual complaints) to ombudsmen. (PTO, sub. DR223, p. 5)

We find that a really good way to work with specialist Community Legal Centres is to look for the opportunities for them to provide direct input into how we provide our services ... (TIO, trans., p. 834)

This partnership between legal assistance providers and ombudsmen helps free up scarce resources for legal assistance providers, and enables ombudsmen to target their outreach efforts.

It is widely recognised that legal referral and assistance services such as Community Legal Centres (CLCs) have high workloads and limited resources. Appropriate referrals to ombudsmen will free up resources and reduce the number of consumers who are turned away. (PTO, sub. DR223, p. 4)

However, ombudsmen need to provide continuous information and education to legal assistance providers to ensure consumers continue to be referred, due to high turnover of staff and volunteers.

The PTO recognises that there can be a high staff/student turnover in legal assistance services and is of the view that this recommendation [that information be made available to providers of referral and legal assistance services] should include regular outreach and training. (PTO, sub. DR223, p. 5)

Where appropriate, specific training for government agencies, legal assistance providers and other relevant services may also assist the referral process.

Frontline staff at relevant government agencies should also be appropriately trained so that information and resources about ombudsman services are front of mind when consumers contact them ... (PTO, trans., p. 606)

Obviously, the scope for many of these activities designed to improve referrals to ombudsmen and complaints services is constrained by available resources. However, even within these constraints, much can and is being done to raise the profile of ombudsman services and improve referrals. The Commission supports ombudsmen and other complaint

bodies continuing to work with governments, industry and legal assistance providers in this way to ensure people who access the system at any point are accurately directed to the most appropriate place to resolve their complaint.

Increasing the accessibility of services

Improving access for disadvantaged clients through tailored service delivery

Ombudsmen are highly accessible, compared to other methods of dispute resolution such as tribunals or courts, because they are free, can be accessed remotely by phone or internet, provide interpreter services and guide complainants through the process without the need for professional advocates. Many other complaint bodies also satisfy these accessibility standards. However, some participants highlighted the difficulties that may remain for members of the community who experience some form of disadvantage in using ombudsman services.

Most industry ombudsmen deliver a telephone and web-based service. This would be a significant barrier to access for most of ATSIILS' [Aboriginal and Torres Strait Islander legal services] clients. Many, particularly those from remote communities, have limited English, low or no literacy and have unreliable or no access to phones and computers. (National Aboriginal and Torres Strait Islander Legal Services, sub. DR256, p. 6)

[The Centre for Rural Regional Law and Justice] notes that, in general, there is very little information about complaints-handling mechanisms, such as the roles of various Ombudsmen's offices, delivered in regional and rural areas. (sub. DR236, p. 6)

While phone-based services are accessible to most people in rural and remote locations and to people with many types of physical or mental disabilities, access may remain low due to lack of awareness or misunderstandings about the nature of ombudsman services.

In addition to outreach programs to raise awareness, some ombudsmen have programs where they travel to meet face to face with particular groups to provide services, particularly Indigenous groups who 'need face to face assistance from culturally appropriate services' (National Aboriginal and Torres Strait Islander Legal Services, sub. DR256, p. 6).

Some Indigenous and CALD consumers are able to raise issues with their energy or water services when we visit them, rather than having to access EWON by phone or in writing. (EWON, sub. 141, p. 18)

... we're currently working with Legal Aid in a partnership in terms of reaching some regional and remote indigenous communities. It's absolutely clear that we have to go to them. There are people there who are never going to come to an ombudsman. While it's time-consuming and resource intensive, it's really important for us to do that and not only to visit once but to go back again, so that there isn't that, 'Who was that person with the clipboard who came last week?' So that has been a really good partnership for us ... (EWON, trans., p. 311)

Our Aboriginal Unit travels across NSW meeting with and speaking to Aboriginal communities. We have developed strong, ongoing relationships with many communities, and these relationships have meant we are able to help to quickly and informally overcome difficulties and challenges when they arise. (NSW Ombudsman, sub. DR295, p. 7)

While these services constitute leading practice in engaging with certain disadvantaged members of the community, their availability depends on the ability of ombudsmen to fund them. This is a matter for ombudsmen to decide as they set internal work priorities.

Complaints in writing

For some ombudsman, legislation prevents them from accepting complaints that are not in writing (unless the complainant is not capable of making a written submission). This applies particularly to government ombudsmen, for example the Victorian Ombudsman, who said:

As well as the complexity of navigating the myriad of complaint handling bodies, Victorians who wish to complain to my office have an additional barrier – a legislated requirement to make their complaint in writing. (sub. DR176, p. 4)

This requirement was introduced in the legislation establishing the Victorian Ombudsman in 1973, when most correspondence was in writing. However, many complaints could be more speedily and effectively addressed if the requirement was removed. About half of the 800 relevant (in-jurisdiction) complaints to the Victorian Ombudsman were not followed up in writing (sub. DR176). The Ombudsman WA and the Health Services Commissioner in Victoria, among others, have similar requirements.

A possible argument for keeping the requirement is that to remove it would open the floodgates of unmeritorious complaints. However, people who currently call the ombudsman are not aware of the written requirement, therefore removing this requirement would be unlikely to alter the number of contacts. While the number of formal complaints would increase, many could be dealt with more efficiently and speedily. The requirement to submit a written complaint may help some people clarify the nature of their complaint, however the Commission has no evidence that complaints received over the phone cannot be adequately clarified by customer service officers. While it would still be open to the ombudsman to ask for details in writing, the Commission sees no persuasive reason to maintain this as a mandatory requirement.

In its inquiry into public services ombudsmen, the UK Law Commission recommended the removal of all requirements for how complaints are received, so that ombudsmen can respond to changing technology.

Given responses received to consultation, we now think that there is no need for statutory requirements as to the form in which complaints are made. This would allow the public services ombudsmen to react to technological developments and the changing preferences of service users, without the need to either reform the governing Acts or routinely exercise discretion so as to keep pace with such developments or other changes. (2011, p. 20)

This recommendation was repeated in a report by the UK Public Administration Committee (2014).

The North Australian Aboriginal Justice Agency suggested that removing the requirement for written complaints promotes access to justice:

... the requirement of a written complaint is a significant barrier to the accessibility of an ADR [alternative dispute resolution] service. (sub. 95, p. 25)

RECOMMENDATION 9.2

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

9.5 Improving efficiency and effectiveness

Redrawing the boundaries of existing ombudsmen

Ombudsmen are not appropriate for all industries or dispute types. Industry representatives have cautioned that the scope and operation of industry ombudsmen should be proportionate to the dispute resolution services required, and should consider the costs, given that industry funding is compulsory (Australian Bankers' Association, sub. 121). Factors that lend themselves to the use of ombudsmen include:

- essential services are involved
- the market is characterised by large firms and limited competition, thus creating significant power imbalance
- there is significant asymmetry of information, such that consumers would have difficulty asserting their rights
- there are a large number of disputes.

Justice Sackville commented on the relative value of ombudsmen in the following way:

These kind of bodies would appear to be most valuable when a service sector has a large number of consumers who cannot easily 'shop elsewhere'. The [in]ability to 'shop elsewhere' can arise, for example, where consumers have little or no choice between service providers (which is especially true when the service provider is a government department or instrumentality) and where consumers are tied into one service provider (for example, pursuant to a long term superannuation or life insurance policy, or even a mortgage that cannot easily be re-financed). (1994, p. 304)

Applying these criteria to existing ombudsmen reveals that there may be some scope to roll back existing schemes, or at least vary the extent to which they attract government funding.

As an example, the Commission sees little value in the Produce and Grocery Industry Ombudsman (created under the Produce and Grocery Industry Code of Conduct) which received only 19 complaints in 2011-12. Similar dispute resolution services exist for the franchising, horticulture and petroleum industry codes. Dispute resolution under these codes is funded by government and, in some cases, co-funded by the disputing parties. Combined, these four services resolved 121 disputes at a cost to government of \$2 million in 2011-12 (based on available data). The Mediation & Arbitration Chambers said that the franchising industry scheme had been ineffective, and that litigation 'has continued unabated despite government funded and mandated mediation processes' (sub. DR244, p. 6).

Where ombudsmen services are warranted (based on the criteria set out above), there may be scope to improve the efficiency of service provision by redirecting some complaints or redrawing the boundaries of some schemes. Indeed, the Commission identified 73 ombudsman or complaints services, and of the 69 that had reported caseload data for 2011-12, the 34 smallest organisations provided only 2 per cent of complaint resolutions. As the Commission has previously identified, whether this proliferation of ombudsmen is important (in policy terms) depends on whether:

- it confuses consumers about where to go
- variations between the individual schemes mean parties are treated in a materially different way, either procedurally or substantively
- there are efficiency gains in specialisation or, alternatively, in consolidation or sharing common assets.

There are several examples where existing ombudsman functions warrant reconsideration.

The Aged Care Commissioner (who finalised 129 complaints in 2011-12 at a cost of government of \$1.5 million) hears unresolved complaints from the Aged Care Complaints Scheme (which itself only dealt with 4246 complaints in 2011-12). In its investigation into caring for older Australians, the Commission recommended that the Aged Care Commissioner be abolished and appeals go to the Administrative Appeals Tribunal (PC 2011).

The SA Workcover Ombudsman finalised 189 complaints in 2011-12. This low caseload is probably due to the narrow jurisdiction left after excluding overlap with other bodies. The SA Workcover Ombudsman has no jurisdiction to investigate issues related to the operation of the *WorkCover Corporation Act 1994* (SA) or the *Fair Work Act 1994* (SA), although workers compensation issues sometimes overlap with the provisions of these Acts. Neither does it have jurisdiction to investigate matters that are, or are capable of being, the subject of proceedings in the SA Workers Compensation Tribunal. The Commission suggests that there may be scope for improvements in efficiency and effectiveness of service delivery if this ombudsman were merged with another body.

A suggestion was made by the Victorian Ombudsman that, where appropriate, other bodies (such as the Mental Health Complaints Commissioner, Disability Services Commissioner

or Privacy Victoria) could focus on their advocacy role and transfer their complaints to the Ombudsman, which is better resourced and has a higher profile. For example, of the 832 complaints and enquiries received by the Disability Services Commissioner in Victoria in 2011-12, 47 per cent were out of jurisdiction, reflecting the narrow scope of complaints that office can receive (Disability Services Commissioner 2012).

In Victoria there are multiple instances of small complaint handling bodies. In some instances their jurisdiction overlaps with my own creating even more complexity for members of the public seeking to resolve a dispute. (Victorian Ombudsman, sub. DR176, p. 10)

The NSW Ombudsman also provided reasons why giving additional functions to the Ombudsman should be preferred to creating new bodies to address a particular policy need.

The NSW Ombudsman has spoken on a number of occasions about the inherent risks in the creation of new bodies to perform roles that could sit within an existing Ombudsman. Doing so creates a heightened risk of unnecessary duplication, as well as increasing the risk of members of the community not knowing which body to approach. ... Providing appropriate additional roles to existing offices means the new function can begin far sooner, and raising awareness is an easier prospect. (sub. DR295, p. 9)

The Commission considers these positions have merit and suggests further investigation is needed to determine where services might be made more efficient and effective through amalgamation, or where services do not warrant government funding.

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.

The Commission has also previously recommended that jurisdictions consider the potential for consolidating energy ombudsman offices, and the ultimate formation of a national energy ombudsman (PC 2008). As identified at the time, costs vary significantly across jurisdictions, with the highest cost scheme currently around six times more expensive per contact than the least (figure 9.1, panel C). An important reason is that the smaller schemes have a limited capacity to spread their fixed costs over many complaints. For example, the Tasmanian Energy Ombudsman, finalised only 499 complaints in 2011-12, less than 1 per cent of the number finalised in Victoria.

EWON suggested that while consolidation may be appropriate in the longer term, there is little support for it at present:

- not all jurisdictions have adopted the National Energy Customer Framework, and some ombudsmen have additional responsibilities outside of the national framework
- a number of energy ombudsmen also have a water jurisdiction
- current energy ombudsmen have different structures in that some ombudsman offices are state authorities, others are private companies
- any such change would need to be subject to a rigorous cost-benefit test.

EWON suggested that these issues need to be resolved at a minimum prior to the consideration of a national ombudsman scheme (sub. DR190). The Commission agrees with this view.

Industry ombudsmen

Submissions to this inquiry consistently saw industry ombudsmen as relatively better performers than government schemes:

In our experience the Industry Ombudsmen are generally more effective than other Ombudsman. (Redfern Legal Centre, sub. 115, p. 25)

SMLS [Springvale Monash Legal Service] finds that Ombudsman services are particularly useful in disputes between industry and consumer and has had positive experiences with them from that perspective. (SMLS, sub. 84, p. 9)

External dispute resolution schemes have worked very hard on changing the culture and improving dispute resolution in industry, and consumer advocates have worked in concert with the dispute resolution schemes and with industry to get these outcomes. ... the culture change has been fantastic. The industry are keen to fix any systemic problems, they're keen to hear from consumer advocates about problems, they're keen to hear from dispute resolution schemes. (Financial Rights Legal Centre, trans., p. 301)

Ombudsman schemes can also provide significant benefits to industry. Research conducted by Ernst and Young has shown that unresolved complaints cost businesses in the vicinity of \$720 for every negative customer experience, due to loss of business and reputational damage (2014). The study found that in many cases, customers take no action, and when they do complain, they are often unsatisfied with the outcome. This supports the cost-effectiveness of highly accessible external dispute resolution mechanisms.

A number of participants pointed to the incentive structures of industry ombudsmen to explain performance differences.

... at the Financial Ombudsman the further you engage in the dispute process and the longer it takes the more the member must pay — so it becomes more costly for them to delay, thus encouraging early settlement before the matter reaches the final stages of the process. (Redfern Legal Centre, sub. 115, p. 25)

Indeed, there seem to be a number of design features contributing to the leading performance of industry ombudsmen, summarised here by the Consumer Action Law Centre:

- industry ombudsman schemes are typically a condition of holding a relevant licence, so all businesses in an industry must participate in the scheme;
- industry ombudsman schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes;
- industry ombudsman schemes typically have independent boards with 50 per cent representation from consumers so the dispute resolutions processes are fair and balanced;
- the ombudsman scheme process provides flexible solutions to disputes but also has ‘teeth’ because the ombudsmen can make findings binding upon the trader
- Ombudsmen are typically required to investigate and report on systemic problems, meaning that they not only provide solutions for individual disputes but also help bigger problems be solved at their source; and
- Ombudsmen keep detailed records and make detailed reports that assists the advancement of consumers’ interests. (sub. 49, pp. 14–15)

There are differing views on the extent to which imposing a cost per complaint increases the incentive for industry members to resolve complaints earlier. Among industry ombudsmen, most charge members a mix of fixed costs and cost per complaint, however some charge only one or the other.

The TIO charges only per complaint and does not charge a fixed fee, however their rationale is based on equitable cost recovery not incentive effects, which were described as incidental (TIO, trans., p. 843). The TIO has experienced a significant decrease in the number of complaints it receives annually, and attributes that decrease not to the cost incentive but to increased competition between telecommunications providers, amendments to industry codes targeted to reduce complaints and the systemic work of the TIO (trans., pp. 836–837).

However, other ombudsmen have presented the view that a fee per complaint does drive behaviour. The PTO said that most of its income is gathered through variable charges, and those costs drive industry behaviour (trans., p. 612). EWON gave the example of one company that was paying 1 million dollars a year in complaint fees before deciding to invest in its internal processes, after which complaint numbers dropped substantially (trans., p. 320).

Some ombudsmen and complaint bodies have a fixed-fee model. This would seem to remove the cost incentives on service providers, although it may still be appropriate where the industry is dominated by one or two players, such as the energy markets in the ACT, Western Australia and Tasmania. For example, where one company supplies 95 per cent of the energy market, charging a fixed fee of 95 per cent of the ombudsman costs may be more efficient than imposing a fee per complaint.

While the price signal may not alter behaviour in every case, on balance, the Commission considers that per-complaint fee structures send the right signals to service providers so that complaints can be resolved more efficiently and effectively. Therefore ombudsmen that operate in competitive markets but charge only a fixed levy — such as the Private Health Insurance Ombudsman — could consider the costs and benefits of changing to a mixed fee structure. While complaint numbers vary from year to year, the Commission received no evidence that this prevents ombudsmen from being able to effectively plan and manage their budgets.

A potential area for industry ombudsmen to improve is in the publishing of more comparable data to enable benchmarking. Many ombudsmen indicated that they comply with the *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*, released by the government in 1997. This requires a detailed annual report including information such as number of complaints received and the time taken to resolve complaints. While this information is useful, it is not always comparable — for example when different measures of timeliness are reported (chapter 25). Many industry ombudsmen collect very detailed data on complaints for the purposes of billing scheme members. The Commission understands that comparable reporting would therefore not be overly onerous, but would only require agreement as to which measures to report.

... we are in the same business, and I think certainly the Energy Ombudsman, which is still a state jurisdiction, we have recognised that we have got even less excuse to [not] have similar reporting structures. So we are working on that really hard to do that. (EWON, trans., p. 320)

Government ombudsmen

Given that industry ombudsmen are seen as better performers and their design features seem to contribute to this, it is worth examining whether any of these features are also relevant for government ombudsmen — the appropriate powers for government ombudsmen may be different to those that are effective in the private sector, due to differing revenue structures, incentives and responsibilities.

Incentive-based fees

In contrast to participants in industry ombudsman schemes, government departments or agencies do not face ‘penalties’ based on the number of complaints they attract or the time taken to resolve them. However, a fee for every complaint — not for the purpose of cost recovery but as an incentive measure — could increase pressure on government agencies to address any systemic issues generating complaints, and to resolve complaints that did arise in an efficient and timely manner, rather than relying on the ombudsman to resolve disputes that could better be dealt with in-house. However, several objections would have to be addressed:

Public services are frequently concerned with the public interest even where this may not be in the best interests of an individual. In fact many public services are indeed purposefully

designed to intervene in the lives of members of the public in ways they are likely to be dissatisfied with. ... In none of these instances would it be appropriate to create an incentive for the agency to avoid or resolve a complaint from the individual who is adversely affected. To do so would be contrary to the public interest, undermine the equitable delivery of services or diminish the protection of vulnerable members of the community. (Victorian Ombudsman, sub. DR176, p. 16)

Government agencies should not be required to contribute to the cost of complaints against them as this could encourage frivolous 'revenge' complaints or targeted costly campaigns against the agency's policies. (Australian Corporate Lawyers Association, sub. DR263, p. 17)

Government agencies are not looking to make a profit, but rather to use the finite resources they have to provide essential services to the community. ... ultimately the money would have to be taken away from the very services we are looking to improve. (NSW Ombudsman, sub. DR295, p. 10)

Other participants highlighted examples of government agencies already contributing to the cost of complaints made against them, through membership of industry schemes:

For example, in respect of my office, when we were originally set up, Telstra was government-owned, and it paid fees in respect of dispute resolution services. National Broadband Network is a member of TIO, and we can deal with complaints in relation, for example, to its exercise of statutory powers to enter land. (TIO, trans., p. 843)

... the membership of the PTO comprises private companies and government agencies. In line with the PTO's funding model each of these organisations pays a fixed levy and a variable levy based on each member's share of cases in the previous year. Therefore these government agencies are contributing to the cost of complaints lodged against them. (PTO, sub. DR223, p. 5)

Where government agencies have the ability to substantially reduce complaints by improving service provision or internal complaints handling processes, a penalty for complaints may increase the incentive to do so. However, such a penalty may have little benefit, or even create risk-averse behaviour, where complaints cannot be avoided because of the nature of the decision or service. For example, for decisions about the allocation of scarce resources or policy decisions, it may not be appropriate to attach a financial penalty to complaints.

On balance the Commission considers that it would be worth governments investigating what kind of fee might be appropriate, and in what circumstances. The Commission also encourages governments to consider this as an option when designing new complaint schemes. Arrangements could be further strengthened by the requirement for agencies to develop and implement dispute resolution management plans (discussed in chapter 8).

Power to make binding recommendations

Some industry ombudsmen have powers to make binding recommendations, however it is still the case that only 1.1 per cent of complaints lodged reach the stage where a determination or binding decision is made (ANZOA, sub. 133). In contrast, government

ombudsmen do not make binding recommendations, relying instead on reports to parliament or the public.

While the potential for binding recommendations provides industry ombudsmen with a certain degree of influence in negotiating with members, the Commission considers the same powers are not generally appropriate for government ombudsmen. Government ombudsmen usually review decisions made with a public interest motive, rather than an over-arching profit motive, and so would need strong evidence to strike down and re-make such decisions.

Power to make public reports

In cases where an ombudsman considers an agency is not adequately responding to its recommendations, public reporting is a powerful tool to prompt the agency to change or publicly defend its current practices. For example, the Commonwealth Ombudsman recently released a public report detailing the behaviour of Centrelink toward clients and its slow response toward some previous recommendations of the Ombudsman. The Ombudsman noted that ‘the department has responded positively to the report by agreeing to implement all of the recommendations, either in full or in part.’ (Neave 2014). A former Commonwealth Ombudsman said, in relation to public reporting:

Public criticism of an agency by an ombudsman can instil within agencies a healthy mixture of anxiety and respect. Not least, publicity moves the file to the desk of the agency head, and often the minister. They will think more acutely about their public image and whether their administration is up to scratch. (McMillan 2010, p. 4)

All government ombudsmen have the power to report to parliament, however not all currently have clear powers enabling them to report to the public on any matter. The UK Law Commission, in its report on public services ombudsmen, recommended that a specific power to report publicly be added to the power to report to parliament.

... requiring every report to be laid before Parliament in order to be published would be overly burdensome. Therefore, a provision allowing for more general dissemination of individual reports should be inserted into the governing statutes for both the Parliamentary Commissioner and the Health Service Ombudsman. (2011, pp. 60–61)

A lack of reporting powers can limit the effectiveness of ombudsman review. For example, the Commission was not able to obtain a copy of the 2009 report by the Victorian Ombudsman on the Legal Services Commission of Victoria (chapter 6), because the Legal Services Commission chose not to provide it and the Ombudsman had limited ability to do so, since the report had not been tabled in parliament.

The issue of reporting powers was raised by the Victorian Ombudsman, who said that:

... the secrecy provisions in my enabling legislation are unhelpful. The *Ombudsman Act 1973* imposes restrictions on my ability to disclose information other than in a report to Parliament. (pers. comm. 4 July 2014)

The Victorian Ombudsman noted that this could be remedied by a broader discretion to release information in the public interest, along the lines of the power in section 35A of the *Ombudsman Act 1976* (Cth).

Standardised reporting

Government ombudsmen have supported the idea of standardised reporting to facilitate benchmarking:

It is appropriate that government ombudsmen be accountable for their performance and the use of performance benchmarking should be part of that accountability. (Vic Ombudsman, sub. DR176, p. 17)

ANZOA agrees that it is important for Parliamentary Ombudsmen to undertake performance benchmarking. ... We suggest that there may be an opportunity to develop further indicators, and further standardisation of relevant indicators, to assist performance benchmarking. (sub. DR200, p. 15)

However, it is important that benchmarking is undertaken carefully to ensure meaningful comparisons can be made:

Parliamentary Ombudsman around Australia have markedly different roles and responsibilities, and legislative and practice variations. This can mean that it is very difficult to develop meaningful points of comparison to gauge our performance against one another. ... This does not mean that individual offices should not develop and report against performance measures and indicators. (NSW Ombudsman, sub. DR295, p. 12)

While the Victorian Ombudsman suggested additional funding for a separate body to conduct benchmarking, ANZOA suggested it would be well placed to collect data on both industry and government ombudsmen, and that core performance data would include:

- types of disputes
- timeliness of services
- cost of services (including segregating complaint handling costs from the costs of other functions)
- citizen/consumer satisfaction with services (using a common measurement tool)
- awareness of ombudsman services (sub. DR200).

The Commission considers that the number of approaches (or ‘contacts’), complaints (received and finalised) and investigations into systemic issues should also be reported. These reported figures should have standardised definitions, as currently a complaint can mean quite different things to different bodies — for example, the Queensland Ombudsman does not include complaints that are not in jurisdiction (pers. comm. 4 July 2014). Further, standard metrics for benchmarking should be agreed, for example, ‘median time taken to resolve in-jurisdiction complaints’, rather than just requiring some measure

of timeliness to be reported. Comparable reporting can assist ombudsmen to assess their performance and learn from each other.

Ombudsmen are also well aware of the importance of reporting systemic issues.

- Systemic investigations support public accountability of organisations and agencies;
- They generally include a test case or a case study which make the circumstances of the systemic issue relatable;
- Publicity stemming from public reporting is a strong incentive to resolve systemic issues proactively and holistically — which can create good news stories for organisations and agencies;
- Other agencies are put on notice to get their houses in order; and
- It provides the public with practical information about what ombudsmen do and how they contribute to improving industry and the services provided by government. (PTO, sub. DR223 pp. 5–6)

Systemic investigations vary too much across and within organisations to be easily compared or benchmarked. The Commission supports the reporting of these investigations and outcomes that currently occurs.

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.

10 Tribunals

Key points

- Tribunals are statutory, independent legal institutions established to provide a forum for resolving specific types of administrative and civil disputes.
 - Administrative tribunals reconsider the merits of government decisions across Commonwealth, state and territory jurisdictions, in areas such as veterans' entitlements, refugee applications and planning decisions.
 - Civil tribunals are alternative forums to the courts for resolving disputes such as claims related to the supply of goods and services. Only states and territories have tribunals with civil jurisdiction. Many tribunals also have jurisdiction for human rights cases such as guardianship, anti-discrimination and the care of children.
- Tribunals aim to provide informal, low cost and timely avenues for resolving disputes through: active case management; using alternative dispute resolution processes; limiting legal representation and costs awards; and assisting self-represented litigants.
- Some tribunals are not always meeting these aims. Options to improve the performance of tribunals and counteract the criticism of 'creeping legalism' include:
 - more effective use of alternative dispute resolution
 - more effective restrictions on legal representation, where appropriate
 - ensuring that all parties are under an obligation to assist the tribunal in achieving its objectives of being fair, just, economical, informal and quick.
- There is also potential to improve the efficiency and effectiveness of tribunals through:
 - developing and adopting new technology
 - co-location, amalgamation, or other restructuring options
 - better collection and reporting of performance data.

Tribunals play a significant and evolving role in Australia's civil justice landscape by providing relatively informal and timely avenues for resolving disputes.

Originally, their remit was to help resolve disputes with government. This continues to comprise a significant share of their caseload, reflecting the ongoing impact of government decision-making on the everyday lives of Australians.

However, tribunals are increasingly seen as both an adjunct and alternative to courts in jurisdictions where they have been assigned to hear civil disputes. Today there are 54 tribunals in Australia, and collectively they resolve around 395 000 disputes per year.

Section 10.1 of this chapter briefly considers the role tribunals play in the civil dispute resolution landscape. Following that, section 10.2 examines the features of tribunals and techniques they employ that are intended to promote access to justice. Section 10.3 examines how tribunals perform in terms of cost, timeliness, informality and delivering just outcomes. The final section (section 10.4) considers how the performance of tribunals might be improved.

10.1 Tribunals in the civil dispute resolution landscape

What is a tribunal?

Tribunals are created by statute. Reflecting their many and varied roles, tribunals are difficult to neatly define. The Council of Australasian Tribunals (COAT) essentially defines them as having the functions of a court without being a court:

Tribunal means any Commonwealth, State or Territory ... body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court... (COAT 2002, pp. 2–3)

Tribunals cannot create binding precedents, nor can they apply criminal penalties. However, many features of courts are common to tribunals. For example, they must:

- be impartial and detached from the ordinary processes of executive government
- have a defined jurisdiction
- receive claims or applications
- determine claims following a process of examining submissions, receiving evidence and assessing that evidence by reference to standards of proof
- use a process of assessment that gives rise to the making of a reasoned decision applying the relevant law
- make a final, binding order.⁴⁸

Tribunals are further defined by the way in which they seek to carry out their functions — with less formality, shorter timeframes and at lower cost than courts. Indeed, the enacting legislation of many tribunals includes these objectives. As COAT noted:

Most tribunals operate under statutory exhortations to be quick, economical and inexpensive while observing principles of natural justice and procedural fairness. (sub. 98, p. 5)

⁴⁸ *N (No 2) v Director General, Attorney-General's Dept* [2002] NSWADT 33 (8 March 2002) at [15].

What types of disputes do tribunals hear?

Historically, tribunals resolved disputes in particular, well defined areas, reflecting the complexity and specialist knowledge required to deal with certain disputes. Over time, some jurisdictions have created broader institutions that act as a one-stop-shop, while preserving varying degrees of internal specialisation.

Tribunals hear both administrative cases (reviewing the merits of government decisions) and civil cases. The nature of this distinction varies by jurisdiction. Under Chapter III of Australia's Constitution, the Australian Government is restricted in the jurisdiction it may assign to Commonwealth tribunals. Specifically, judicial power is reserved for the courts. As a result, Commonwealth tribunals are administrative and no Commonwealth tribunal has general civil jurisdiction.

Commonwealth tribunals exist for issues such as workplace relations, migration, veterans' affairs, taxation and social security matters. Tribunals 'stand in the shoes' of the original decision maker, and so can impose a different decision. This can be contrasted with judicial review by courts, where only the legality of a decision is considered. As the Administrative Appeals Tribunal (AAT) remarked:

Merits review undertaken by skilled independent members allows these tribunals to reach the correct or preferable decision — not merely to set a flawed decision aside and send it back for reconsideration. ... judicial review can set decisions aside, compel duties to be performed and prevent wrongs, but it cannot substitute a correct or preferable decision — that is a step which only merits review can undertake. (sub. 65, p. 1)

Constitutional restrictions do not apply to state and territory governments, which may assign both civil and administrative jurisdiction to tribunals. Rather, the jurisdiction of state and territory tribunals is limited to what is endowed on them by their own legislation or by subject matter legislation.

While states and territories have more latitude in the powers they can confer on tribunals, jurisdictions have exploited these opportunities to differing extents (table 10.1). For example:

- the Victorian Civil and Administrative Tribunal (VCAT) was the first amalgamated tribunal of its kind in the world and remains the largest tribunal in Australia (VCAT 2013). It has a considerable jurisdiction across three divisions — civil, administrative and human rights — and 14 lists that focus on more specialised issues
- the Queensland Civil and Administrative Tribunal (QCAT) receives applications in relation to, for example, consumer disputes, guardianship orders, child protection, administrative review, anti-discrimination, professional discipline and building regulation.

At the other end of the spectrum is the Northern Territory, which has no general civil or administrative tribunal. It has only two tribunals — the Mental Health Review Tribunal and the Lands, Planning and Mining Tribunal. Other civil matters are heard in the courts

and administrative merits review is unavailable in some cases. The Commission notes that the desirability of establishing an administrative tribunal in the Northern Territory is currently being reviewed — the third review of its kind.

A full list of the tribunals covered in this report is set out in appendix D.

There is a broad trend toward consolidating tribunals:

From 1 January 2014 five states and territories (Victoria, Western Australia, Queensland and New South Wales, and the ACT) will have large ‘super’ civil and administrative tribunals with a wide jurisdictional reach and broad but similar powers to decide administrative review matters, civil disputes and human rights cases quickly and economically. South Australia has announced plans for one. The Northern Territory government has instituted discussions to a similar end. (COAT, sub. 98, p. 4)

Table 10.1 Consolidated tribunals
Jurisdiction

	<i>Acronym</i>	<i>Name (date established)</i>	<i>Administrative</i>	<i>General civil</i>	<i>Guardianship</i>	<i>Land and planning</i>
Cth	AAT	Administrative Appeals Tribunal (1975)	✓	<i>n.a.</i>	<i>n.a.</i>	<i>n.a.</i>
NSW	NCAT	NSW Civil and Administrative Tribunal (2014)	✓	✓	✓	<i>x</i>
VIC	VCAT	Victorian Civil and Administrative Tribunal (1998)	✓	✓	✓	✓
Qld	QCAT	Queensland Civil and Administrative Tribunal (2009)	✓	✓	✓	<i>x</i>
WA	SAT	State Administrative Tribunal (2005)	✓	<i>x^a</i>	✓	✓
SA	SACAT	SA Civil and Administrative Tribunal (2013)	✓	✓	<i>x</i>	<i>x</i>
ACT	ACAT	ACT Civil and Administrative Tribunal (2008)	✓	✓	✓	✓

^a The SAT has limited jurisdiction in civil matters.

Source: Commission research.

What share of disputes do tribunals handle?

A commonly held view is that more cases in Australia are dealt with by tribunals than by courts. For example, a former President of the AAT said:

Ordinary Australians are more likely to experience proceedings before a tribunal than before a court. (Downes 2004, p. 6)

However, data collected by the Commission show that courts finalise around 60 per cent more cases than tribunals — partially reflecting significant filings in family and probate law, and small claims filings in magistrates’ courts in some jurisdictions.

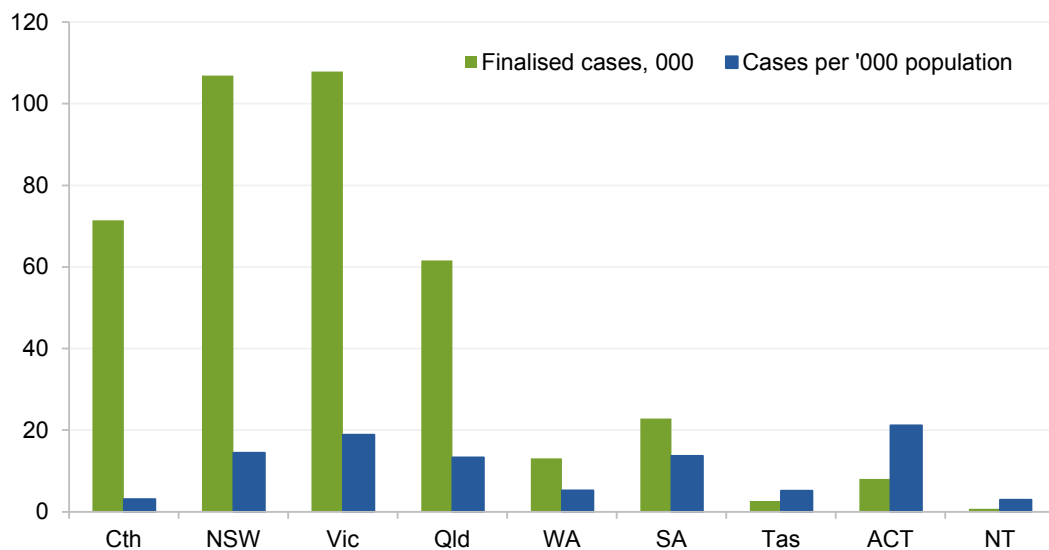
That said, tribunals are significant players in the civil justice system (figure 10.1). This point was echoed by COAT:

Tribunals impinge upon the lives of citizens in broad and diverse ways. Large or small, they are busy. (sub. 98, p. 4)

Per capita caseload differences between jurisdictions reflect the types of tribunals that exist and the range of cases they are able to hear. For example, the ACT has a well-established consolidated tribunal with wide jurisdiction, whereas Western Australia’s SAT does not have general civil jurisdiction.

Figure 10.1 Tribunal caseload by jurisdiction

Cases finalised in 2011-12



Data source: Commission estimates.

10.2 A different way of ‘doing business’

Tribunals seek to meet statutory requirements to deliver quick, economical and inexpensive justice by:

- being less formal than courts
- providing active case management
- employing alternative dispute resolution (ADR)

-
- limiting legal representation and costs awards
 - assisting self-represented litigants.

Informality

Tribunals are commissioned to be just, quick, efficient and low cost, and to operate without regard to technicalities and legal form. Tribunals generally set their own procedures and are not bound by the rules of evidence (Standing Committee on Law and Justice (NSW) 2012). This promotes substantive justice, as all relevant evidence is admissible.

The criterion for admissibility of material in the tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance. (*Casey v Repatriation Commission* (1995) 39 ALD 34 at 38 per Hill J)

Informality is often institutionalised by a tribunal's enacting legislation or by subject matter legislation. For example, the following features of the Social Security Appeals Tribunal (SSAT) are found in various Acts that assign jurisdiction to it.

The SSAT is not bound by legal technicalities, legal forms or rules of evidence and is required to act as speedily as a proper consideration of the review allows. The SSAT may inform itself on any matter relevant to a review of a decision in any manner it considers appropriate. The SSAT may take evidence on oath or affirmation for the purposes of a review of a decision. (SSAT, sub. 86, p. 2)

Active case management

Tribunals exert greater influence over events and the pace of hearings than courts traditionally have (chapter 11), and they can be more inquisitorial in their approach. According to COAT:

... [most tribunals'] case management techniques [involve] early discussions with the parties themselves at directions hearings, compulsory conferences and the like. Tribunal members also often adopt an inquisitorial approach to dispute determination. This early intervention through directions hearings and the like informs the tribunal about the real issues in a matter, and enables members to frame directions designed to ensure the quickest and least expensive method of resolution. (sub. 98, pp. 8–9)

The inquisitorial powers of tribunal members are thought to assist self-represented litigants because members can ask questions and seek information that a self-represented litigant may not know to present. This can be used to address any imbalance of power between parties and direct parties to the core issues, which can expedite proceedings. Justice Barker, President of the WA State Administrative Tribunal, explained:

We can ask for more information, and that is a very important part of being a tribunal. Courts cannot do that. (Standing Committee on Legislation WA 2009, p. 23)

The extent to which tribunal hearings become inquisitorial depends on the nature of the matter before the tribunal and the parties and members involved. A significant benefit of tribunals is that they can actively modify procedures depending on the demands of a particular case. As O'Connor J observed:

An unrepresented applicant in the social security jurisdiction, with an intellectual disability, will require vastly different procedures compared to a case where two SCs [senior counsel] are arguing about complex taxation law. That is not to suggest that either application is of any lesser importance to the applicant in each case. It is simply to demonstrate that procedural flexibility has a context. (1999)

Intensive and widespread use of ADR

Tribunals identify themselves as being extensive users of ADR, and many operate under legislation that exhorts and encourages parties and the tribunal itself to use a range of ADR techniques. For example, QCAT operates under a statutory imperative to use ADR 'widely and energetically'. It uses compulsory conferences where mediators (who are also tribunal members) not only have the usual powers of mediation but can also give directions:

That directions power is salutary, and invaluable. It enables the presiding member, after an unsuccessful mediation, to make case-specific directions about remaining unresolved issues, evidence, and the speediest and cheapest method of getting the matter to the shortest possible hearing. (COAT, sub. 98, p. 7)

Where matters are referred to mediation or conciliation, they are often resolved through conferences between the parties prior to formal hearings. For example:

- of matters referred to compulsory conferences at VCAT in 2012-13, 57 per cent were resolved
- of matters referred to conciliation at the Fair Work Commission in 2011-12, 78 per cent were settled
- of new building matters at the WA SAT in 2011-12, 56 per cent were settled through the directions hearing process and mediation
- of non-minor civil disputes in QCAT in 2011-12, 62 per cent were settled at mediation.

A number of tribunals highlighted the benefits of incorporating ADR into their processes. The AAT for example, said that it uses a number of types of ADR, and that these processes lead to applications being finalised earlier and lead to outcomes that parties prefer. The AAT observed that ADR processes also provide an opportunity for the issues to be explored and discussed in detail in a forum that is less daunting for many parties than a formal hearing (sub. 65).

Even if parties are not able to resolve disputes through pre-hearing discussions, the discussions can identify and narrow the issues in dispute (chapter 8).

Limiting rights to legal representation and costs awards

Some tribunals operate under statutory provisions requiring parties to seek the tribunal's permission if they wish to be legally represented.

The purpose of the provisions is to balance the right to representation with the need to operate quickly and cheaply (Bell 2009). The SSAT explained that due to the non-adversarial nature of SSAT hearings, the presence or absence of legal representatives does not put either party at a disadvantage (sub. 86).

Discretion generally exists to allow representation where the proceeding is likely to involve complex questions of fact or law, or where one party suffers a particular form of disadvantage. However, other constraints may apply. For example, in the SSAT, a lawyer representing a party is not permitted to cross-examine the other party or his or her witnesses.

Limits on the use of legal representation are far from universal. For example, parties in the AAT have a legislative entitlement to representation. The extent to which they elect to be represented varies significantly by type of decision being reviewed — ranging from 82 per cent for veterans' affairs to 26 per cent for social security matters (sub. 65).

Similarly, in specialist tribunals dealing with adult guardianship and administration and mental health issues, representation is often a matter of automatic right or, at least allowed in the majority of cases.

Another feature of tribunals is the limit on the award of costs. Typically, costs are only awarded where one party has acted unconscionably, for example, by delaying proceedings or making a legally untenable claim (*Choi v Mee Wah To (No 3)* [2014] QCAT 030).⁴⁹ This is in contrast to the courts, where costs usually 'follow the event' (chapter 13). Limiting costs also reduces the proportion of cases where obtaining legal assistance is cost-effective.

Assisting self-represented litigants

Limits on the use of legal representation are typically coupled with requirements on tribunals to ensure that all parties understand the practices and procedures. This can require the tribunal to:

- explain to a self-represented party the procedures to be followed
- direct the self-represented party positively to the legal and factual issues in the case, helping them to understand what they are

⁴⁹ The AAT is bound by a different set of exceptions. While the usual position is that parties bear their own costs, the decision maker will usually be required to pay the costs incurred by an applicant who is successful when seeking review of decisions under particular Acts (sub. 65).

-
- direct the self-represented party negatively away from irrelevant issues, explaining why
 - assist the self-represented party to present their evidence and to test the evidence of the other party ...
 - assist the self-represented party to present their submissions in the case by directing their attention to the relevant issues and asking for their response. (Bell 2009, p. 75)

For example, section 29 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) imposes an active obligation on the tribunal to take all reasonable steps to ensure that each party understands the practices and procedures of the tribunal, the nature of assertions and legal implications of those assertions, and any decision of the tribunal.

Most amalgamated tribunals conduct staff training and special outreach programs to assist self-represented litigants. For example, the AAT runs an outreach program that involves calling self-represented litigants early in the course of a matter to answer questions they may have and provide information on what will happen next and what services may be available, such as interpreters, disability services or legal assistance. This is repeated prior to a hearing, where a staff member will again contact a self-represented litigant to discuss the proceedings. On the day of the hearing, a staff member will also familiarise the person with the hearing room and what will occur (sub. 65).

Tribunal staff and members do not offer legal advice, but only advise parties on procedural aspects of their matter. However, duty lawyer and other legal advice schemes operate out of some of the larger tribunals. Where representation is allowed, duty lawyers can appear on behalf of an individual (chapter 14).

10.3 Are tribunals effective in delivering access to justice?

Given that it is the aim to deliver economical, timely and informal justice that sets tribunals apart from the courts, it is important to explore how successful tribunals are in delivering accessible justice.

Cost to government of service provision

The cost of maintaining a tribunal depends on factors such as the number of cases, the type of cases and the needs of clients. These factors vary considerably across tribunals, and along with a paucity of data, make cost and efficiency comparisons problematic.

Only VCAT publicly reports the cost of each of its major jurisdictions. QCAT provided the Commission with this information (figure 10.2), however, other consolidated tribunals

were not able to. While limited by a lack of publicly reported data, some further comparisons can be made across similar (although not identical) case types.⁵⁰

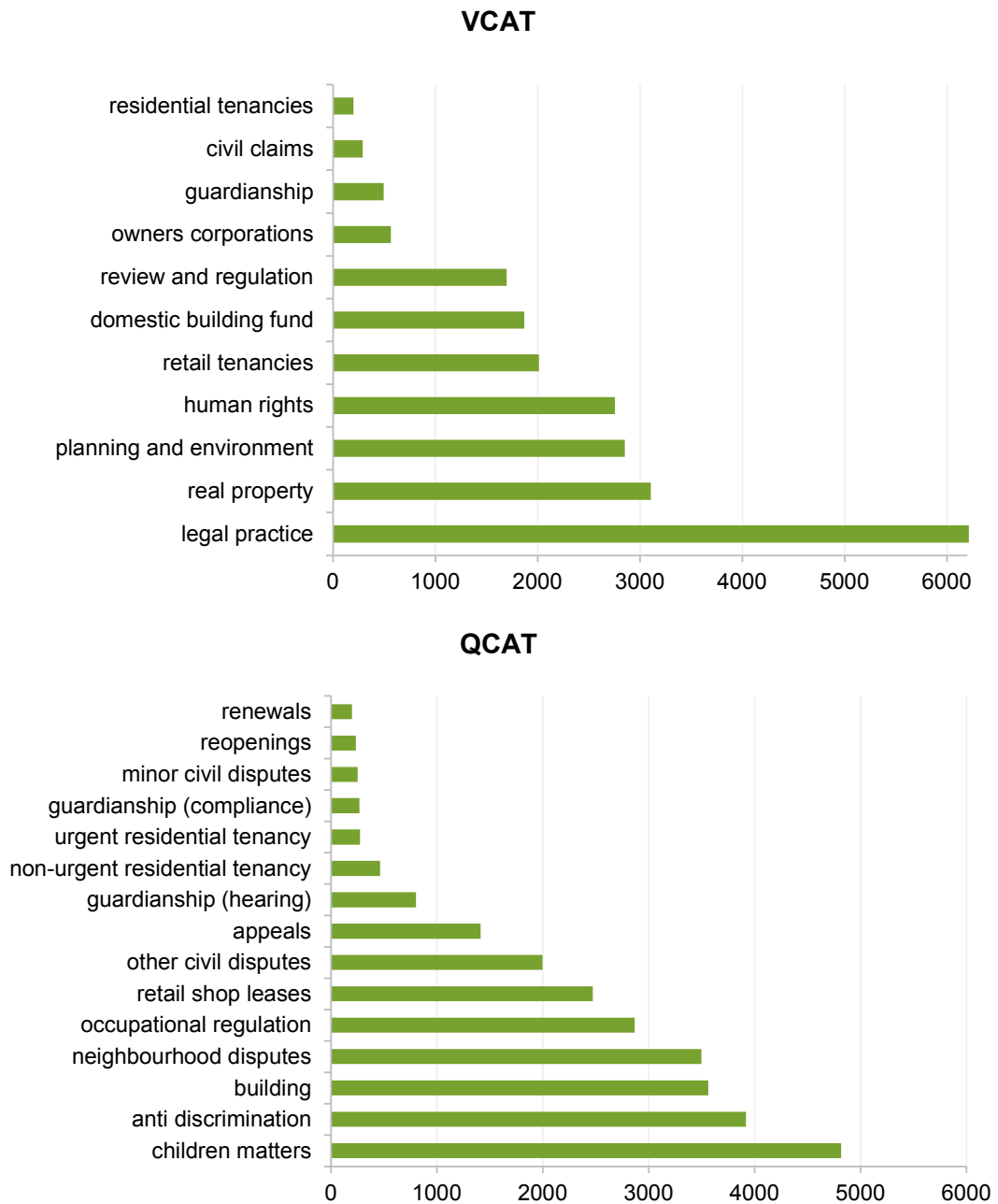
- Civil tribunals tend to have relatively low average costs. In 2011-12, average costs in VCAT's civil division were \$290 per case, costs in NSW's civil tribunal (which is now part of NCAT) were around \$440 per case and minor civil disputes in QCAT cost \$250.
- Mental health tribunals have average costs ranging from \$320 per case in Tasmania to \$530 in Victoria.
- Administrative tribunals appear significantly more expensive. For example, in 2011-12, average costs per case in VCAT's administrative division and in the NSW Administrative Decisions Tribunal were \$2500 and \$4700 respectively. In the AAT, which deals with social security reviews along with a range of other (relatively complex) matters such as tax, the average cost per case was \$7200.
- Average costs for specialist tribunals vary. For example in 2011-12, average cost per case was \$2300 in the SSAT, \$4200 in the Fair Work Commission, \$4900 in the Migration Review Tribunal and Refugee Review Tribunal (MRT and RRT) and \$1700 in the Veterans' Review Board (VRB). At the high end, the National Native Title Tribunal cost over \$1 million per case resolved in 2011-12, and the Australian Copyright Tribunal cost over \$100 000 per case.

Examining trends in cost per case over time for individual tribunals provides some insight into tribunal efficiency. However, changes in the jurisdiction and case load of individual tribunals may be a factor in changes in costs over time.

In the case of VCAT, even when inflation and case numbers are taken into account, average costs have increased at a rate of around 3 per cent per year since its creation (figure 10.3). An explanation put forward is that the proportion of complex cases heard in the smaller lists has been increasing (Bell 2009). In contrast, since its creation in 2009, overall costs in QCAT have risen only one per cent, and cost per case has fallen 2 per cent in real terms. Cost per case at the AAT has increased for both cases that proceed to a hearing and those that do not. Between 2004 and 2013, the average cost of finalisations without a hearing increased from \$2000 to \$3500, and those with hearings increased from \$11 000 to \$16 600 (2013 prices). It is important that the reasons for cost increases are analysed by tribunals.

⁵⁰ Average cost per case is calculated by dividing total expenditure (or total expenditure of a particular tribunal division) by finalised cases, and so includes the full cost of overheads.

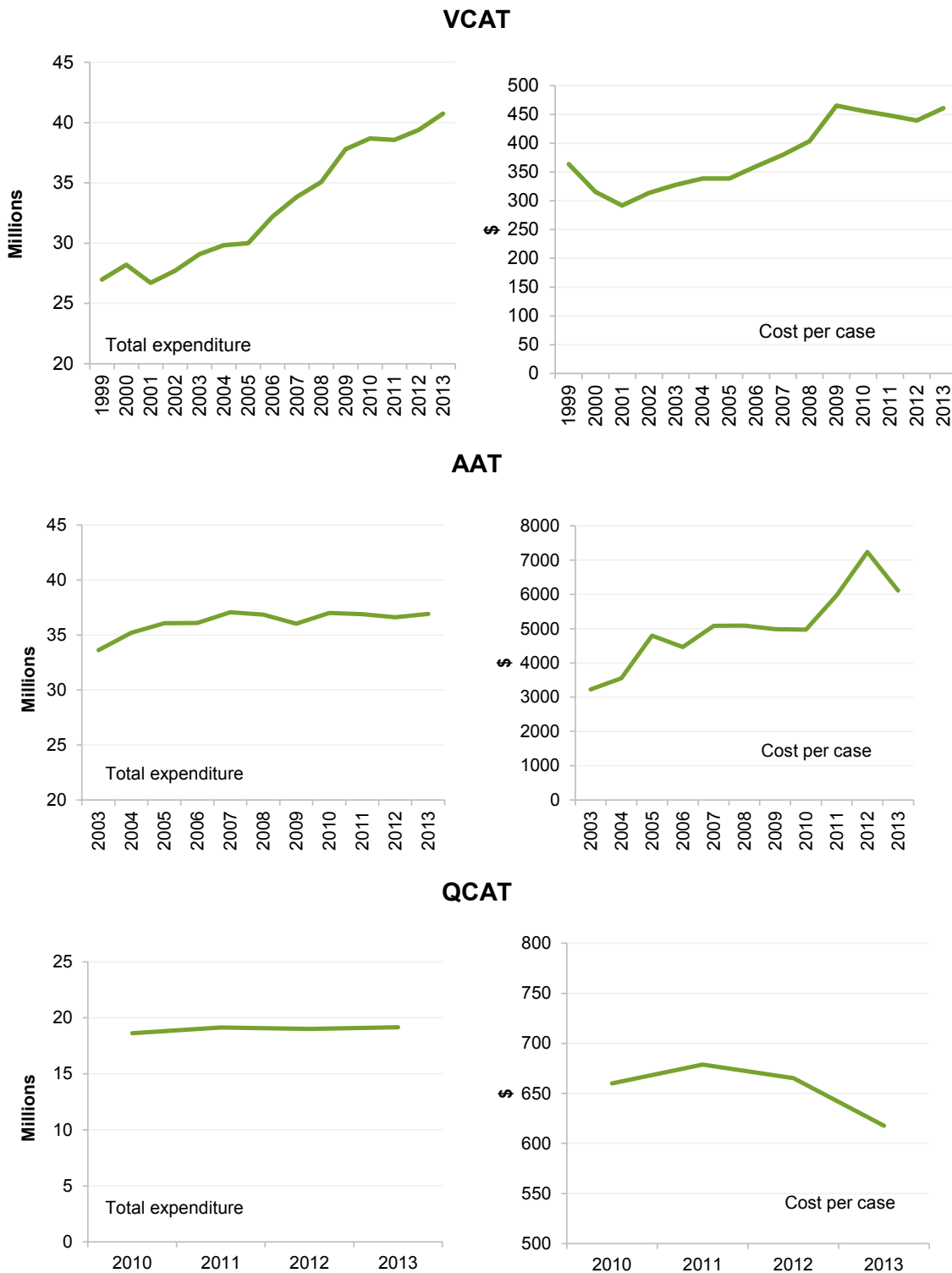
Figure 10.2 **Average cost of particular case types**
2012-13



Data sources: VCAT Annual Report 2012-13; QCAT pers. comm., 11 February 2014.

The MRT and RRT submission noted that recent operational efficiencies have had a substantial impact on the average cost in those tribunals, which declined from \$4900 in 2011-12 to \$3600 in 2012-13 and is on track to be lower again in 2013-14 (sub. DR188).

Figure 10.3 Total annual expenditure and cost per case
2012 prices



^a Cost per case is calculated by dividing total expenditure by total cases finalised in a given year.

Data source: Annual reports.

Cost to litigants

Given that most tribunals aim (and many are required by statute) to minimise the cost to parties, it is imperative to know what costs parties incur when resolving their disputes. But there is little meaningful data on the full cost to litigants of attending tribunals. Previous reviews, such as the 2009 review of the SAT or the 2010 review of VCAT, did not attempt to estimate these costs.

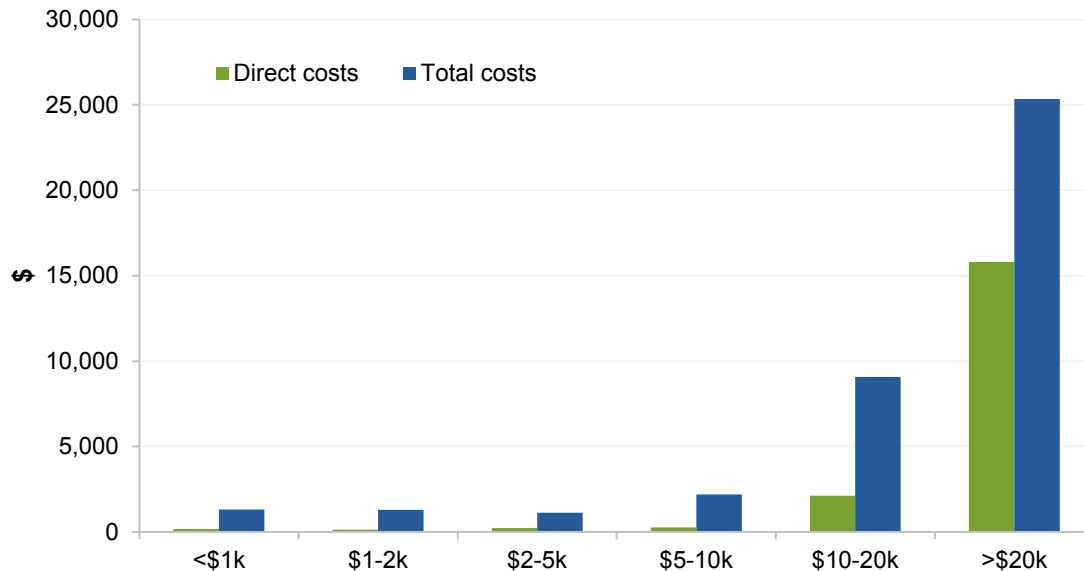
For smaller claims or less complex cases (which comprise the bulk of tribunal caseload), the key costs to litigants are tribunal fees and time costs, including the cost of preparing the case and attending the tribunal. There is limited information available on these costs. One of the few empirical studies of the direct and indirect costs of using tribunals was undertaken by the Victorian Small Business Commissioner, focusing on the cost to small businesses of attending VCAT (VSBC 2014). The study found that the indirect cost to disputants — such as the cost of staff time and attending hearings — was around \$1000 in lower value disputes (that is, those disputes under \$5000). Greater use of technology provides one avenue to reduce these costs, and is discussed in section 10.4.

In more complex cases where parties require legal advice or expert reports, professional fees can substantially increase the cost to litigants (chapter 3). Of the small businesses that participated in the VCAT study, 20 per cent engaged a legal representative, at an average cost of \$8000 (median \$2700). The combined direct and indirect costs of attending VCAT — including staff time costs, travel and other expenses, but excluding VCAT fees — was \$9000 for disputes between \$10 000 and \$20 000, and \$25 000 for disputes over \$20 000 (figure 10.4). The average cost across all disputes was 74 per cent of the disputed amount (VSBC 2014).

The study also surveyed non-pecuniary costs. Businesses said that litigation had an adverse effect on business performance (37 per cent), work related stress (52 per cent), and/or health and well-being (31 per cent). This was significantly higher for smaller businesses and where larger amounts were in dispute.

Comcare provided further information on the costs incurred by litigants in workplace compensation disputes, which are usually resolved in the AAT. These types of cases typically involve large compensation amounts and can require testimony from expert medical witnesses. Comcare advised that the mean cost to the opposing party in such disputes was just under \$20 000 (with a median of around \$15 000) (Comcare, pers. comm., 28 February 2014). (The cost to Comcare in these disputes is discussed later in this section.)

Figure 10.4 **VCAT, average costs incurred by small businesses, by amount of dispute^a**



^a Direct cost included expert services (e.g. lawyers, accountants) and transport and related costs, but not VCAT fees; total cost also included the amount of time spent by the businessperson or their staff on the dispute and litigation process, calculated at an ABS-based hourly rate.

Data source: VSBC (2014).

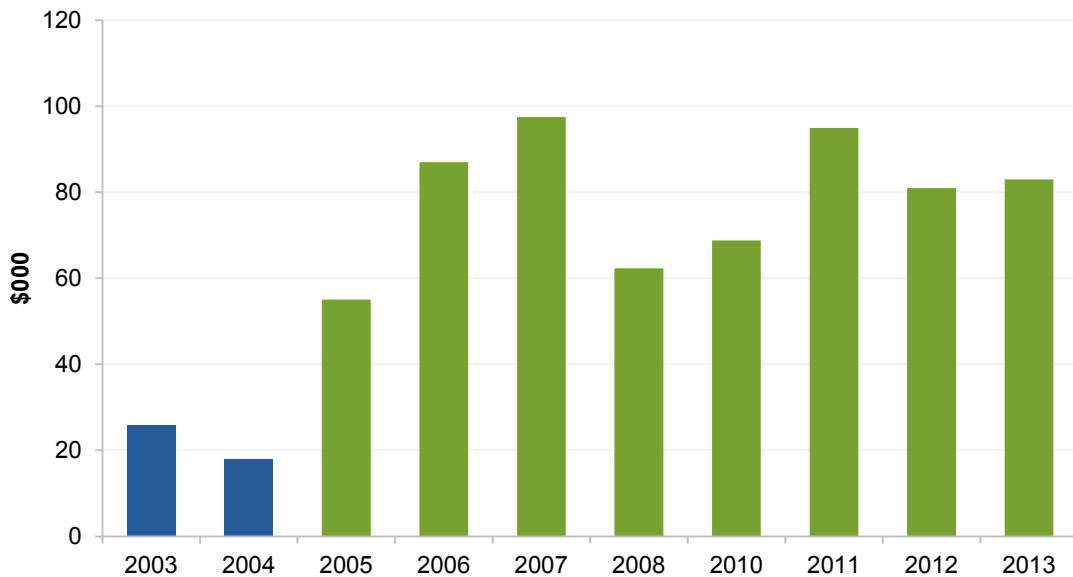
While broadly based estimates are not available for the cost incurred by parties attending the SAT, the Veterinary Surgeons Board of WA noted a significant increase in legal and administrative expenses after the introduction of the SAT (figure 10.5). The Board stated that the potential for legal costs to blow out for a single case has had an impact on their decisions to proceed with some complaints, and that the time to resolve more serious issues has doubled. One matter where the Board sought to reprimand a veterinary surgeon took 15 months to resolve and cost \$44 000, of which the board recovered \$30 000. While the Board considered this time and cost to be disproportionate to the severity of the misconduct, there was no suitable alternative sanction (sub. 145). Issues of increased complexity, legality and cost were raised by the Veterinary Surgeons Board and others in the 2009 review of the SAT (Standing Committee on Legislation WA 2009).

Costs to litigants are mitigated in some cases by provision of legal assistance and fee waivers. For example, a number of tribunals offer fee waivers for disadvantaged clients (chapter 16); these same clients may also be eligible for assistance from a legal aid commission or community legal centre (chapter 20).

Governments also incur legal costs in defending administrative matters, although the nature of these costs varies by tribunal. In the SSAT, VRB, MRT and RRT, government departments provide the tribunal with the relevant information and do not attend hearings, obviating any need for legal representation. In contrast, both the Australian Tax Office and

Comcare can incur substantial costs in bringing or defending action in the AAT. For example, Comcare report that they incurred average costs per case of \$15 500 when matters were withdrawn, \$23 000 when matters were resolved by consent and \$48 000 for matters that went to hearing (Comcare, pers. comm., 28 February 2014).

Figure 10.5 **Legal expenses of the Veterinary Surgeons Board WA**



^a The SAT commenced operations on 1 January 2005.

Data source: Veterinary Surgeons' Board of WA (sub. 145).

Timeliness

Tribunals aim to resolve disputes quickly in order to minimise the impact of the process on parties. Long timeframes may reduce access to justice by discouraging parties from seeking redress. In some cases, delays can substantially affect parties' wellbeing, as noted by the Tasmanian Mental Health Tribunal:

The Tribunal's failure to meet statutory timeframes is not just about statistics, it impacts on the lives of involuntary patients with mental illness. (2012, p. 5)

The Australian Small Business Commissioner suggested that the expected time required to resolve disputes through tribunals was a deterrent for bringing matters:

I don't think there's a lack of trust or confidence in the court or tribunal system, but there is a sort of, 'Do you have to go through all of that? It's going to take so long,' attitude. (trans., p. 52)

As discussed in chapter 3, delays can have very real tangible and intangible costs on their clients. The Consumer Action Law Centre provided the example of a recent small civil claim relating to a defective vehicle that was before VCAT. For this case, there was an

11 month delay between the time the client stopped using the defective car to the time a favourable result in VCAT was achieved. While the client had access to a loaned car, the car was not large enough for all of her children (sub. 49).

Most tribunals that reported data on timeliness resolved at least 50 per cent of disputes within 6 months (figure 10.6). When weighted for case numbers, the average resolution time for all tribunal cases was 3 months. However, many tribunals do not provide this data.

It is important to bear in mind that the complexity of disputes handled varies significantly both across and within tribunals, affecting the time taken. For example, the AAT reports that 93 per cent of social security applications were finalised within 12 months, but only 68 per cent of workers' compensation and 70 per cent of veterans' affairs applications were finalised within that (target) timeframe (sub. 65). This reflects differing times required to gather factual evidence and organise witnesses, among other factors, and underscores the need for caution in making timeliness comparisons across tribunals.

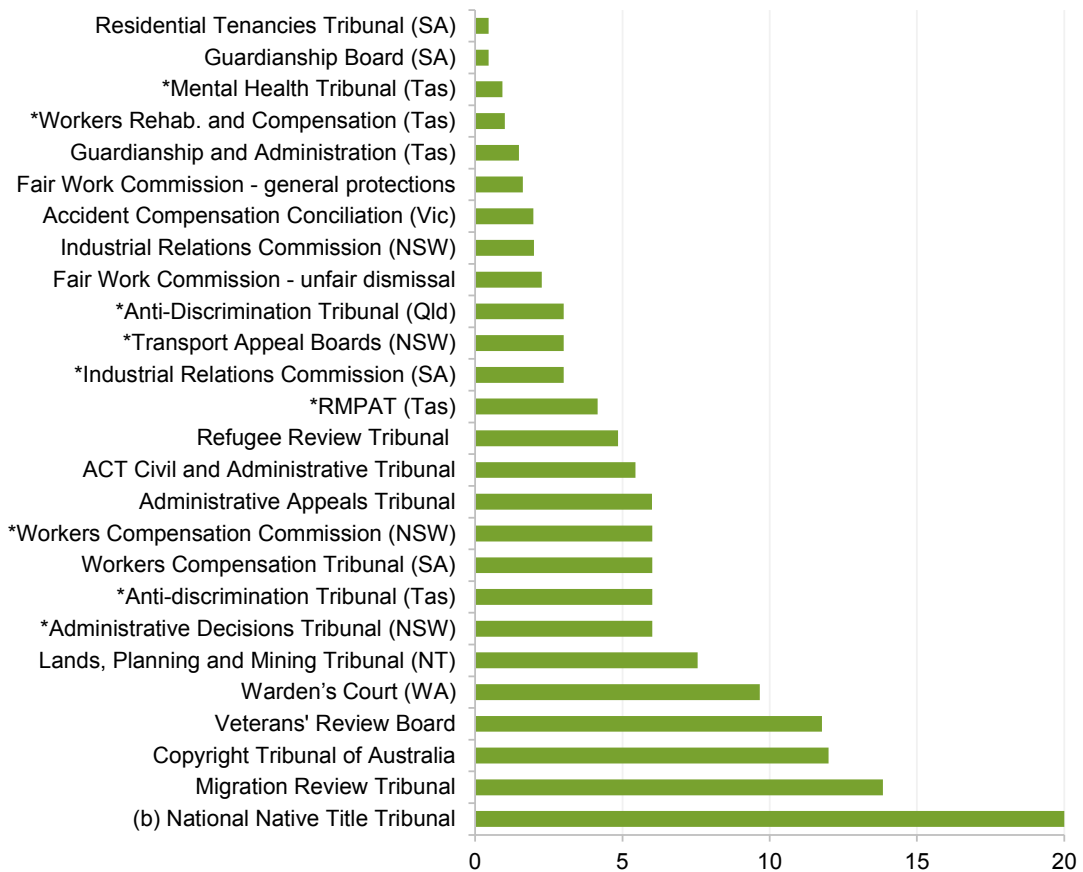
VCAT, QCAT and the SAT report timeliness data for each division (figure 10.7), allowing for some comparison between similar types of cases. For example:

- retail tenancy cases take 12 weeks to finalise in VCAT and 13 weeks in QCAT
- guardianship matters take 5 weeks in VCAT and 13 weeks in QCAT
- occupational regulation matters take 9, 19 and 24 weeks to resolve in SAT, VCAT and QCAT respectively.

However, even these comparisons should be treated with caution — although tribunal lists appear to manage similar cases, differences in legislation can also have a significant impact on how complex, and therefore how costly and time consuming, cases are in different jurisdictions. The estimated weighted average time to resolve cases in these three tribunals is 6.5 weeks.

Figure 10.6 Time to finalise at least 50 per cent of matters^a

Median time measured in months, 2011-12

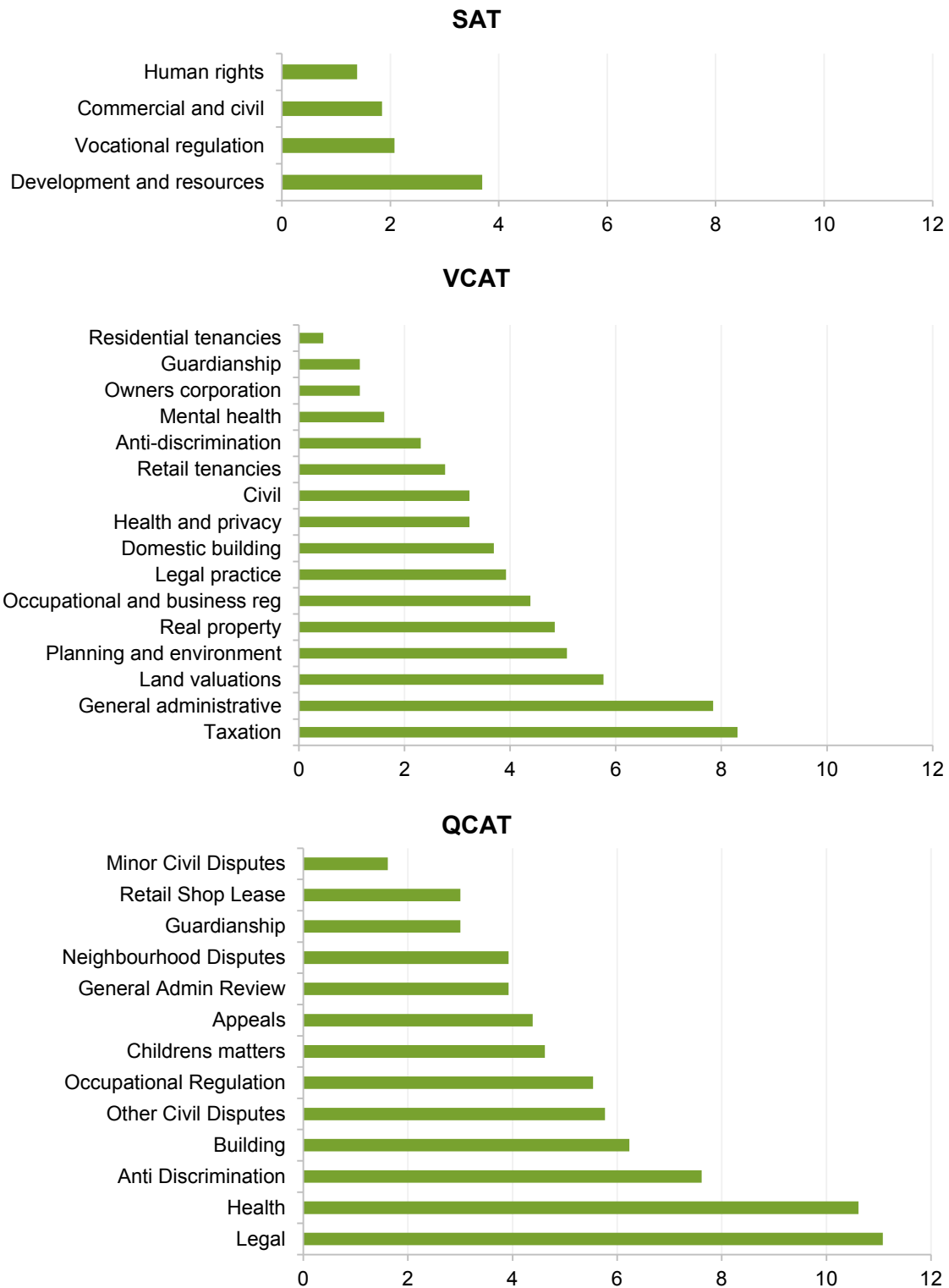


^a Tribunals that did not specify the time taken to resolve 50 per cent of matters are denoted by (*). The time taken to resolve a higher proportion of cases was used as an alternative, according to the data available. ^b The National Native Title Tribunal recorded an average time to finalise of 71 months (6 years).

Data source: Commission estimates from tribunal annual reports.

Figure 10.7 Median time to resolve disputes; consolidated tribunals

Median time measured in months, data for 2011-12



Data sources: 2011-12 annual reports; QCAT pers. comm., 11 February 2014.

User satisfaction

Cost and timeliness measures are only partial indicators of the effectiveness of tribunals — ultimately, users are seeking fair and just resolutions to their disputes. Given the nature of legal disputes, some dissatisfaction is likely even where no injustice has occurred. Rates of appeal, complaints and surveys of user satisfaction provide some insights, but may be affected by factors beyond the control of the tribunals, such as the options available for appeals (table 10.2).

Table 10.2 Measures of satisfaction
2011-12

QCAT	Client and stakeholder satisfaction rates of 71 per cent and 67 per cent respectively; complaints at 0.7 per cent of total applications
AAT	75 per cent of representatives and 59 per cent of litigants considered that their matter had been dealt with fairly 1.9 per cent of cases were appealed and 0.8 per cent were the subject of complaint
ACAT	0.7 per cent of cases were appealed (60 appeals) and there were 4 applications for leave to appeal to the Supreme Court.
VRB	15.6 per cent of decisions were appealed (to the AAT)
FWC ^a	10.5 per cent of unfair dismissal cases were appealed (58 of 551)
MRT	3.2 per cent of decisions were appealed to the Federal Circuit Court or the High Court (254 of 8 011)
RRT	23.5 per cent of decisions were appealed to the Federal Circuit Court or the High Court (660 of 2 804)

^a Fair Work Commission.

Source: Annual reports.

The AAT and QCAT both conducted user surveys in 2012. In the AAT, perceptions of fairness were strongly correlated to whether the case was decided in a person's favour. However, among representatives, who tend to have less of a personal investment in the outcome, 75 per cent expressed satisfaction with the fairness of the review process. ACAT conducted a survey in 2010 and has planned another for 2014 (pers. comm., 7 July 2014). The SAT undertakes ad hoc surveys, for example, in 2014, a survey of parties in strata titles matters (which focused on self-represented parties) found that 46 per cent of respondents rated their experience positively and only 23 per cent negatively (pers. comm., 4 July 2014).

In the *LAW Survey*, people who had recently finalised their legal problems gave similar satisfaction ratings for both courts and tribunals (Commission estimates based on unpublished *LAW Survey* data).

Based on the limited data, rates of appeals are variable — ranging from 1.9 per cent of AAT cases to 23.5 per cent of RRT cases — noting that ‘the volume of cases that go to the courts from the RRT in particular may be driven by factors other than an assessment that the RRT had made an error’ (MRT-RRT, sub. DR188, p. 7).

10.4 How might tribunal performance be improved?

There is a divergence between the public's expectations of tribunals — that they should provide a forum accessible to the ordinary citizen — and current practice. This divergence is borne out in some of the data that the Commission has gathered on timeliness and the costs to litigants, as well as the findings of past reviews. For example, a 2009 review of VCAT pointed to criticisms about excessive cost and delay associated with being listed and obtaining a decision, as well as 'creeping legalism' and the dominant role of lawyers. Justice Bell, who conducted the review of VCAT, put it this way:

[The tribunal] was intended to provide quick, cheap and efficient justice for the general public. Yet many people think it had become too formal, with lawyers, expert witnesses and advocates dominating proceedings. It was often said the tribunal had allowed 'creeping legalism' to occur. (2009, p. 21)

As noted by participants to this inquiry, this represents a shift away from the original intent of tribunals. For example, the Springvale Monash Legal Service (SMLS) said:

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 Commission has identified a number of ways in which the performance of tribunals can be improved. Most are an extension of measures that have already been shown to be effective, or are a return to guiding principles. They include:

- employing ADR as part of active case management
- limiting legal representation where appropriate
- employing technology to greater effect
- identifying opportunities for streamlining and amalgamation.

Assisting self-represented litigants and improving the evidence base also have scope to improve the performance of tribunals. These issues are discussed in chapters 14 and 25 respectively.

More effectively using ADR as part of case management

Many disputes brought before tribunals are well suited to the use of ADR. Some tribunals are active users of ADR and refer a significant proportion of cases to these processes.

There are many options that are be[ing] presented by blending ADR skills and techniques with tribunal processes to enable that the tribunal system to meet a range of objectives and to promote a more responsive approach to litigant needs. Many tribunals have pursued the option of referral of cases to ADR processes such as mediation, arbitration and case evaluation or appraisal that are conducted separately from the determinative process. (Sourdin 2005, p. 17)

Using ADR to resolve disputes lodged with tribunals can significantly reduce costs for both tribunals and users. For example, the AAT (2013) noted a significant difference in its average costs between cases finalised prior to a hearing (\$3500) or with a hearing (\$16 600).

However, it is important to recognise that there are a number of dispute types and case circumstances where a formal determination at hearing is more appropriate and results in a quicker and more cost effective resolution. For example, ACAT advised that occupational discipline and regulation matters must, by law, be resolved through a hearing, and guardianship and mental health matters are rarely amenable to ADR as they are not adversarial in nature (ACAT, pers. comm., 7 July 2014). Further, mediation may not be the most appropriate method to safeguard the rights of severely disadvantaged parties. This may also depend on how the mediation is conducted and the skill of the mediator. Professor Noone from LaTrobe University stated that:

The challenge for those concerned with Access to Justice is how to ensure the rights of the disadvantaged and vulnerable are enhanced and protected in the context of increasing use of ADR processes that are often mandated by courts and tribunals. (sub. DR186, p. 3)

The underlying procedural design of particular tribunals may also limit the occasions when ADR is the most efficient or effective way to resolve disputes. For example, hearings in the MRT and RRT take less than two hours on average, and the Department of Immigration and Border Protection does not appear. Introducing an additional ADR component would be more likely to increase costs to all parties (MRT-RRT sub. DR188). Further, decisions in those tribunals are based on whether visa criteria are met or not, leaving very little room for a negotiated outcome. A similar situation exists in the SSAT (SSAT, sub. DR191).

However, for many disputes, ADR processes can lead to better outcomes (chapter 8). This makes it important for tribunals to have case management processes that can identify and triage disputes, and direct parties to the most appropriate process.

While it appears that most tribunals have triage processes in place, there is a great deal of variability around if and when matters are referred to ADR.

- The AAT reported that 73 per cent of finalised cases went through some form of ADR. Most applications are referred to conferencing where the issues and case direction can be decided upon, and where parties are directed to other forms of mediation if there appears to be scope for settlement. Thus there does not seem to be much scope to increase the use of ADR (pers. comm., 11 July 2014).
- The SAT makes extensive use of mediation and compulsory conferences, and indicated that it has no restrictions on the use of ADR, and therefore its use is determined only by the nature of the matter at hand. The SAT reported that for the lists where ADR is appropriate and statistics are collected (these lists comprise around 20 per cent of all cases), around 95 per cent go through some form of ADR (pers. comm., 5 July 2014).

- In QCAT in 2012-13, around 11 per cent of cases went to compulsory conference or mediation, and of those, half were resolved or partially resolved. ADR was used in more than 90 per cent of occupational regulation and retail shop lease cases, and around 50 per cent of anti-discrimination, guardianship of children, ‘other’ civil and general administrative review cases. Twelve per cent of minor civil disputes were mediated (minor civil disputes comprised 60 per cent of total case volume in QCAT), and QCAT recently trialled new mediation methods in this area (pers. comm., 4 August 2014).
- NCAT commenced in January 2014 and intends to further investigate where ADR can be increased. Upcoming initiatives include: the pilot of an online dispute resolution system for small consumer disputes; the use of conciliation as a first step in resolving dividing fences disputes; and the introduction of case conferencing in the health professional list. Currently, conciliation is the primary dispute resolution process used in the Consumer and Commercial Division (pers. comm., 23 June 2014).
- ACAT considers that its use of ADR is currently maximised (pers. comm., 7 July 2014). For example: almost all civil disputes and residential tenancies matters are referred to a preliminary conference before a registrar or member of the ACAT; for administrative review and discrimination matters, suitability for mediation is considered at the initial directions hearing; and all energy and water hardship matters start with an informal meeting. ACAT could not report the number of cases that go through ADR processes.
- VCAT reported that less than 3 per cent of cases currently go through ADR processes (the use of ADR in VCAT is examined in box 10.1), and their strategic plan notes an intention to expand the use of ADR into areas where it has not traditionally been used (2014, p. 5).

Box 10.1 **Unpacking ADR use in VCAT**

In VCAT, only 2.8 per cent of cases went through compulsory conference or mediation in 2012-13 (2457 matters out of 88 421 finalised) and settlement was 56 per cent (1382 matters). However, this headline figure does not reflect the types of disputes lodged at VCAT and the appropriateness of these disputes for resolution through ADR. For example:

- residential tenancy matters are not generally amenable to resolution through ADR due to legislative limitations on how matters can be settled. Only 85 cases out of 58 436 went to compulsory conference or mediation. VCAT advised that these cases generally take 15 minutes to hear (pers. comm., 13 March 2014)
- VCAT advised that they consider guardianship matters are not amenable to ADR as hearings are required in order to make protective orders. No matters were referred to ADR (out of 11 952 finalised)
- civil claims are predominately managed under the Short Mediation and Hearing Program which is not reported as a mediation activity in the ADR statistics. Civil claims comprise around 10 per cent of total caseload (8433 cases), so better reporting of the use of this hybrid mechanism could affect ADR statistics.

Source: VCAT (2013).

From the information available, there appears to be scope to increase the use of ADR in some tribunals.

Some ADR practices were highlighted as particularly successful by tribunals.

- Preliminary conferences can be used to define the issues and identify how to proceed. Conferences are commonly run by tribunal members so that if the parties reach an agreement, orders can be made and the matter finalised.
- As noted in chapter 8, the AAT (sub. 65) has developed process models for each form of ADR they use and guidelines to assist staff in the appropriate referral of cases. Such measures can increase the consistency in referral and resolution pathways, and if made available to parties, could better inform them about what to expect in the dispute resolution process.

In chapter 8, the Commission recommends that courts and tribunals seek to expand the use of ADR processes (recommendation 8.1).

Restrictions on representation

As described above, tribunals have traditionally been forums that aim to facilitate self-representation. However, restrictions on representation, and actual use of representation, vary. Across the consolidated tribunals, any party may be legally represented in the AAT, ACAT and SAT, but leave (permission) is generally required in VCAT, QCAT and NCAT.

What do existing leave requirements look like?

The restrictions that exist in VCAT, QCAT and NCAT are framed in different ways, but have some common features, including:

- a right to appear personally
- no general right to be represented
- leave required for representation where no exception applies
- automatic exceptions to the requirement for leave for certain categories of people/bodies or certain categories of cases (which vary for each tribunal).

The greatest variation across jurisdictions relates to the types of people and cases that are automatically exempted from the general requirement for leave for representation.

- NCAT, for example, requires leave to be granted for representation in most cases, however, it has exceptions for some divisions such as the Occupational Division and the Consumer and Commercial Division.
- VCAT has a range of automatic exceptions covering particular persons (for example children, municipal councils or representatives of the State) and circumstances (for

example, where another party to the proceeding is a professional advocate or is authorised to be represented by a professional advocate).

- QCAT also automatically exempts particular types of persons (such as a child or a person with impaired capacity) and particular types of cases (such as proceedings that relate to disciplinary actions). QCAT's legislation also gives guidance to tribunal members about circumstances that should be considered in support of an application for leave, for example, if a party is a state agency, the proceedings are likely to involve complex legal or factual issues, or another party is already represented.
- The Fair Work Commission allows legal representatives only with leave, but some professional representatives may appear without leave, for example in-house lawyers or union lawyers (FWC 2014).
- The SSAT, MRT and RRT allow representation but may restrict the occasions when representatives can appear or restrict their role in the proceeding; for example, cross-examination of parties or witnesses is not permitted in the child support jurisdiction (SSAT, sub. DR191; MRT-RRT, sub. DR188).

What are the rates of representation?

While most tribunals do not publicly report rates of representation, some of the larger tribunals were able to provide this information to the Commission.

- Data were not available on the extent to which parties are represented in ACAT or VCAT (pers. comm., 7 July and 27 June 2014 respectively). Anecdotally, representation in VCAT appears to be less than 20 per cent (2014, p. 3).
- Only 2.5 per cent of parties in QCAT were represented in 2012-13; representation was requested in 2 per cent of guardianship cases and 1 per cent of minor civil disputes, and was granted for 83 per cent and 40 per cent of requests respectively — these two jurisdictions constitute 91 per cent of QCAT caseload (pers. comm., 4 August 2014).
- The SAT indicated that 6 per cent of all parties were represented in 2012-13, although 29 per cent of matters involved a represented party.
- The AAT, which has very different jurisdiction from other consolidated tribunals, reported that almost half of all individuals were represented in 2012-13 (AAT, sub. DR312).

Improved data would better inform policy in this area.

What are the benefits and costs of representation?

There are benefits and costs associated with allowing legal representation (and other professional representation) in tribunals. Representation can assist parties who cannot adequately promote their own interests (for example, individuals appearing before mental

health tribunals) or when facing an opponent who is a business professional or an in-house lawyer. It can also assist parties and the tribunal where complex legal issues are involved.

However, as noted during the review of the QCAT Act (Queensland Government 2012), high rates of representation can create unintended consequences such as increased formality, length and cost of proceedings. Further, legal representation is usually only available to those who can afford it, creating inequity between users of the tribunal. In relation to VCAT, the Disability Discrimination Legal Service said:

These individuals are increasingly finding themselves running cases against law firms and barristers in a process which ... is becoming increasingly legalised and often not much differently run from jurisdictions such as the Federal Court. (sub. DR237, p. 6)

In one example given by the SSAT, legal representation was considered an obstruction to timely justice:

... the SSAT noted the observation of the Federal Magistrates Court about the 'paucity' of relevant evidence after a five day hearing at which one party was legally represented. The inquisitorial hearing by the SSAT of an application for review of the same kind of decision involving the same parties (in respect of a different child support period) took 2.75 hours and neither party was legally represented. The SSAT's decision was not impugned on appeal. (sub. 86, p. 3)

The Queensland Public Interest Law Clearing House (sub. 58) also argued that it had observed instances where lawyers introduced unnecessary complexity and dealt aggressively with self-represented parties, such as by threatening to pursue an order for costs in own-costs jurisdictions.

Further, as indicated in section 10.3, legal costs can substantially reduce the potential gains from litigation. Where both parties are equally capable of handling the dispute themselves, the incentive to use legal representatives in tribunals can be seen in terms of a 'prisoner's dilemma'. That is, both parties may well be better off if they both elect to self-represent. But where one party chooses to engage a lawyer, it creates an incentive for the other party to do the same.

Not surprisingly, a wide range of views exists on when legal representation should be permitted in tribunals. Stakeholders in this (and other related) inquiries have argued variously that legal representation should be increased, stay the same, or be scaled back.

Many lawyers' groups argued against restrictions on representation:

Maurice Blackburn strongly disagrees with any suggestion that legal representation at any level of the dispute resolution process should be restricted. (sub. DR197, p. 7)

Views expressed by the Law Society of South Australia (sub. DR219), Allens, Ashurst and Clayton Utz (sub. DR224), the NSW Bar (trans., p. 107), the Tasmanian Law Society (sub. DR227), Avant Mutual Group (sub. DR216), Australian Lawyers Alliance (trans.,

p. 220), the City of Sydney Law Society (sub. DR249) and the Law Institute of Victoria (sub. DR221) covered several main arguments:

- lawyers promote efficiency and assist tribunals — self-represented litigants slow down the process and are more difficult for tribunals to deal with; lawyers assist the tribunal to be more efficient and timely
- not all tribunals manage fast and simple cases, therefore blanket rules are not appropriate. Cases that are very complex (for example, medical negligence cases) require the expertise of lawyers
- lawyers are needed to address a lack of capacity on the part of some people
- restrictions on lawyers will not solve the problem — creeping legalism cannot be solely attributed to lawyers but must be addressed by tribunals themselves
- legal representation is akin to a right.

The Springvale Monash Legal Service suggested that legal representation should be more widely available in tribunals because of ‘the increasing procedural complexity’ and the limited understanding of tribunal procedure that many clients have (sub. 84, p. 9). But another (more direct) means for addressing this problem is to reduce procedural complexity and provide more guidance for self-represented litigants.

Many legal assistance groups supported the restriction of lawyers in tribunals in general, but were keen to ensure that the framing and application of restrictions would not prevent representation for disadvantaged people who lack the capacity to advocate or represent themselves before a tribunal. These included Redfern Community Legal Centre (sub. 115), Consumer Action Law Centre and Consumer Credit Legal Centre NSW (sub. DR202), Family Violence Prevention Legal Services Victoria (where it affects Aboriginal victims/survivors of family violence, sub. DR212), the Women’s Legal Centre of ACT (trans., p 16) and the Women’s Legal Services NSW (sub. DR257).

In general we agree with the underlying reasons for [restrictions on representation]. However, the recommendation should explicitly state that this should not be to the detriment of those parties, who because of their disadvantage require independent assistance in understanding the proceedings and presenting their case. (National Aboriginal and Torres Strait Islander Legal Services, sub. DR256, p. 7)

We believe that it is important that tribunals remain as user-friendly and as informal as possible. However, we also believe it is important that applications to seek leave to have legal representation should be determined on a case-by-case basis, particularly taking into account the imbalance of power between the parties. There is also often a lot at stake for parties before tribunals, for example tenancy tribunals may be deciding whether or not to terminate a party’s residential tenancy agreement. (Kingsford Legal Centre, sub. DR242, p. 7)

Mental health and guardianship are areas where legal representation is seldom restricted. However, given the nature of these matters, most representation is provided by the legal assistance sector and depends on the resources allocated to those jurisdictions. For example, in the Mental Health Review Tribunal (NSW) legal representation was involved

in 63 per cent of all hearings in 2011-12 and just over 98 per cent of all forensic hearings, where criminal charges were involved (COAT, sub. 98). In other jurisdictions, levels of representation are much lower. In both the SA Guardianship Board (sub. DR264) and the Queensland Mental Health Review Tribunal, legal representatives are involved in around 2 per cent of cases. Queensland Advocacy Incorporated reported that low levels of representation in Queensland were due to limited funding, and that in contrast, the Attorney-General's representative attends 50 per cent of forensic hearings (sub. DR234).

What is an appropriate balance?

The Commission considers that legal representation should not be the norm in tribunals. Consistent with their original intent, tribunals should conduct themselves in a way that, in many cases, will make the involvement of lawyers unnecessary.

However, the Commission accepts that there are some circumstances in which legal representation is desirable or necessary, such as where it facilitates the most efficient identification and resolution of complex issues, or where parties require it for fairness in the particular case or for practical reasons. The Commission considers that in most cases, rules restricting representation can be drafted to accommodate these circumstances — QCAT and NCAT are examples. These rules provide that particular types of cases — which may be complex, or have significant consequences for individuals — may be broadly exempted from the general requirement for leave for representation, and particular categories of individuals may also be exempt (for example, children or people with impaired capacity). There is also broad discretion on tribunal members to allow leave where it is warranted in the circumstances.

Additionally, the Commission accepts that there may be some tribunals where restrictions are not necessary due to the subject-matter of cases or procedural design. For example, the Commonwealth merits review tribunals are essentially inquisitorial (that is, the decisionmaker does not appear) and therefore there does not appear to be any basis for excluding representatives (Legal Aid NSW 2000).

The AAT summarised the factors to consider when deciding the appropriate role for representatives:

- the nature and characteristics of the type of dispute, including the types of issues and the potential to reach agreement in relation to those issues
- the complexity of the issues that arise for resolution
- the capacity and availability of parties to participate in ADR
- the costs incurred by the court/tribunal and the parties in relation to the overall dispute resolution process and, in particular, costs that may be saved through the use of ADR. (sub. DR312, p. 2)

The Commission's approach is consistent with the view put by Leon:

Thus, an assumption of legal representation will not be the starting point. It may well be the outcome in any given case, but that will be because the circumstances warrant such representation rather than because the culture of the tribunal creates the need or the expectation of representation. (1999, p. 357)

Even where neither party is significantly disadvantaged, it will rarely be the case that two parties are perfectly matched in terms of their ability to prepare and present a case. Rather than addressing the imbalance by allowing legal representation in all or almost all cases (and given that many participants cannot access representation anyway) it is preferable that tribunals strive to address imbalances between parties through simplified procedures, active case management and procedural assistance from members and staff. For example, Legal Aid NSW said that disadvantaged clients are more capable of self-representation in the tribunals that take a more inquisitorial approach (trans., p. 182).

Consistent application of existing rules is important

There are concerns that even where restrictions on representation exist, these may not be enforced rigorously. The Consumer Credit Legal Centre (NSW), for example, said that restrictions on representation should be more strictly enforced to avoid the case of in-house lawyers appearing without leave.

Our main submission is that lawyers should need leave to represent complainants. In NSW, in matters commenced by unrepresented litigants we routinely saw the defendants being represented by ‘in-house legal counsel’. The defendants were not seeking leave to appear. (sub. 87, p. 39)

There is also the concern that some tribunal members grant leave as a matter of course, rather than considering whether it is necessary and desirable in the circumstances of the case. To address this, tribunals should have in place clear guidelines on the circumstances in which legal representation is desirable or necessary and set in place processes for ensuring these guidelines are met.

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.

Duties on representatives

In cases where representation might genuinely be required, there should be requirements on all representatives to support the objectives of the tribunals in which they appear. A duty on parties and their representatives was recommended by the AAT and supported by Professor Spender, a presidential member of ACAT:

The AAT's view is that there would be value in making explicit in its governing legislation not only the responsibilities of the AAT but also the responsibilities of parties and their representatives to help facilitate a review process that is fair, just, economical, informal and quick. (sub. 65, p. 12)

An example of such a requirement can be found in the *Federal Court of Australia Act 1976* (Cth), which sets out the purpose of case management (to facilitate the just, quick, inexpensive and efficient resolution of disputes according to law) and requires parties to act consistently with that purpose (ss. 37M, 37N). These provisions even allow costs awards to be made against lawyers. Judges can also make other directions as necessary to achieve the stated purposes (s. 37P). The AAT (sub. 65) noted that it cannot award costs except in very limited circumstances, reducing its ability to enforce litigant behaviour.

Educating legal representatives on the differences between courts and tribunals and the way in which they are expected to conduct themselves in tribunals would help to prevent them reverting to familiar court formalities. A former President of the AAT commented on the extent to which legal counsel are not used to the absence of formal rules of evidence and other court norms:

Even cases with senior counsel representing all parties are not quite the same [in the AAT] as in courts. They may look very similar, but I still see the surprise on the face of counsel when I reject a question that has not been objected to, or tell counsel that I will admit evidence, but if it

is in contest he will need to supplement it, or interrupt submissions to tell counsel what I want the submissions to address, or tell counsel to exchange documents informally rather than using a summons to produce, or tell counsel that if they make a further interlocutory application they will need first to explain to me why they have not been able to agree on what is being sought. (Downes 2008, p. 11)

The Tasmanian Law Society did not support such requirements being placed on representatives, citing the potential for a conflict between the interests of clients and the requirements of the tribunal.

The Law Society has concerns about [powers to make cost orders] and does not support it. This conflicts the role of the representative. What may be seen to be legitimate steps taken by a legal representative to appropriately protect and advance the case of their client may not be seen to 'advance tribunal objectives' (whatever those objectives are stated to be and how broadly or transparent they are) although it may be in the paramount interests of the client. (sub. DR227, p. 10)

However, it is not clear that this raises a conflict, any more so than it does in the context of courts, where lawyers' duty to the court under the common law is always paramount to their duty to their clients.

The Tasmanian Law Society further said that this recommendation was not needed because lawyers already comply with ethical obligations:

The short answer is that legal practitioners do have the required understanding because they must; to adequately represent the interests of their clients and fulfil their ethical obligations. (sub. DR227, p. 10)

However, there are reports of cases in which representatives engaged in self-interested behaviour, and tribunals were not able to impose sanctions. For example, the president of the then Industrial Relations Commission said that:

If I had a power to award costs against representatives I would have given serious consideration to requiring [the legal representative] to pay a substantial proportion of the costs that the Applicant will be ordered to pay. There is a persistent concern among some members of the Commission that a small number of representatives specialising in unfair dismissal encourage applicants with poor cases to commence proceedings ... in the knowledge that they, the representatives, cannot be exposed to an order for costs. (*Tosco Mihajlovski v I R Cootes Pty Ltd [2004] AIRC 173*)

The Law Institute of Victoria claimed that the behaviour of representatives is an issue where non-lawyers are permitted to appear in the Fair Work Commission without being subject to the same restrictions or duties as are imposed on lawyers (sub. DR221).

In chapter 12, the Commission has recommended that governments should ensure there are overarching statutory obligations on parties and their representatives to assist the court or tribunal to facilitate the just, quick and cheap resolution of disputes. (recommendation 12.1). Courts and tribunals need to rigorously enforce these obligations, including via, but not limited to, costs orders.

Use of technology

There are many ways in which the use of technology can improve outcomes for tribunals and their users. The use of information and communication technology can significantly improve the administration of justice in order to enhance efficiency, access, timeliness, transparency and accountability (CEPEJ 2006). Technology can also make tribunals more accessible for self-represented litigants (chapter 17).

Tribunals across Australia already make good use of technology including in administrative and back-of-office functions, lodgments, record keeping, data collection and reporting, hearings and case management. However, investment in information technology has been uneven across jurisdictions, with the availability, quality and use of technology varying widely between and within jurisdictions. Even relatively standard uses of information technology, such as case management systems, could be improved in some cases. For example, while all consolidated tribunals indicated that they use electronic case management systems, ACAT is updating its case management system as the current system has limitations for electronic document storage and retrieval of performance data (pers. comm., 7 July 2014). The Commission is aware of at least one specialist tribunal that does not keep electronic records of cases and could not easily answer a question about case numbers in a particular year.

Among the larger, consolidated tribunals, most provide comprehensive online information on topics such as their jurisdiction and the remedies available, how to lodge a case and what to expect when turning up at the tribunal. Online lodgment is not available in the AAT, ACAT or QCAT, and is only available for particular matters in most other amalgamated tribunals. The SAT has taken online lodgment a step further and provides an online application wizard available which generates the appropriate application form according to information entered by the user.

VCAT is the only consolidated tribunal for which documents are primarily kept in electronic form and hard copies are not required for case records (pers. comm., 27 June 2014). VCAT is moving toward a paper-free environment in 2017 and increasing the availability of online forms and automated behind-the-scenes processes (VCAT 2014). However, the Law Institute of Victoria commented that ‘the introduction and adoption of technology in Victorian tribunals has been disappointing and slow’ (sub. DR221, p. 25).

A further example of the use of technology is the MRT and RRT case management system, which allows for the exchange of data between the tribunals and the Department of Immigration, ensuring that accurate visa information is maintained (sub. DR188). The SSAT is similarly working with the Department of Human Services to enable relevant documents to be uploaded from the Department to the Tribunal (sub. DR191).

Audio visual systems (including teleconferencing and video conferencing) are already in use in most Australian tribunals, for example to conduct preliminary conferences over the phone or to allow expert evidence to be given remotely. That said, consolidated tribunals tend to have more audio visual facilities, particularly for video conferencing, than smaller,

specialist tribunals (box 10.2). Recommendations in chapter 17 that courts use more telephone conferences and online technologies for the purpose of procedural or uncontentious hearings, where appropriate, are also relevant to tribunals.

There also appears to be scope for much greater use of technology to deal with small claims, where the total cost of resolving low-value disputes may exceed the amount in dispute, especially when indirect costs — such as the time taken to complete forms or travel to the tribunal location — are included (figure 10.4).

Box 10.2 Teleconferencing and videoconferencing

While consolidated tribunals make use of teleconferencing and videoconferencing, the circumstances in which they do so vary.

- In the AAT, teleconferencing is generally the default option for conferences and directions hearings. Teleconferences are also held on request where it is more convenient for parties, and witnesses routinely give evidence by telephone. Videoconferencing may be used for case events including hearings at the request of the Tribunal or the parties (pers. comm., 11 July 2014).
- VCAT allows phone and video conferencing where the parties agree (pers. comm., 27 June 2014).
- The SAT uses telephone and videoconferencing where it is more convenient, such as for short directions hearings (pers. comm., 4 July 2014).
- In ACAT, parties require leave of the tribunal to use teleconferencing or videoconferencing during hearings or conferences (pers. comm., 7 July 2014).
- NCAT allows teleconferencing or videoconferencing in preliminary sessions for those who cannot easily access their premises, but for hearings, leave must be granted (pers. comm., 23 June 2014).
- In QCAT phone and video conferences are available on request from parties and/or the Tribunal (pers. comm., 4 August 2014).

There are several international examples of ‘online justice’. In England, Money Claim Online is a virtual legal service that allows claimants and defendants to make or respond to debt claims online. A qualitative study in 2013 found that most users considered the online forms easier and more convenient than paper forms, and a number of organisations reported the online system to be quicker and more efficient. However, some individuals and organisations continued using paper forms because of habit or unfamiliarity with online forms in general. Other problems included limited awareness of the online system and technical limitations, such as forms timing out or large attachments being rejected (Chowdhury and Ellis 2013).

A form of ‘e-tribunal’ is currently being implemented by the Government of British Columbia in Canada (2012). The Civil Resolution Tribunal, due to commence in 2014, will provide a range of free dispute resolution tools for any dispute, including diagnostic tools, triage support and online information to encourage resolution, followed by an escalating

range of (predominantly online) ADR options for small claims and strata disputes that are not resolved among the parties.

Chapter 17 recommends that Australian governments and courts examine opportunities to use technology to facilitate more efficient and effective interactions between courts and users, provide greater assistance to self-represented litigants, reduce administration costs and support improved data collection and performance measurement (recommendation 17.2). This recommendation is also relevant to tribunals. Continued improvement in the case management systems of tribunals will assist in supporting efficient case flow management and allow for the collection of data critical to evaluating the effectiveness of procedural and other reforms. A particular priority for governments and tribunals is the further investigation of options for delivering online justice, particularly for small claims.

Creating efficiencies by restructuring

Australia was one of the first countries to move towards greater consolidation of tribunals and has provided a model for other countries. The AAT model, established in 1976 as the prototype of a general jurisdiction tribunal, received warm commendation in South Africa, Canada and the United Kingdom (Creyke 2002).

Since the creation of the AAT, many Australian states and territories have followed suit, with seven out of nine jurisdictions now having ‘super’ civil and/or administrative tribunals (Tasmania and the Northern Territory being the exceptions). Consolidation at the state and territory level has generally been well-received and appears to offer the following advantages:

- streamlined administrative structures resulting in improved efficiency
- increased physical presence outside of capital cities, thus improving visibility and access for rural and remote clients; and greater availability of technology to reduce the need for travel
- better record keeping and more consistent data collection
- support services such as duty solicitors are more likely to be cost-effective.

However, the actual impact of tribunal consolidation on efficiency and effectiveness has not been well measured. In 2004, when amalgamation was still in its early stages across Australia, Bacon found that:

... these reforms are taking place in the absence of data about their likely implications, and without a thorough understanding of the objectives that generalist versus specialist tribunal systems can realistically achieve. (2004, p. i)

Little has changed since 2004. In 2009, a ten-year review of VCAT (Bell 2009) included broad statements about the benefits of amalgamation, with no comparative data on the differences in efficiency or other indicators between large generalist and small specialist

tribunals. The review of the SAT (Standing Committee on Legislation WA 2009) and the NSW study that recommended the creation of NCAT (Standing Committee on Law and Justice (NSW) 2012) also failed to provide any comparative analysis that demonstrated the benefits of amalgamation. This was partially due to poor case management systems in very small tribunals and a subsequent lack of data that could be analysed or compared pre or post consolidation. A review of QCAT commenced in 2012, as required by legislation. It is unclear whether this review will examine the benefits of amalgamation in any detail — the review is ongoing and, as at 1 July 2014, the Queensland Department of Justice could not inform the Commission of a likely finalisation or publication date.

However, in spite of an absence of Australian data, the Commission considers that there are key savings to be found in tribunal consolidation, and — where consolidation is not appropriate or desirable — shared administration of tribunals. This is consistent with overseas experience. In Scotland, for example, the creation in 2010 of the Scottish Tribunals Service — a shared administrative body for six tribunals — was estimated to have achieved efficiencies in 2011-12 of £1 million through rationalising organisational structures and support services: around 2.4 per cent of total costs (Scottish Government 2012).

Where to from here?

In the federal context, the Administrative Review Council proposed in 1994 that the main Commonwealth tribunals be merged into a new general Administrative Review Tribunal. This recommendation was picked up and expanded upon in the 2012 Skehill review, which recommended that the consolidation of all Commonwealth merits review bodies should be ‘endorsed as the Government’s desired end-state’ (Department of Finance and Deregulation 2012, p. 90).

However, the Skehill review said that this ‘end-state’ could not be achieved until substantial up-front capital investment in accommodation and technology was made so that meaningful gains in efficiency and effectiveness could be achieved in the short-medium term. The Skehill Review also considered that achieving reform along these lines would be ‘protracted and politically difficult’ and would limit existing appeal rights from ‘first-tier’ SSAT and VRB decisions (discussed below). Instead, the Review recommended that the heads of the larger Commonwealth tribunals should work together and report on initiatives for efficiencies or improvements that might be achieved by cooperative or shared efforts between them (Department of Finance and Deregulation 2012).

In its draft report, the Commission expressed the view that while moves towards the model recommended by the Administrative Review Council may require significant upfront investment, the savings to be gained over the medium-to-long term warrant the Australian Government continuing to explore and move towards this model. Some inquiry participants said that this would have a positive effect on accessibility:

The Society is of the view that the proposal to consolidate Commonwealth merits review bodies in a single Administrative Review Tribunal generally has merit. Particularly in a small State like South Australia, a ‘one-stop shop’ for Commonwealth merits review is regarded as a sensible development. (Law Society of South Australia, sub. DR219, Attachment, pp. 50–51)

Other stakeholders expressed concerns about the exact form of the of the proposed amalgamated tribunal:

A two tier level of external appeal is critical for our clients and must be retained in any consolidation of the SSAT and AAT. (National Welfare Rights Network, sub. DR201, p. 5)

In February 2014, the National Commission of Audit recommended that the AAT become the sole civilian merits review tribunal (2014). On 13 May 2014, the Australian Government announced its intention to amalgamate the AAT, SSAT, MRT, RRT and the Classification Review Board from 1 July 2015 (Parliament of Australia 2014). Merits review of freedom of information matters, currently undertaken by the Office of the Australian Information Commissioner, is also to be transferred to the AAT from 1 January 2015.

Cost savings are likely to be based on the reduced cost of administration, accommodation and information technology services. The Government announcement indicated that the measure could save \$20.2 million over four years, however the Commission suggests that the greatest benefits can be gained if this change is used as an opportunity to examine broader improvements to Commonwealth merits review, rather than being solely focused on the final dollar outcome. The amalgamation presents a range of opportunities to improve the functioning of Commonwealth tribunals, and so, parties’ access to justice. These include opportunities to consider further improvements to case management and electronic record keeping, or improved tailoring of services to individuals with special needs, including self-represented litigants.

The proposed amalgamation excludes the VRB. In making its recommendation the National Commission of Audit stated simply:

The Commission [of Audit] does not propose the Veterans’ Review Board be included as it essentially operates as a division of the Department of Veterans’ Affairs and focuses on defence-related matters. (2014, p. 158)

That is, while the VRB is an independent statutory body (VRB 2013), all business and corporate services are provided by the Department.

The Commission is supportive of the Government’s efforts to improve the efficient operation of Commonwealth agencies, but notes that any cost savings depend on a range of decisions that have access to justice implications, including any restrictions on second tier review rights and changes to practices in representation by government departments (discussed below).

In situations where consolidation is not appropriate, there are other ways in which tribunals can cooperate to improve efficiency. Options include co-location, shared administrative

services (such as information technology and records management) or shared outreach efforts (although most tribunals do not invest significant resources for outreach; SSAT, sub. DR191). Co-locating is a simple option to reduce the internal administrative costs of small tribunals. The Tasmanian Guardianship and Administration Board said that it was in the process of co-locating with other Justice Department tribunals (2012).

Ensuring appropriate and cost-effective review and appeal rights

The question of whether tribunals should include an appeals division is closely related to the question of how to most efficiently and effectively structure tribunals. The three main arguments put in favour of facilitating internal appeals are:

- giving parties a more accessible and affordable right of appeal
- increasing the consistency, predictability and quality of tribunal decisionmaking
- encouraging the building of tribunal jurisprudence.

However, if avenues of appeal are too broadly available, for example where appeals do not require the leave of the tribunal, there may be potential for unmeritorious appeals and unnecessary and costly duplication.

In its report on tribunal reform, the NZ Law Commission rejected the need for appeal layers in the tribunal system, preferring to leave appeals to the courts:

There is not a strong case for creating an appellate tribunal within the unified tribunal structure, at least at this time. Appeals from tribunals should continue to be heard by the courts. (2008, p. 15)

The scope for internal appeal varies across tribunals. Currently, decisions of VCAT can be appealed only to the Supreme Court of Victoria on a question of law and with leave. Differing views have been expressed about the desirability of reform, with one former President of VCAT recommending the establishment of an appeal tribunal within VCAT and another former President expressing the view that ‘the creation of an internal appeal is not desirable to the cost and workload it would create’ (NSW Government 2012, p. 88).

QCAT allows a party to appeal to an internal appeal tribunal from a decision of a non-judicial member, subject to certain limitations and exclusions. For example, leave of the tribunal is required in order to appeal a decision in a proceeding for a minor civil dispute, or on a question of fact. Similarly, the recently established NCAT provides for internal appeals to an Appeal Panel as of right on any question of law, or with the leave of the Appeal Panel on any other grounds. There is no internal appeal system in the SAT, but there is for ACAT, and an internal appeal mechanism is proposed for the new South Australian Civil and Administrative Tribunal.

No comments were received in response to the draft report on the issue of whether internal appeals were appropriate in consolidated state and territory tribunals. The lack of input from stakeholders suggests that this is not a significant issue.

Second-tier merits review

In the federal tribunal system, decisions of the SSAT and the VRB are reviewable by the AAT — often referred to as ‘second-tier merits review’ — without the need to obtain leave. Given that the SSAT will become part of the AAT, the question is whether the general right to second tier merits review should be abolished, restricted or maintained.

Abolishing second tier merits review for matters currently heard in the SSAT would mean that the only avenue of appeal would be to the court system on a question of law. If second tier merits review were to be retained for all or some matters, an appeals function would need to be created in the newly amalgamated body.

When the Administrative Review Council considered the amalgamation of Commonwealth tribunals in 1994, it recommended that second-tier merits review be restricted to cases:

- raising issues or principles of general significance
- involving manifest error of fact or law, or
- where new information that would have materially affected the decision is discovered.

At the time, the Council considered that this would improve the approach that some applicants take to merits review in the veterans’ area, noting a culture where ‘some applicants approach the VRB with an expectation of eventually proceeding to the AAT’ such that they ‘do not always present the VRB with all relevant information, or raise all relevant issues’ (ARC 1995, p. 157). In 2012-13, almost 20 per cent of VRB decisions were reviewed by the AAT, with 40 per cent of these decisions varied or set aside. However, as noted above, the Australian Government does not currently intend to include the VRB in the amalgamated AAT.

An argument frequently raised in support of second-tier merits review is that the first review (as heard by the SSAT or VRB) deals with the less complex matters quickly and efficiently, allowing resources to be focused on the smaller number of second appeal cases (currently heard by the AAT) that are more difficult to deal with. Thus overall costs are reduced in comparison with a scenario where parties and the tribunal would invest more heavily in, for example, pre-hearing procedures, representation and expert opinions (National Welfare Rights Network, sub. DR201).

Currently, the SSAT resolves social security cases quickly (8.3 weeks), relatively inexpensively (the average cost of cases in the SSAT was \$2215 in 2012-13), informally (the department does not appear, creating a non-adversarial environment and reducing the need for legal representation) and with no fees payable by the applicant. Average cost in the AAT was significantly higher at \$6303 in 2012-13, reflecting, among other things, the significantly higher remuneration of AAT members (SSAT, sub. DR191).

If an appeals function is not created within the amalgamated AAT, or if an appeals function is created but appeals are allowed in only very limited cases (as opposed to the

current situation where appeals are allowed from the SSAT to the AAT without leave), it could lead to significantly different behaviour by parties and the tribunal, including:

- parties may wish to be represented in a greater number of cases, imposing costs on parties or on the legal assistance sector. Currently, representation for social security matters is 18 per cent in the SSAT (pers. comm., 15 July 2014) and 26 per cent in the AAT (sub. 65)
- the Department currently does not appear at SSAT hearings, but may choose to appear if it has limited ability to appeal the merits of a decision made in its absence
- the Tribunal may take longer to hear and decide cases where the parties engage lawyers or submit more supporting information, and/or the remuneration of SSAT members may increase in line with AAT members if they are hearing the same types of cases, increasing overall costs.

When the costs to all parties and the tribunal are considered holistically, these behavioural changes have the potential to reverse any cost savings that might otherwise be gained by hearing fewer or no secondary merits appeals.

However, if the ability to appeal is not unduly restricted, it might be possible to reduce the number of unmeritorious second-tier merits reviews without altering behaviour in a way that would reduce potential cost savings. For example, if a leave requirement gave wide discretion to the AAT, such discretion would assist in maintaining the current non-adversarial system whereby the Department does not appear at the initial review. Increases in the cost to parties and the Department of representation could be substantially avoided if the informality and accessibility of the primary review is maintained.

Irrespective of the approach adopted, the Commission considers that there is scope to reduce unmeritorious claims, for example by providing better information to those who lodge claims — only around 20 per cent of social security cases result in a change to the original decision whether in the SSAT or on appeal in the AAT.

11 Court processes

Key points

- The courts are a central component of the formal civil justice system and perform a public service that goes beyond the private interests of the parties to a dispute.
- Of the small proportion of civil disputes that make their way to the formal civil justice system, most get resolved before final judgment.
- A wide range of interrelated factors influence the cost, timeliness, fairness and efficiency of court based dispute resolution. Some factors, such as the complexity of the law, court resourcing and court fees are outside courts' control. Other factors, such as court processes and case management approaches are within courts' control.
- Australian courts have implemented a wide range of reforms to promote efficient and proportionate dispute resolution and address issues of cost and delay including through:
 - active judicial case management
 - court supervised alternative dispute resolution
 - adoption of docket systems of case allocation and other systems to ensure consistent pre-trial case management
 - greater utilisation of specialist lists and judges
 - limiting the scope of discovery
 - promoting greater judicial management of the discovery process
 - developing rules and techniques for the more efficient use of expert witnesses.
- However, there is scope for courts to consider adopting these reforms more broadly, insofar as they are appropriate to their circumstances, noting that the resources and jurisdiction of courts differ.
- Care must be taken to ensure reforms designed to promote early and more active identification of issues do not simply front load rather than reduce costs.
 - This underscores the importance of improved data collection and empirical evaluation of the impact of reforms.
- Any reforms to court processes need to be accompanied by better incentives for litigants and their legal representatives to avoid undue cost and delay.

Courts are the central pillar of the civil justice system. They provide a mechanism for creating, interpreting and applying the law, and in so doing, can perform a public service, which goes beyond the private interests of the parties to a dispute. However, despite significant civil reform efforts in all jurisdictions, there remain concerns that court-based dispute resolution is excessively resource intensive.

Court processes and different case management approaches establish a framework within which parties to litigation operate and can provide incentives for parties to engage in proportionate dispute resolution. As such, they can significantly impact on the cost, timeliness, fairness and efficiency of the litigation process.

This chapter initially explores the importance of courts in providing access to justice, the factors that affect court performance, and ways in which court rules and processes can contribute to unnecessary cost and delay (sections 11.1 and 11.2). It then examines a range of court processes and case management approaches as potential responses designed to improve the efficiency of court-based dispute resolution (sections 11.3 to 11.7).

11.1 Courts are important in providing access to justice

Courts are arranged hierarchically, both federally and at the state and territory level. Federal courts include the High Court of Australia, the Federal Court of Australia, the Family Court of Australia, and the Federal Circuit Court of Australia. All states, except Tasmania, have a supreme court, a district (or county) court and a magistrates' (or local) court. Tasmania, the ACT and the Northern Territory do not have an intermediate court. Some jurisdictions have established additional specialist courts or divisions within courts (chapter 17).

Courts deal with a significant proportion of disputes entering the formal civil justice system (chapter 10). However, most matters that reach courts are resolved prior to final judgment. For example, judicial determination generally accounts for less than three per cent of all civil finalisations in state and territory supreme and district courts. Magistrates' courts have a much higher rate of finalisation by judicial determination, although the majority of cases are still finalised before this stage.

Cases of greater legal or factual complexity are distributed upwards in the hierarchy of courts. This seeks to ensure that matters are dealt with at the most suitable level, using the simplest and most cost effective procedures.

11.2 What influences the accessibility of the courts?

Factors affecting the accessibility and efficiency of court based dispute resolution can be conceptualised as 'supply' side factors (which influence the number of cases resolved over a particular period) and 'demand' side factors (which influence the number of incoming cases in a particular period or the 'litigation rate').

Table 11.1 Factors impacting the ‘market for litigation’^a

Where the number of disputes in the community is given

<i>Supply side factors</i>	<i>Demand side factors</i>
<ul style="list-style-type: none">• Court resourcing• The efficiency of the litigation process as influenced by:<ul style="list-style-type: none">- the degree of task specialisation- case flow management- use of information and communication technology- conduct of parties- court process and procedures• Court governance	<ul style="list-style-type: none">• Cultural traits and general economic conditions• The costs of accessing the service and cost shifting rules• The incentives that apply to lawyers as shaped by the joint effect of the fee regulation and the organisation of the supply of legal services• The availability of alternative dispute resolution• Court processes and procedures

^a The number of disputes in the community is itself affected by a number of factors such as the structural, social and economic characteristics of the economy, the business cycle, and the quality and quantity of legislation.

Source: Adapted from Palumbo et al. (2013).

Courts have varying degrees of control over these factors. Levels of court funding and judicial resourcing, for example, have direct impacts on the timeliness of court outcomes, but are largely outside the control of the courts. However, courts can influence the efficiency of the litigation process through their choice of court processes and case management.

A review of the literature and the submissions made to this inquiry identify the following as key factors contributing to unnecessary cost and delay:

- a lack of early identification and narrowing of the issues, including problems with pleadings (for example, strict adherence to overly formalistic pleadings, disputes over pleadings, continual amendment of pleadings)
- deference to party autonomy/lack of proactive judicial case management of the litigation
- lack of judicial specialisation, ownership and continuity
- unnecessary interlocutory steps and excessive time and resources being devoted to interlocutory disputes
- a lack of adherence to timelines set by the court
- wide ambit of document discovery, disputes about discovery, abuses of discovery
- inefficient listing practices of courts
- the use of multiple expert witnesses (at a time when the cost of the professional services of such experts has been increasing)

-
- insufficient use of modern technology (for example, requiring parties to appear for minor timetabling issues that could be done by telephone).

Courts have been actively seeking to address these factors in an effort to contain unnecessary cost and delay.

11.3 Case management

What is case management?

Traditionally, Australia's adversarial system of litigation left primary responsibility for the pace of litigation in the hands of the parties and their lawyers. 'The court's role was reactive — the judge was the umpire; not a player in the process' (ALRC 2000, p. 390). Case management transfers some of the initiative in case preparation from the parties to the court — including management of pre-trial processes and, for the very few matters that proceed to trial, the trial itself.

Case management has been implemented in courts across Australia (and the common law world) over the past two decades. Over time, practice and procedure rules have been significantly modified so that pleadings, discovery, evidence presentation and settlement facilitation are subject to court control and supervision (ALRC 2000).

Moves to give courts greater control are based on the premise that the conduct of litigation is not a mere private matter for the parties but that 'there is an important public interest in the functioning of the civil justice system' (Cairns 2014, p. 51). This sentiment has been supported by the High Court of Australia. It indicated that just procedural outcomes must not be pursued solely by reference to the interest of the parties to particular proceedings. The effects of procedural decisions on other litigants and on the public's interest in the efficient use of court resources must also be taken into account.⁵¹

By giving greater control of the litigation to the court, case management seeks to contain the cost of litigation and ensure the timely resolution of cases, without compromising the quality and fairness of the process. This includes reducing the time parties' lawyers spend on unnecessary processes or issues that can be resolved early in the process. As noted by the Law Council of Australia:

Lawyers' time is expensive. It cannot be too plainly stated that the only effective means for reducing the cost of litigation are means which result in less work being done by lawyers over the course of a proceeding. (2011b, p. 16)

⁵¹ *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 217-18 (Gummow, Hayne, Crennan, Keifel and Bell JJ).

Approaches to case management

Courts perform their case management functions through a series of directions held either before a judge, magistrate, associate judge, master or registrar. This may involve:

- making orders for alternative dispute resolution (ADR) in an appropriate case (chapter 8)
- ensuring that the parties and their lawyers adhere to agreed schedules and other obligations
- dispensing with pleadings in appropriate cases
- keeping the scope of discovery, subpoenas and interrogatories proportionate to what is at stake
- requiring parties to focus on case preparation at an early stage, with a view to settling the case or narrowing the issues in dispute
- limiting experts or using court appointed experts
- restricting the length of interlocutory and final hearings (for example, limiting the time that may be taken in cross-examination, limiting the number of witnesses).

In practice, a wide variety of case management practices and approaches are employed in Australian courts and in relation to different types of matters (Cairns 2014). As noted by Justice Sackville, in contrast to the United Kingdom, case management in Australia has generally been implemented on the initiative of the courts themselves, rather than as a consequence of recommendations made by an external agency. Approaches to case management have been articulated in court rules and practice notes. More recently, case management provisions have also been put in legislation.⁵²

This ‘process of innovation on a court-by-court basis has tended to produce diverse case management arrangements across the various jurisdictions’ (Sackville 2009, p. 213). Further, case management approaches must necessarily vary according to the type of litigation:

No single case management model can or should be applied to all forms of litigation. A trial court with wide and varied caseloads, including potentially complex and lengthy litigation, is likely to require a more flexible and judge-intensive regime than a specialist court accustomed to handling high-volume, largely standardised claims. Even within the same court, case management techniques will have to be adapted to the demands of particular categories of litigation. (Sackville 2009, p. 213)

At the superior court level, most jurisdictions direct more complex cases to particular lists that are subject to more intensive case management than other matters. For example, in the Supreme Court of Western Australia, cases requiring more intensive supervision are

⁵² For example, the *Civil Procedure Act 2005* (NSW); *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth); and the *Civil Procedure Act 2010* (Vic).

entered into the ‘Commercial and Managed Cases List’ and docket-managed by the judge likely to hear the trial of the case. Cases not entered on this list are case managed by registrars up to the listing conference stage.

In larger volume jurisdictions such as New South Wales, there are a greater number of subject matter ‘lists’– for example, in the Common Law Division of the Supreme Court of NSW there is the defamation list, professional negligence list, possession list, administrative law list and the general management list. Cases in specialist lists are generally case managed by the list judge in conjunction with a registrar. The list judge also allocates the cases for hearing.

The Federal Court provides a Fast Track list with streamlined procedures for commercial, insolvency and intellectual property matters that will be heard in less than five days. Key elements of the list are the abolition of formal pleadings, a scheduling conference six weeks after filing (which the parties’ lawyers must attend), interlocutory applications dealt with on the papers, reduced discovery obligations, a pre-trial conference, and a ‘chess-clock’ style trial. Judgments are generally delivered within six weeks of the trial concluding. The Federal Court also has specific case management approaches for other types of matters, for example, taxation and admiralty and maritime cases.

Intermediate and lower courts also use active case management. The Local Court of NSW applies strict timeframes for different stages of the process and its court practice notes clearly set out case management steps and timeframes. Claims in the small claims division are conducted with as little formality and technicality as the proper consideration of the proceedings permit. A normal adversarial trial is not available as of right and the procedure at the trial is determined by the magistrate or assessor.

Case management approaches in the Family Court of Australia, the Federal Circuit Court and the Family Court of Western Australia implement, in different ways, Division 12A of Part VII of the *Family Law Act 1975* (Cth). This Part requires child-related proceedings to be conducted in a less adversarial way with the court actively controlling and managing the proceedings (chapter 24).

Courts in all jurisdictions use ADR as part of the case management process in a range of ways (chapter 8).

The case management approach required in a particular case will be influenced by any applicable pre-action requirements and how well these requirements have been adhered to (chapter 12). For example, the impact of the pre-action protocol applying in the Supreme Court of the Northern Territory has been described in this way:

[O]ur aim here is to make sure there aren’t any discovery issues outstanding when we commence proceedings. You’ve shown the documents to each other, that’s it. So we don’t need an order for discovery. The pleadings can be much more focused ... Often we won’t even need those because you’ll say, “Look, there’s just a point of law in issue here. It doesn’t need a set of pleadings. That’s the point of law. What’s your decision?” So that’s how the pre-action

conduct ought to be used to focus litigation, so that it happens quickly and if it does happen, it does happen. (Bar Association of the Northern Territory, trans., p. 1019)

Impacts of case management reforms

Many stakeholders in this inquiry expressed strong support for active judicial case management and considered that it reduced cost and delay. Indeed, some submissions considered there was a need for judges to go further and ‘flex their muscles’ in ensuring that litigation is conducted efficiently and expeditiously (IMF, sub. 103, p. 39).

However, the wide variety of case management approaches in Australian courts makes it difficult to assess the costs and benefits of case management in a general way. Added to this difficulty is an absence of empirical evidence on the impacts of different models of case management in Australian courts. As Chief Justice Martin observes:

... courts and litigants are investing substantial resources into intensive case management. It is most unsatisfactory to be left to anecdotal experience and intuition in order to assess whether these investments are paying dividends. (2012b, p. 44)

Impacts on delay

Case management approaches can have different effects on delay and cost. The available international evidence suggests that active judicial case management is effective in reducing delay between the time of commencing proceedings and finalisation. Chief Justice Martin suggests that there is also anecdotal evidence in Australia to this effect (Martin 2012b).

Impacts on costs

However, active case management also carries a risk that, in an effort to move matters along more quickly, cases may be ‘over managed’ resulting in increased costs. This is supported by international evidence, which suggests that some forms of judicial case management may increase costs for litigants. One of the only large empirical studies on case management, conducted in the United States in 1996, found that although early judicial case management significantly *decreased* time to finalisation, it significantly *increased* litigant legal costs. The report suggested that the latter occurred because — in those cases that would previously have settled before judicial involvement — the early involvement of the judge meant that lawyers worked more hours to respond to the judge’s requirements (Kakalik, Dunworth and Hill 1996). Similarly, the Australian Law Reform Commission (ALRC) has previously noted concerns that past case management practices in the Family Court increased costs to litigants due to repeat case events (ALRC 2000).

While far reaching reforms to case management occurred in England and Wales following the introduction of the Woolf reforms in 1999, evidence of their effects is weak as no large empirical study was undertaken. Commentators have varying views about the effects of these reforms on costs. Some commentators consider that costs have increased

significantly as a result of case management (Zander 2009), while Lord Jackson, in his final report on costs, concluded that ‘case management can and should be an effective tool for costs control’ (Jackson 2009a, p. xxiii), noting:

All the feedback I have received during the Costs Review indicates that (despite academic scepticism) both costs and time are saved by good case management. (Jackson 2009a, p. 394)

Similarly divergent views were contained within the Law Council’s submission to this inquiry. The Law Society of NSW expressed support for the involvement of the court in narrowing the issues, while the Law Society of South Australia raised some doubts about the efficiency benefits of case management practices (sub. 96, p 50).

In respect of the Federal Court’s Fast Track list, there is some evidence to suggest that it has been successful in reducing both cost and delay. Anecdotal commentary by practitioners suggests that the Fast Track list reduces legal costs from filing to resolution by about two-thirds or more (Black 2009). One solicitor interviewed by Lord Jackson estimated a 50 per cent cost saving from the Federal Court’s Fast Track list (Jackson 2009b).

In addition to its impact on cost and delay for litigants in individual cases, it is important to note that increased judicial time spent on case management means that without the allocation of additional resources, there is less judicial time for other matters. As noted by Justice Byrne:

There is no spare judge time. So committing more judicial effort to pre-trial management means that something else has to give: there might be fewer judge hours committed to the Applications jurisdiction or to Crime, as examples. That should only be done if the return justifies the commitment: in particular, where that would enhance the chances of settlement or else reduce the number of days needed for a trial (2010, p. 4).

Case management — where to from here?

Based on the above, it appears likely that well-targeted and appropriately employed case management can improve efficiency in the dispute resolution process. The challenge is in getting the balance right — ensuring that case management processes result in a fair, timely and efficient resolution of the dispute and limit unnecessary work on the part of legal practitioners, court staff and judicial officers.

No single model of case management is appropriate for all cases in all courts and this was a theme that came through strongly in submissions in response to the draft report (Law Council of Australia, sub. DR266; Law Society of South Australia, sub. DR219; Judicial Conference of Australia, sub. DR195).

Nevertheless, there is value in identifying case management practices and innovations that have proven effective and that could be applied more broadly (for example, in similar cases in another jurisdiction) — noting that the applicability and appropriateness of any case management approach will depend upon the jurisdiction and resources of individual courts.

The elements to which the success of the Federal Court's Fast Track List are attributed include:

- the lack of automatic progression through a series of procedural steps with sequential timelines
- very few pre-trial appearances before the judge (usually only two)
- a focus on the early identification of the real issues throughout the entire procedure
- consistent engagement by those who are in charge of the litigation as principals (i.e. a judge with ownership of the matter and the practitioners who will have responsibility for the conduct of the trial)
- discovery by leave and only for good cause
- strict observance of time limits (Black 2009).

The Fast Track list also abolishes formal pleadings which are a major contributor to unnecessary cost and delay in the litigation process (Allens, sub. 111; Spender, sub. 135; Marfording, sub. 19; Law Council of Australia 2011b; Thornburg and Cameron 2011) and instead uses less formalistic Fast Track Statements and Responses.

In the course of recent inquiries, both the ALRC and the Victorian Law Reform Commission have recommended further consideration be given to reform of pleadings (ALRC 2011; VLRC 2008). The former Chief Justice of the Supreme Court of South Australia has similarly noted:

The system of pleadings does not work. The pleadings do not identify, define and confine the limits of a dispute. They do not present a clear framework for the resolution of pre-trial issues, nor for trial issues. Anyone who talks to judges about civil litigation will have heard judges remark how often it is that the pleadings conceal rather than expose the real dispute. They will say that the pleadings are too complex, pleading a confusing set of alternatives or cumulative claims. Often at the start of the trial judges ask for a summary of the real issues between the parties, because the pleadings are of no practical use ... Costs are incurred at the pre-trial stage because of this (Doyle 2011, p. 6)

A number of submissions in response to the draft report were concerned that abolition of formal pleadings would result in a lack of clarity about the issues in dispute and negatively impact the cost and timeliness of litigation (Law Council of Australia, sub. DR266; Law Institute of Victoria, sub. DR221, Law Society of South Australia, sub. DR219). However, given the numerous criticisms of pleadings — which the Law Council of Australia agrees are 'real and substantial' (Law Council of Australia 2011b, p. 25) — the Commission remains of the view that there is scope for greater use of less formalistic alternatives to pleadings, particularly when combined with active judicial management.

The reduction in the number of pre-trial appearances also significantly contributes to the effectiveness of the Fast Track list. This was emphasised by Lord Jackson in his report on costs. He recommended that courts should ensure that case management conferences and other interim hearings be used as effective occasions for case management and do not

become formulaic hearings that generate unnecessary costs (for example, where directions could easily have been given without a hearing) (Jackson 2009a), a point made by IMF Australia (sub 103) and the Law Council of Australia (Law Council of Australia 2011b).

While elements of the Federal Court's Fast Track approach are already incorporated to differing degrees in the case management practices of lists and divisions in other Australian courts, there appears to be scope for this approach to have broader application.

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.

In order to ensure the benefits of case management reforms are maximised, the application of different case management techniques to different types of matters at different stages of proceedings needs to be subject to ongoing evaluation and refinement. Considerable support for greater empirical analysis and evaluation in this area was expressed by a range of stakeholders in response to the draft report (Law Institute of Victoria, sub. DR221; Law Society of NSW, sub. DR174; Insurance Council of Australia, sub. DR193; Law Society of South Australia, sub. DR219; Law Society of NSW, sub. DR174).

Feedback from Australian courts indicates that the level of empirical analysis and evaluation of their case management practices varies considerably, with some courts advising that they currently do not evaluate the impact of different case management approaches (identifying resourcing constraints as a barrier), and other courts indicating that they regularly evaluate their case management practices — using statistical and operational reports to assist in analysis.

The Commission considers that courts' case management systems should collect statistics which allow courts to assess the impact of case management and procedural reforms on court resources, settlement rates, timing of settlements, trial length (for those matters that proceed to trial) and timeliness. Adequate funding and technology systems are obviously necessary enablers and are discussed in chapter 17.

In expressing its support for greater empirical analysis and evaluation in this area the Judicial Conference of Australia referred to the International Framework for Court Excellence (IFCE) as a tool that can assist courts to evaluate and improve their functioning (sub. DR195, p. 3). A number of Australian courts, led by the judiciary, are in different stages of implementing this Framework, or otherwise using it to inform case management

evaluation. The Commission considers that broader use of the IFCE by Australian courts may promote a greater focus on the collection of statistics to support case management evaluation and performance measurement.

However, courts are not in possession of all data relevant to assessing the full impact of different case management approaches, for example, impacts on litigant costs. There are also broader questions of relevance to all courts that employ active judicial case management, for example, whether it is possible to identify in advance those matters that will benefit from more intensive judicial management (because of factors that make it likely that it will ultimately go to trial) and those matters that can be more efficiently left to the parties to manage. The Australian Institute of Judicial Administration (AIJA) has recently commissioned research in this area (Executive Director, AIJA, pers. comm., 13 August 2014). A number of courts expressed support for the AIJA taking on a ‘clearinghouse role’ in respect of case management information. Chapter 25 identifies further quantitative research into different case management approaches as a priority and recommends that the Law, Crime and Community Safety Council consider the appropriate evaluation mechanism for this, and other civil justice, research (recommendation 25.4).

In addition to ensuring case management practices are appropriately evaluated, judges and other court officers involved in case management also need to be appropriately trained in effective case management techniques. This training should draw from evidence-based evaluations as far as possible. As noted by Justice Sackville:

The enthusiasm for case management ... needs to be matched by equal enthusiasm for systematic evaluation of the many and various techniques adopted by courts and for training judicial officers in tried and tested techniques of case management. The latter should involve regular opportunities for judicial officers to exchange views and experiences. In the Australian federal system, notwithstanding the undoubted advantages of federalism, the tendency to reinvent the judicial wheel is frequently apparent. (2009, p. 217)

Participation in judicial education programs can enable greater use of case management techniques and promote the sharing of approaches adopted or trialed in different jurisdictions. In particular, it can assist in addressing the apparent reluctance of judges to use existing case management powers, despite the possibility that their use could resolve disputes earlier (Law Council of Australia, sub. 96, p. 72).

There are a number of existing programs available through judicial education bodies in Australia for judges to receive training in case management skills, for example, the National Orientation Program for new judges conducted by the National Judicial College of Australia, seminars offered by the Australian Institute of Judicial Administration, and programs run by the Judicial College of Victoria (which have a particular focus on the *Civil Procedure Act 2010* (Vic)). In 2011-12, the National Judicial College of Australia reported that a specific program on case management is in the early stages of development. The College advised that as at 4 August 2014 a committee of judges is developing the program but it is not known when it will be finalised (Director, NJCA, pers. comm., 4 August 2014).

Many submissions to this inquiry expressed support for greater judicial training in case management (Law Society of NSW, sub. DR174; Insurance Council of Australia, sub. DR193; Law Society of South Australia, sub. DR219; Law Council of Australia, sub. DR266).

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.

11.4 Case allocation

Lack of judicial continuity and ‘ownership’ may contribute to unnecessary cost and delay in dispute resolution. As noted by former Chief Justice Black of the Federal Court:

Endemic tendencies to delay are liable to be exacerbated when, in the years that might elapse between the commencement of the action and its trial, any one of many associate judges, masters, prothonotaries, registrars or other quasi-judicial officers may deal with the case. (2009, p. 91)

The degree of judicial continuity and ownership is largely determined by the model by which courts allocate their cases.

In Australia, there are two basic methods for allocating cases within a particular court, court division or court location — the master calendar system and the individual docket system (Mack, Wallace and Roach Anleu 2012). Under the calendar system model, all cases go into a common pool with judges, masters, registrars and/or magistrates allocated to particular tasks that arise at different stages. Within the master calendar system, there are two ways work is allocated to a judicial officer: cases are initially allocated to lists, and then to specific dates, such as the first appearance list or the small claims list or a trial list (the judicial officer to preside over those cases in that list or category is determined by a separate process); or work is allocated directly to an individual judge or magistrate (for example, in urgent cases or just before a matter is set for trial).

The master calendar system has been the predominant system in most Australian state and territory courts (Mack, Wallace and Roach Anleu 2012), although there is increasing use of individual dockets. Under the individual docket system each case is assigned to a judge or magistrate and managed until the case is finalised. Some courts, such as the Federal Court, the Federal Circuit Court and the Family Court of Australia, utilise an individual docket system for all matters.

Other courts, for example, the Supreme Court of Western Australia, utilise an individual docket system only for cases requiring more intensive case management. Others may use an individual docket system for civil but not criminal matters. Others may use a hybrid approach, whereby a single judge deals with pre-trial directions for all matters in the list, but the trial of the matter will then be allocated to any of a number of list judges as occurs in the Commercial List of the Supreme Court of NSW and certain lists in the Supreme Court of Victoria.

The individual docket system is seen to have a number of advantages. It enables judicial officers to exercise greater control over their workload. It also imposes more direct responsibility on judicial officers for case managing the files allocated to them. Judicial continuity means there is no need to explain to a new judge the nature of the case and its history and allows judicial time for reflection on the case and its issues. It has also been suggested that judicial monitoring creates incentives for practitioners to comply with orders and that pre-trial processes may be more productive and lead to quicker or better disposition (Mack, Wallace and Roach Anleu 2012).

For these reasons, many submissions (for example, Maurice Blackburn, trans., p. 637; Marfording, sub. 19; NSW Bar Association, trans., p. 118; Law Council of Australia, sub. DR266) and consultations to this inquiry were strongly supportive of judicial case management by a single judge as in the individual docket model, although a small number of judicial officers have expressed a contrary view.

This is consistent with international experience. In the course of both Lord Jackson's 2009 review on costs in England and Wales and the 2010 Duke Conference in the United States, there was strong support for the greater use of active case management by a single judge (Kourlis and Kauffman 2013). In respect of England and Wales, Lord Jackson recommended ensuring that as far as possible, a case remains with the same judge (Jackson 2009a).

However, the individual docket system has some limitations:

- the additional managerial responsibilities may not suit the skills and abilities of all judges (though this could be remedied with training and improved judicial selection)
- the individual docket system is more resource intensive — additional staff and technology resources may be required to do organisational work involved in case management, and Registrars (and similar officers) can perform less complex tasks more cheaply than judicial officers
- there may be problems of (perceived) overwork or delay arising from very long trials, trials overrunning estimates, differing judicial approaches to management, and the unequal impact of random case allocation, resulting in longer lists for some judicial officers

-
- from a management perspective, disparities in how far out cases are listed can mean a lack of the ability of the court to control its backlog (Mack, Wallace and Roach Anleu 2012).

Some stakeholders emphasised that while individual docket systems are valued, other models can also operate efficiently and effectively. For example:

QPILCH notes that the Queensland Supreme Court's system, in which one Judge has responsibility for the Commercial List, one Judge has responsibility for the Caseflow Management List, and two Judges share responsibility for the Supervised Case List, seems to work well. (QPILCH, sub. DR247, p. 28)

There are other effective approaches to ensuring consistent pre-trial management, usually involving Registrars and rule based models such as in the District Court of New South Wales. All such systems depend on the commitment of the judicial or court officer administering them, and on the culture of the court or tribunal. (Law Council of Australia, sub. DR266, p. 54)

On balance, given that there is widespread stakeholder support for the individual docket system, there appears to be merit in courts that do not utilise this model further examining the potential for doing so. That said, the Commission recognises that the volume and characteristics of the case load of individual courts, and the available judicial and other human resources, will necessarily impact on whether the advantages to be gained by greater utilisation of individual dockets outweigh the disadvantages.

A 2012 evaluation of docketing at Leeds County Court in England, for example, found that formal docketing and specialisation may be problematic in smaller courts, with reduced flexibility for listing — and consequent delay — outweighing the advantages to be gained by docketing (Taylor and Fitzpatrick 2012). That said, it was still suggested in the course of the evaluation, that even in smaller court centres a degree of informal docketing and specialisation might occur where practical as a matter of good practice.

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.

11.5 Discovery

What is discovery and why does it matter for access to justice?

Discovery allows the parties to litigation to obtain and/or inspect documents and other information held by the opposing party that are relevant to the issues in dispute. The

purpose of discovery is to ensure that all relevant evidence is brought before the court (Cameron and Liberman 2003).

While sometimes described as ‘a critical element of fact-finding, truth seeking and decision making (Cameron and Liberman 2003), many reports into the justice system, judicial officers, and commentators have raised concerns about discovery (VLRC 2008). Among the concerns raised are the cost and delay associated with discovery without corresponding benefit and the use of discovery as a tactical tool to leverage settlement or put off an opposing party.

The process of discovery reduces information asymmetry between the parties, and between the parties and the judge. Like all information problems, the benefits of any given additional piece of information should exceed its costs. It is the purpose of discovery rules to promote this outcome.

Developments in information technology have resulted in the production and storage of increasing volumes of electronic documents amplifying the challenges in managing the efficient operation of the discovery process. However, the magnitude of the problem of disproportionate discovery in Australia remains unclear. In some areas, disproportionate discovery appears to be less of an issue, such as in cases where there is a relatively narrow range of documents, such as medical negligence and personal injury. The ALRC also found that discovery rules in respect of family law matters in both the Family Court of Australia and the Federal Circuit Court of Australia were generally working well (ALRC 2011). Submissions to this inquiry raised no concerns about discovery in family law matters.

Many submissions to this inquiry (Law Council of Australia, sub. DR266; Supreme Court of Victoria, sub. DR324; and Tasmania Law Society, sub. DR227) indicated that discovery is largely a problem in complex litigation and that the majority of cases either do not get to the point where discovery is required, or are of a nature where discovery is not an onerous or costly component of the proceeding.

There is evidence to suggest discovery is problematic in more complex and larger disputes. Noting significant data limitations, the ALRC (2011) estimated that discovery in Federal Court proceedings generally represented approximately 20 per cent of total litigation costs. It found that disproportionate discovery efforts were most likely in proceedings relating to corporations law, trade practice law, intellectual property law, class actions, engineering or construction law, product liability, insurance litigation, taxation law and financial cases in family law matters (ALRC 2011). Similarly, in assessing the regulatory impact of Victoria’s 2011 discovery reforms, the Victorian Department of Justice (Vic DoJ 2012a) assessed the percentage of client costs attributable to discovery as:

- 15 per cent for small commercial cases and 52 per cent for large commercial cases
- 15 per cent for small common law cases and 25 per cent for large common law cases

-
- 51 per cent for ‘atypical’ cases such as class actions (comprising both common law and commercial cases).

Discovery reforms — where are we at now?

Many Australian jurisdictions and individual courts have reformed their discovery processes over the last two decades. Reforms have involved differing combinations of:

- narrowing the scope of discovery
- facilitating more tailored discovery orders through use of ‘categories’ or ‘menus’ of discovery options
- promoting greater judicial scrutiny of the discovery process through:
 - limiting the accessibility of discovery mechanisms through leave requirements
 - giving judicial officers express and broad case management powers in relation to discovery
- requiring a focus on proportionality
- encouraging party cooperation and issue identification through use of discovery plans and protocols, particularly in respect of electronically–stored information
- utilising cost powers to provide incentives for proportionate discovery
- requiring or facilitating early disclosure of critical documents
- utilising pre-trial oral examinations about discovery and specialist referees.

Australian jurisdictions have approached discovery reform and its timing in many ways. Some reforms, such as narrowing the scope of discovery and using a ‘categories’ based approach, were implemented in some jurisdictions many years ago. Other reforms, such as mandatory pre-disclosure, have only been implemented relatively recently in a smaller number of jurisdictions.

Narrowing the scope of discovery — the death of the Peruvian Guano test

The classic test of relevance is the ‘train of inquiry’ test (otherwise known as the Peruvian Guano test).⁵³ This test requires discovery of documents that either ‘directly or indirectly’ relate to the matters in question in an action.

⁵³ So called because it was established in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 65. A document is relevant if it may either advance a party’s own case or damage the opponent’s case, or alternatively lead to a course of inquiry which would do so.

All Australian jurisdictions, except the ACT and Western Australia, have followed the United Kingdom's lead — moving away from the Peruvian Guano 'train of inquiry test' to adopt a narrower test. New Zealand has also followed this approach.

Most Australian jurisdictions have moved to a requirement that discoverable documents be directly relevant to issues in the proceedings (or directly relevant to issues raised by the pleadings or in the affidavits) and have more clearly defined the concept of 'reasonable search'.

The effectiveness of this shift is unclear. Lord Jackson's 2009 Review of Civil Litigation Costs in England and Wales found that the narrowing of the test in the United Kingdom had resulted in no difference in practice from the old Peruvian Guano test.⁵⁴ Lord Jackson reported that solicitors simply continued to disclose everything that might be in any way relevant (Jackson 2009a). The continuation of past discovery practices is not surprising as the reduced volume of discoverable documents under a narrower test substantially benefits the receiving party who has to review fewer documents. However, a party making discovery often needs to review a broader range of documents to determine whether they fall within scope, which is costly. Once having done so, the party making discovery can act strategically by over-disclosing. As noted by Justice Byrne of the Supreme Court of Queensland:

Substitution of 'directly relevant' for the Peruvian Guano touchstones seems not to have had a major impact on the burdens of disclosure, for a number of reasons. Sometimes a litigant is content to over-disclose: to slow down the litigation or to swamp the other side with material, forcing significant expense to be incurred. Sometimes, the lawyer wants to search through the client's documents to make sure that nothing has been overlooked. Having done that, the additional expense of delivering the documents to the other side is often insubstantial in the scale of things. (2010, p. 3)

The relevant policy question, however, is whether overall costs — those that accrue to all parties, including the courts — are lower relative to the benefits lost from not having access to additional information. Analysis of the impacts of discovery reforms suggest the benefits of a narrower test are potentially significant. For example, the Victorian Department of Justice (2012a) estimated that the number of discoverable documents would be reduced by around 20 per cent under a narrower test, resulting in savings in the order of \$67.5 million.⁵⁵

In the absence of data as to how often general discovery is given by parties in the ACT and Western Australia, it is difficult to assess the potential impact of a narrower test for discovery in those jurisdictions. Moreover, the Commission considers that stronger judicial control, supported by leave requirements, and utilisation of a tailored approach to

⁵⁴ Lord Jackson's Review of Civil Litigation Costs found that parties who strictly complied with the test of 'direct relevance' would disclose fewer documents, but incur higher costs (Jackson 2009a).

⁵⁵ The report noted that the estimated figure depends on the extent to which lawyers conform to the spirit of the new discovery test and the way the judiciary exercises its case management powers to manage the volume of documents discovered in large litigation.

discovery (both discussed below) are more effective ways of reducing disproportionate discovery costs.

However, given there is evidence to suggest that a narrower test, when combined with other approaches, may offer considerable cost savings, those jurisdictions which have not already acted to limit discovery to information of direct relevance should do so, provided that this reform is accompanied by strong judicial control of discovery to ensure that benefits are achieved.

Utilising categories and other means of tailoring discovery

Narrowing the scope of general discovery is one way of controlling the cost of discovery. Another way is for parties or the court to tailor discovery obligations in each case to suit the issues by describing discoverable documents by categories. Discovery by categories has been available in all Australian courts for a number of years.

There is limited evidence as to whether discovery by categories of documents or particular issues in dispute has reduced the burden of discovery. Some submissions to the ALRC's 2011 review contested any significant efficiencies, citing failure of parties to collaborate in devising categories, inappropriate timing of discussions as to appropriate categories, and the fact that parties are still required to review all of their documents to ascertain their relevance to the categories (ALRC 2011).

In its submission to this inquiry, Allens commented on the need for careful crafting of categories to ensure that they appropriately limit the discovery process, noting:

In our experience, the limiting function intended to be achieved by categories can backfire and actually increase the scope of discovery (sub. 111, p. 6).

Categories appear to be most effective in limiting discovery obligations when formulated with objective criteria, such as where the documents were located, or when the documents were created. Some have suggested that greater judicial involvement in the formulation of categories would reduce the complexity, uncertainty and cost associated with discovery (ALRC 2011).

Some jurisdictions have gone further than making category based discovery available, and moved to a presumption against standard discovery. The Federal Court's starting point is that it will fashion any discovery order to suit the issues in the particular case. Similarly, in the United Kingdom, 'standard disclosure' is no longer the default position for multi-track cases. Instead the judge will decide what order for disclosure to make from a 'menu' of options, usually at the first case management conference. A similar approach has also been adopted in New Zealand's High Court Rules where what is termed 'tailored discovery' (which can involve more or less than standard discovery) is presumed to apply instead of standard discovery in specified circumstances.

While courts in all Australian jurisdictions have powers to limit discovery to what is necessary, the Commission considers that rules and practice notes in a number of Australian courts could:

- more clearly contain a presumption against standard or general discovery, at least for more complex cases
- more clearly outline available discovery options for practitioners and the court.

As noted by the ALRC in the context of the Federal Court:

articulating in practice notes some of the specific ways the Court might exercise its broad powers in relation to discovery ... might serve to drive cultural change and generate certainty of expectations and obligations. This would alert practitioners and remind the court of the range and flexibility of the powers available to the Court. (ALRC 2011, para. 7.20)

The Supreme Court of Queensland's Supervised Case List Practice Note, for example, sets out a range of options for consideration by parties, including the exchange of critical documents, Fast track orders (where the scope of discoverable documents is confined along the lines of the Fast Track in the Federal Court), exchange of documents to be relied upon, supplemented by additional requested documents, or the exchange of documents limited to certain categories.

Promoting strong case management of the discovery process

Rule changes to encourage more tailored and targeted discovery have been accompanied by increasing recognition that strong judicial control and involvement is critical to ensuring proportionality in the discovery process (ALRC 2011).

In all Australian jurisdictions, discovery is controlled by the different case management systems in operation in each court. Discovery will generally be discussed at an early directions hearing or case management conference.

Jurisdictions define court powers in relation to discovery with varying degrees of specificity, with some jurisdictions using legislation for this purpose and others applying court rules. However, all courts have capacity to restrict discovery to that which is necessary at the particular stage of the proceeding for fairly disposing of an action or for the saving of costs.

Yet in spite of broad powers, there are consistent calls for increasing judicial involvement in the discovery process. It is therefore critical that judges use their existing powers effectively and actively engage in scrutinising discovery requests.

In its 2011 report, the ALRC recommended that the Federal Court, in association with relevant judicial education bodies, develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings. Some work is already proceeding. In March 2012,

the Australasian Institute of Judicial Administration and the National Judicial College of Australia held a discovery seminar for judges, which covered some of the foundations for judicial education in this area.

The Commission supports continued development of a judicial education program on managing the discovery process, including e-discovery and its use by judges throughout Australia. Given that work on a program is in progress the Commission makes no recommendation in this area.

Use of leave requirements

Requiring leave of the court for discovery facilitates much greater judicial control of the discovery process. Traditionally, general discovery has been available to parties as of right in most matters — usually by a party serving notice on another party⁵⁶ — without leave or a court order. This continues to be the case in most state and territory supreme courts except New South Wales. In New South Wales discovery must be obtained by order of the court, although parties can, by notice, require production of specific documents — such as documents referred to in the other party’s originating process, pleadings, affidavits or witness statements.

Differing views have been expressed, including by different law reform bodies, as to whether discovery should be available as of right or require leave (ALRC 2011; VLRC 2008) and there are strong policy arguments both ways. Similarly mixed views were also reflected in submissions to this inquiry with some stakeholders opposed to requiring leave for discovery in all matters (Law Council of Australia, sub. DR266; Law Institute of Victoria, sub. DR221; Tasmanian Law Society sub. DR227), and others supportive of consideration of the broader application of leave requirements (Insurance Council of Australia, sub. DR193; QPILCH, sub. DR247).

The Federal Court requires parties to seek the leave of the Court to obtain discovery. This requirement is regarded as an important control over the use of discovery — reflecting the ‘gatekeeper role of the Court’ in ensuring that discovery obligations are not imposed on litigants unnecessarily, and promoting consistency in the types of cases for which discovery mechanisms are reserved. (ALRC 2011).

Several state and territory superior courts are moving towards a requirement for leave for matters in particular court divisions or court lists. For example, in the Commercial Court of the Supreme Court of Victoria and the Equity Division of the Supreme Court of NSW discovery is by court order only. In the Supreme Court of Queensland’s Supervised Cases List discovery obligations are deferred until a Document Plan is agreed and approved by

⁵⁶ In the Northern Territory, Queensland and South Australia, the obligation arises automatically without any requirement for notice. In WA, leave is required where the matter has been entered for trial. In Tasmania, discovery is allowed without leave in an ‘action’. The court’s leave is necessary for a proceeding commenced by application.

the Court. Similarly, in the Supreme Court of the Northern Territory, the Court will make an order dispensing with discovery in any civil case unless it is satisfied that discovery should be limited to particular documents or classes of documents or that general discovery is necessary to resolve the real issues in dispute and proportionate.

While there is little empirical evidence on the effectiveness of leave mechanisms in containing cost and delay associated with discovery, *prima facie*, there is a case for the broader application of leave requirements — or rules which defer discovery obligations until the court has considered the issue — at least in respect of more complex cases.

Requiring parties to justify discovery

Complementary to mechanisms which ensure judicial oversight of discovery, several jurisdictions have introduced rules which require parties to justify discovery as necessary.

Federal Court rules and practice notes impose a clear obligation on litigants to justify an application for discovery orders — even when those orders are sought by consent of the parties — by explaining to the Court why discovery is necessary for the just determination of issues in the proceedings. In turn, this ensures that the Court scrutinises the need for discovery and makes a conscious decision as to whether discovery is necessary in each case (box 11.1). However, the Court still has flexibility to tailor discovery obligations to the need of the case.

Similar obligations exist in the Supreme Court of NSW's Equity Division and the Supreme Court of Queensland's Supervised Case List. There are good grounds for other jurisdictions to apply such obligations.

Costs orders

A more direct way of ensuring the proportionality of discovery efforts is to extend courts' powers to make costs orders in relation to discovery. Examples include requiring parties requesting discovery to pay in advance for some or all of the estimated costs of discovery; requiring security for the payment of the cost of discovery; or specifying the maximum cost that may be recovered for giving discovery or taking inspection. Amendments facilitating this approach have been made in respect of the Federal Court and in Victoria.

Such orders would need to be used carefully. However, the Commission sees merit in this approach being utilised more broadly in appropriate cases.

Box 11.1 Case management of discovery in the Federal Court

Federal Court rules require all applications for discovery orders to specifically address the need for the orders sought and require the Court in all cases to make a determination as to whether discovery is necessary. In this way, discovery obligations in Federal Court proceedings are the result of conscious judicial decision making.

In determining whether to make any order for discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely benefit of discovery and the likely cost of discovery and whether that cost is proportionate to the nature and complexity of the proceeding.

In making orders for discovery the Court must actively fashion any order to suit the issues in a particular case and consider:

- is discovery necessary to facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible?
- if discovery is necessary, for what purpose?
- can those purposes be achieved by a means less expensive than discovery or by discovery only in relation to particular issues?
- where there are many documents, should discovery be given in a non standard form, e.g. initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?
- whether discovery should be given by the use of categories or by electronic format or in accordance with a discovery plan?
- should discovery be given in the list of documents by categories and by a general description rather than by identification of individual documents?

Sources: Federal Court Rules 2011 (Cth), r. 20.11. Practice Note CM 5.

A right to inspect critical documents prior to discovery

Some jurisdictions — most notably Victoria in 2011 — have sought to promote the timely identification of issues and reduce the problem of disproportionate discovery by requiring early disclosure of critical documents.

Such disclosure may help facilitate settlement and does not affect or limit a party's discovery obligations. The term 'critical documents' is intended to capture the documents that a party would reasonably be expected to have relied on as forming the basis of the party's claim when commencing the proceedings, as well as documents that the party knows will adversely affect the party's case.

Similarly, as part of recent reforms to discovery rules in the High Court of New Zealand, parties must make initial disclosure of documents referred to in a pleading or used when preparing the pleading. The disclosure must be made at the time that the pleading is served.

In the Supreme Court of Queensland's Supervised Case List, parties are encouraged to seek directions that provide for the early exchange of 'critical documents', which are the

documents likely to be tendered at any trial and likely to have a decisive effect on the resolution of the matter.

Some submissions to this inquiry have suggested that there may be benefit in introducing early disclosure requirements more broadly. There is a question as to whether this should be imposed as a standard rule (as in Victoria) or simply be available as an option that can be utilised in appropriate cases.

The Commission received limited feedback in response to its request for information about the impact of the Victorian pre-disclosure requirements in section 26 of the *Civil Procedure Act 2010* (Vic), with Maurice Blackburn noting that it has had ‘a positive impact on the conduct of litigation in that jurisdiction’ (sub. DR197, p. 9). In the absence of other, contrary evidence, the Commission considers that a facilitative approach is appropriate, whereby early exchange is available as an option for use in appropriate cases. Pre-action protocols which can facilitate early disclosure before proceedings are commenced are discussed in chapter 12.

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.

Managing e-discovery

Discovery of electronically stored information (ESI) will usually comprise the bulk of the discovery exercise in modern commercial litigation and it presents particular challenges for those involved in discovery processes. Electronic technologies have proved necessary to manage the large volumes of ESI and this has important implications for access to justice. As noted by QPILCH:

Where litigation involves the discovery of a large number of electronic files, this has particularly significant implications for access to justice. Self-represented litigants will rarely, if ever, have access to the sophisticated software required to carry out large scale electronic discovery, or to sift through a large number of documents received electronically from the other party. (sub. DR247, p. 26)

The form and scope of ESI is amorphous and changing. ESI gives rise to metadata, legacy data and backup media issues (Legg and Turner 2011). Discovery of ESI therefore raises questions about what constitutes a ‘reasonable search’ for discoverable documents stored in multiple and constantly changing electronic document management systems or databases, and in what form documents should be exchanged or produced for inspection by the parties or the court. The answers to these questions have potentially large implications for the ease (and therefore cost) of review.

In many cases, decisions about the scope of discovery should not be made in isolation from practical issues arising in the discovery process — such as where or with whom those documents are located or held, how the documents are stored and how they may be retrieved:

... decisions about the practicalities of discovering relevant documents — particularly in relation to electronic documents — can have a far greater impact on the cost and time involved, than deciding what the relevant documents are. (ALRC 2011, para. 6.101)

In our view, the burden of discovery would be more effectively and appropriately ameliorated by focusing on the scope of the search rather than the test for relevance. (Allens, sub. 111, p. 7)

A more effective option ... might be to introduce protocols limiting the extent of searches that parties conduct in the first place. Protocols could require parties to agree on the limits of document retrieval and review to ensure that discovery remains proportionate to the nature and complexity of the proceedings, the amount of damages claimed and the real issues in dispute. (QPILCH, sub. 58, p. 48)

Decisions about the scope of discovery, or even whether discovery should be permitted at all, should take into account the practicalities and costs of making discovery at the time discovery orders are made.

In most Australian jurisdictions, courts have issued practice notes to encourage parties to consider, from the start of proceedings, ways to use information technology to manage the discovery process more efficiently (and also to use technology in appropriate cases at trial — chapter 17). There are no relevant practice directions in the ACT or Tasmania. In Western Australia, guidance is provided to parties who may be required, or who wish, to present material to the court in electronic format but the practice direction does not cover the use of technology in pre-trial processes.

There is scope for the wider adoption by Australian jurisdictions of practice directions covering e-discovery and use of document plans. Checklists utilised in the United Kingdom (Practice Direction 31B and Electronic Documents Questionnaire), New Zealand’s High Court Rules, the Federal Court’s Pre-Discovery Conference Checklist and

the Supreme Court of Queensland Supervised Case List provide useful models. Recommendations 6.6–6.8 of the ALRC’s report on discovery also identify a range of issues for possible inclusion in such guidelines.

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.

11.6 Expert evidence

An expert is a witness who the court accepts as qualified to express an opinion on a matter relevant to the court’s determination (Cairns 2014). While not required in all types of cases, expert evidence has been identified as one of the principal sources of expense, complexity and delay in civil proceedings. The views of experts are important not only in the small proportion of matters that go to trial, but can be critical to advancing a pre-trial settlement.

Studies of litigation costs have found that expert witness costs:

- can equal or exceed solicitor fees in personal injury cases, especially those that reach court (Williams and Williams 1994)
- are significantly affected by the number of experts involved in a case (Fry 1999)
- are generally higher for plaintiffs (Williams and Williams 1994; Worthington and Baker 1993)
- are higher for cases that proceed to trial and to verdict (Williams and Williams 1994, Worthington and Baker 1993).

Average and median amounts spent on expert witnesses depend on the court and tribunal (table 11.2). Average expert costs noticeably exceed median expert costs, suggesting that in some cases, expert costs can be very high.

Several submissions raised concerns about the costs of expert evidence, particularly in the context of family law. Legal Aid NSW, for example, said:

A major financial cost of litigation in family law disputes arises from the need for parties to obtain expert evidence. Expert reports are an important way in which Family Courts determine what outcome is in a child's best interest ... Arguably the shortage of child and family experts willing to practice in the family law jurisdiction (both psychologists and psychiatrists) has resulted in a market rate in excess of \$5000 per report. Legal Aid NSW will fund some reports for those who are legally aided and meet guidelines, but due to limitations on funding cannot approve all requests. Many self-represented litigants are unable to afford such reports. (sub. 68, pp. 29–30)

Table 11.2 Estimated expert costs per case in selected jurisdictions

From various surveys of legal costs in Australia, in 2011-12 dollars

<i>Court</i>	<i>Year</i>	<i>Description</i>	<i>Sample size</i>	<i>Mean</i>	<i>Median</i>
District Court of Queensland	1990	Personal injury	116	1 292	n.a.
County Court of Victoria	1990	Personal injury	185	1 397	n.a.
New South Wales (District and Supreme)	1993	Plaintiff	33	9 145	2 277
	1993	Defendant	48	1 652	1 207
Victoria (County and Supreme)	1993	Plaintiff	50	2 690	1 360
	1993	Defendant	65	1 052	545
Family Court of Australia	1999	Applicant	41	3 284	586
	1999	Respondent	33	2 900	1 172
Federal Court of Australia	1999	Applicant	15	6 705	2 929
	1999	Respondent	8	119 943	8 780
NSW Dust Diseases Tribunal	2006	Plaintiff	52	5 009	n.a.
	2007	Plaintiff	125	4 325	n.a.

^a Converted to 2011 12 dollars using price deflators from National Accounts (ABS 2013a).

Sources: Williams and Williams (1994); Worthington and Baker (1993); Matruggio (1999a, 1999b); NSW Government (2007).

Progress so far

Rules governing the use of expert witnesses have undergone significant reform in Australian jurisdictions, both on the initiative of courts themselves and through legislative reform. In so far as these reforms seek to reduce the costs associated with the use of experts by giving courts greater control over how experts are used, they are part of the broader trend toward more active judicial case management.

Australian expert evidence reforms have been influenced, in part, by the 1996 Woolf Report in the United Kingdom, which identified two problems with the manner of adducing expert evidence, namely, adversarial bias, and excessive costs in the engagement of unnecessary experts. That said, some Australian reforms pre-date the Woolf report, and

some innovations were developed by Australian courts and tribunals. Reform has been gradual and uneven across jurisdictions.

Substantial review of the rules and practice concerning expert evidence was undertaken in New South Wales in 2004–06 (NSWLRC 2005), and reforms were implemented empowering the court to take early control of the use of expert evidence in civil proceedings.

The purposes of the reforms and key features are:

- to ensure that the court has control over the provision of expert evidence
- to restrict expert evidence in proceedings to that reasonably required to resolve the proceedings
- to avoid unnecessary costs associated with parties to proceedings retaining different experts
- if it is practicable to do so without compromising the interests of justice, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court
- if it is necessary to do so to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings
- to declare the duty of an expert witness in relation to the court and the parties to proceedings.

Key elements of the New South Wales model are:

- a requirement to seek directions from the court if parties intend to adduce expert evidence at trial
- extensive powers to control expert evidence, including limiting the number of experts
- use of single joint experts
- a power to appoint court appointed experts
- a requirement for disclosure of contingency fee arrangements
- a power to direct experts to confer and produce joint reports
- options for the manner in which expert evidence is to be given, including concurrently.

Chief Justice Martin (2009) has referred to the New South Wales model as ‘best practice’. In 2008, the Victorian Law Reform Commission recommended adoption of most of the elements of the New South Wales model in Victoria and this recommendation has since been implemented.

Other jurisdictions have adopted some, but not all, of the elements of this model (table 11.3). Roughly half of Australian jurisdictions require parties to seek directions if they propose to adduce expert evidence; the Family Court goes further and — following the English approach — requires parties who seek to rely on expert evidence to apply to the court for permission to do so. All jurisdictions empower the court to direct experts to confer and prepare joint reports and expressly permit expert evidence to be heard concurrently. About half of Australian jurisdictions provide for court appointed experts. All but two impose specific duties on experts.

The Queensland rules take a unique approach in that they provide for persons who are in dispute to appoint a joint expert to report on a question *before* proceedings are instituted. If the parties cannot agree, one of the disputants can apply to the court to appoint an expert. In either case, unless the court otherwise provides, only that expert can give evidence in proceedings on the relevant question. These provisions are intended to provide a mechanism to overcome the difficulty that the appointment of a single expert in the course of litigation often takes place after the parties have already engaged their own experts, and thus already incurred substantial costs.

Similarly, a recent practice note of the Equity Division of the Supreme Court of NSW encourages parties to discuss the appointment of experts before commencing proceedings with the goal being the retention of just one expert, or one expert for each specified issue or matters in issue.⁵⁷

Impacts, benefits and costs of expert evidence reforms

Australian reforms of expert evidence are based on the premise that greater judicial control of experts will help keep costs down. As such the effectiveness of the reforms depends on how often and appropriately judges use their powers and monitor the compliance of parties with expert evidence requirements. It is difficult to measure the overall impact of Australian expert evidence reforms, particularly in the absence of any empirical studies. That said, the Commission considers that there is sufficient evidence that particular reforms introduced in some jurisdictions may reduce costs. Each of these reforms is discussed in turn.

Leave or court direction

A majority of Australian jurisdictions require parties to seek directions from the court before adducing expert evidence. The purpose is to give greater judicial control over the use of experts to reduce unnecessary costs. It allows a court, at an early stage, to make a range of directions, for example, that no expert evidence be given on a subject, that it be given only on certain subjects, that only a certain number of experts give evidence on a particular subject, or that a single expert witness or court appointed expert be appointed.

⁵⁷ Practice Note SC Eq 5, 10 August 2012.

Courts can make such directions in the course of ordinary directions hearings and case management conferences.

The Commission considers that such an approach is consistent with more active judicial case management generally and could be implemented more broadly across Australian jurisdictions.

Single experts

A single expert may be chosen by the parties or appointed by the court and is the sole person who is able to give evidence on a particular issue unless the court directs otherwise.

Roughly half of Australian jurisdictions have followed the United Kingdom's lead in allowing courts to direct that an expert be engaged jointly by the parties. However, it is difficult to determine the extent to which these provisions are used.

The Queensland rules differ from other jurisdictions in that they establish a presumption in favour of single experts in all cases. Thus, although the parties do not require permission of the court to call expert evidence, they are restricted to a single expert unless the court determines that the case justifies an alternative course. That said, it has been suggested that this preference is not reflected in the practice of the Supreme Court of Queensland, with the single expert model being used in only a minority of cases (Rackemann 2012). A similar presumption operates in the NSW Local Court.

A primary objective of the use of single experts is to minimise cost and delay to the parties and the court by limiting the volume of expert evidence that would otherwise be presented. Other potential advantages are that single experts are likely to be more impartial and less adversarial; they can assist in levelling the playing field between parties with unequal resources; and their use may increase the prospects of settlement.

Table 11.3 Expert evidence reforms

Yes No

Jurisdiction	Purpose clause	Requirement to seek directions of court	Express powers including limiting number of experts	Disclosure of contingency fee arrangements	Duties on experts - code of conduct	Provision for conferences and joint reports	Express power to direct parties to engage a single joint expert	Power for court to appoint own expert ^b	Direct how expert evidence is to be given
NSW	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
VIC	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
QLD	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
SA	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
WA ^a	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
TAS ^a	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
NT ^a	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
ACT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Federal Court	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Family Court	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

^a Refers to superior courts only. ^b Does not cover use of referees.

Source: Court rules and practice directions in Australian jurisdictions.

However, the model has disadvantages:

The most obvious limitation of the single court-appointed expert model is that it deprives the decision-maker of the benefit of competing views where, as is often the case in matters which proceed to trial, there is more than one available expert opinion. (Rackemann 2012, p. 171)

Support for single expert evidence, both in Australia and the United Kingdom is mixed. In so far as there have been positive reports, the former President of the Administrative Appeals Tribunal (AAT) has cautioned:

The evidence will almost certainly be given efficiently. The task of the judge will be easier. The problem is that there is no way of testing whether the conclusions are correct. By definition there is nothing to test the expert evidence against. (Downes 2005, p. 6)

However, there appears to be a reasonable consensus that single joint experts can reduce costs, while still ensuring fair outcomes, provided that they are used carefully.

Submissions to the VLRC review noted that the appointment of single joint experts may be appropriate in more straightforward cases, for example the assessment of future care needs of a plaintiff in a personal injury matter, but not for complex issues of liability (VLRC 2008). A similar view was reached by Lord Jackson in the course of his Costs Review, noting ‘the general view of practitioners is that single joint experts are beneficial for less important and less controversial quantum issues’ (Jackson 2009a). In the Land and Environment Court of NSW matters relating to more objective issues such as noise, traffic, parking, overshadowing, engineering, hydrology and some contamination issues are seen as suitable for a parties’ single expert (Pepper 2012).

Justice McClellan of the Supreme Court of NSW has commented on the need to carefully assess the appropriateness of a single expert in this way:

We have also found [single experts] to be of significant utility in cases in the Common Law Division of the NSW Supreme Court, particularly in relation to less controversial issues relating to damages ... [but] there are legitimate concerns about the use of single experts. They may mask legitimate differences of opinion in relation to complex issues. They may also lead the parties to incur additional expense, especially if a party engages another expert to evaluate and advise with respect to the single expert. These issues must be recognised and the case for a single expert carefully considered. (McLennan 2010, p. 39)

On balance, the Commission sees benefit in judicial officers in all Australian jurisdictions having the flexibility to appoint single experts in appropriate cases. In the United Kingdom, section 7 of Practice Direction 35 provides clear guidance as to the factors that the court should take into account when deciding whether to make an order for a single joint expert. Similar guidance is provided in relevant Practice Notes in the NSW Land and Environment Court, the Supreme Court of Queensland’s Supervised Case List and section 65L of the *Civil Procedure Act 2010* (Vic). Other Australian jurisdictions could consider providing similar clear guidance.

Court appointed experts

A court may appoint experts to assist in the consideration of substantial matters in a case, or because parties do not wish to use a single expert but the Court finds that a single expert would be appropriate.

About half of Australian jurisdictions provide for courts to appoint experts. However, it has been suggested that courts rarely avail themselves of this form of expert evidence (Selby and Freckleton 2013).

In the course of this inquiry, Marfording (sub. 19, p. 7) expressed strong support for greater use of court appointed experts, as have other commentators (Davies 2003). The Bar Association of NSW indicated general support for ‘judicious use’ of court appointed experts, provided their use was not mandatory (sub. DR206, p. 4) Maurice Blackburn raised concerns:

[Our] experience is that, at least in complex civil litigation such as medical negligence cases and class actions, joint experts and court appointed experts have universally failed to adequately address the issues that have proven to be of value in the just determination of disputes. (sub. DR197, p. 10)

One lower court — the South Australian Magistrates Court — has successfully used court-appointed experts to good effect. The Court has developed a panel of experts that can be called on by the court to provide independent expertise to help the court. The panel comprises 18 professional, trade and technical experts. These experts are used to help parties to settle disputes, to assist the court and parties prepare for an efficient trial and to assist the court during hearings. The Court notes that this has ‘proven to be a cost effective and efficient means of dealing with complex technical issues’ (Courts Administration Authority 2013, p. 33).

In feedback on the draft report, the Law Council of Australia cautioned against the use of expert panels ‘in any circumstances’, noting:

... it is often the case that governments have sought to introduce ‘efficiencies’ by elevating the role of experts beyond their area of specialisation to replace judicial discretion. (sub. DR266, p. 58)

The Commission does not see that this concern applies to the panel of experts model referred to — which is an initiative of the Magistrates Court of South Australia, not government — and does not involve elevating the role of experts beyond their area of specialisation.

The Law Council also raised a concern that limiting expert evidence to those that are part of a panel ‘inappropriately changes the focus of assessing each expert on the strength of his or her expertise and argument in a given case to a focus on how and who chooses the expert panel’ (sub. DR266, p. 59). The Commission received no evidence to support this concern. Rather, other participants expressed support for broader application of this model (Law Society of South Australia, sub. DR219; QPILCH, sub. DR247).

The Commission considers that use of court appointed experts should be an option available to judges to use in appropriate cases. Section 65M of the *Civil Procedure Act 2010* (Vic) provides clear guidance about the factors a court might consider in deciding whether to appoint a court appointed expert. The model employed in the Magistrates Court of South Australia may prove particularly cost effective in other Australian lower courts.

Expert conclaves, concurrent evidence and the management of experts

Most Australian courts can direct expert witnesses to give evidence at the same time ('concurrent evidence' or 'hot-tubbing'). Generally, such concurrent evidence follows a conference between the experts ('conclave of experts'), although it need not do so. Conclaves also take place when the concurrent evidence technique is not employed. Procedures for them differ between courts (and tribunals).

Concurrent evidence is an alternative to the traditional adversarial method in which expert evidence is given sequentially by experts for one side and then the other, in the course of which they are examined-in-chief and cross-examined by the legal representatives for each side. While procedures differ between courts and individual judges, the giving of concurrent evidence has seven key stages, are set out in box 11.2.

While rules or practice directions in all Australian jurisdictions allow the court to direct experts to participate in expert conclaves and give evidence concurrently, the extent to which these techniques are utilised in Australian courts is uneven. It appears to be most used in the Land and Environment Court of NSW, the Federal Court, the Supreme Court of NSW and the AAT.

Proponents of concurrent evidence argue that the procedure narrows the issues in dispute, allows all evidence to be presented to the decision maker at the same time, reduces the likelihood of adversarial bias and saves costs and time (Garling 2011; Pepper 2012).

A number of submissions to this inquiry also expressed strong support for the efficiencies of the concurrent evidence approach, including the AAT:

In a study into the use of the procedure conducted by the AAT in 2005, members reported that the use of the concurrent evidence procedure improved the quality and objectivity of evidence and that as a result the decision-making process had been enhanced. In relation to the impact of the procedure on the length and cost of hearings, the AAT's experience is that the concurrent evidence procedure can save significant amounts of hearing time, particularly in cases where the parties seek to call a large number of expert witnesses to give evidence. (sub. 65, p. 13)

In evaluating the early phase of the 2012 Manchester Concurrent Evidence Project in the United Kingdom, Genn found that, although a larger evidence base was needed, early signs were that there are time and quality benefits to be gained from the use of concurrent evidence (Genn 2012).

However, while there are many proponents of concurrent evidence, support is not universal. Some have raised concerns that the procedure remains partisan, saves little in costs, and that there is the potential for expert evidence to be ‘dumbed down’ and for more assertive experts to dominate the ‘hot tub’. It has also been suggested that because the structure of concurrent evidence varies from court to court, the benefits of such procedures depends greatly on the ability of the judicial officer to direct the discussion.

Even when it is used, it may be that the early stages of the concurrent evidence process, namely identification of the key issues, and the experts’ conference and preparation of the joint report, are more important than the later step of concurrent oral evidence.

In my experience the first step [identifying the critical questions for expert opinion] is not utilised as extensively as it should be ... Ordinarily, each party and its expert get together to formulate the questions, with appropriate assumptions, that the expert is to address in his written report. Consequently, there is the risk of a disconnect between the questions addressed and the assumptions used by one party’s expert and those used by another party’s expert. Usually these differences will get sorted out in due course, often by the provision of supplementary or reply expert reports, but this tends to complicate and lengthen the expert evidence section of the case. Frankly, it is to no-one’s advantage to have to grapple with a series of lengthy intersecting expert reports that have been provided in chief, in reply or by supplementary report. (Young 2010, p. 2)

Box 11.2 Stages of concurrent evidence

- First, identification of the issues upon which expert evidence is needed.
- Second, the preparation of individual expert reports.
- Third, a conference between the experts, without lawyers, in order to prepare a joint report that sets out the matters upon which there is agreement and the matters upon which there is disagreement, including, where possible, short reasons as to why they disagree.
- Fourth, the preparation of the joint report.
- Fifth, the experts are called to give evidence together, at a convenient time in the proceedings, usually following the tendering of the lay evidence.
- Sixth, the experts are given an opportunity to explain the issues in dispute in their own words. Each expert is then allowed to comment on or question the other expert.
- Seventh, cross examination of the experts is permitted. During this process, each party is permitted to rely on their own expert for clarification of an answer.

Source: Pepper (2012).

Holding a joint conference earlier in the process may also be beneficial.

In the usual civil case, the experts only get together to identify the critical issues after they have exchanged their written reports. The concept of an experts’ conference and the preparation of a joint report works well, so there is no reason why an earlier meeting between experts would not be advantageous. (Young 2010, p. 2)

This approach is used in the Queensland Planning and Environment Court. Experts in this court are required to confer at an earlier stage in the process, without individual reports being prepared and with their opinions being formulated in a process of mutual peer review while quarantined from the parties and their legal representatives (Rackemann 2012). The benefits of this approach are that experts are briefed on the same questions and factual assumptions and have an opportunity to confer prior to coming to conclusions in individual reports. This model has possible advantages in reducing adversarial bias and achieving efficiencies in the expert evidence process (Monichino 2012).

Overall, the full concurrent evidence process (including early identification of issues, experts conferences and joint expert reports) appears to be a useful alternative to the orthodox expert witness processes. Its practicality has been tested in several Australian courts and there is scope for its wider application. The Commission also considers that the practice of using experts' conferences earlier in the process (as in the Queensland Planning and Environment Court) should be more broadly adopted.

The level of guidance about when court should use concurrent evidence and the procedures for doing so vary considerably across jurisdictions. The guidelines developed by the AAT may prove a useful model for other jurisdictions.

Expert evidence — where to from here?

Australian courts have adopted many innovative reforms in relation to expert evidence. However, Australian jurisdictions have implemented these reforms to different degrees and refinement of the approaches and the circumstances to which they are best applied are ongoing.

While there is incomplete evidence on the benefits of the multiple variants for managing expert witnesses, *prima facie*, judges should have more discretion in this area. The Commission considers that judicial officers in all jurisdictions should have the power to utilise the full 'menu' of options available to judicial officers in New South Wales and Victoria.

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.

11.7 The importance of complementary reforms

Case management and reforms to court processes and procedures, while important, can only ever be a partial solution to the problems of unnecessary cost and delay. Justice Croft has expressed the need for complementary reforms in the following way:

Judicial management is a major factor in narrowing issues and keeping litigation on track. However, it is my view, that no matter how involved a judge becomes in the management of litigation to define the issues, until practitioners and parties do not have incentives (whether they be financial or tactical) to spend time in interlocutory proceedings the problems of delay and expense will not finally be addressed. (Croft 2011, p. 26)

Incentives for litigants to use procedural tactics to their own advantage, and incentives for lawyers to ‘over-service’ can be more directly addressed through changes to the way costs are awarded to parties and the way practitioners are remunerated. These issues are discussed in chapters 6, 13 and 18.

12 Duties on parties

Key points

- The behaviour of parties to litigation influences the timeliness and cost of resolving disputes. Adversarial behaviour that is not geared towards efficiently and effectively resolving disputes often occurs. A cultural shift towards more cooperation would improve access to justice.
- Parties and their lawyers face overarching obligations to assist the court to get to the truth and resolve disputes. The effectiveness of these obligations could be improved with more ready and consistent enforcement.
- The use of targeted pre-action protocols can help resolve disputes early by narrowing the range of issues in dispute and facilitating alternative dispute resolution. Jurisdictions should further explore the use of targeted pre-action protocols that are subject to strong judicial oversight.
- Governments and their lawyers use model litigant rules to guide their behaviour. Evidence on their effectiveness is mixed. While good in theory, in practice it appears that they are not always enforced. Compliance and enforcement need to be more even and transparent.
- It is unlikely that any one reform will significantly change parties' behaviour. While duties and obligations can assist, reforms that empower courts and tribunals to enforce obligations are essential.
- A very small proportion of people behave frivolously or vexatiously during litigation. Such behaviour can cause significant harm to other parties to the litigation and can disproportionately consume court and tribunal resources on matters with little or no merit.
 - The laws that curtail access to the justice system for such litigants often act late in the process and provide insignificant deterrence. There is a need for earlier and graduated responses that allow a broader range of individuals to apply for orders and enable the judiciary to better manage frivolous and vexatious litigation.

The behaviour of parties when conducting litigation influences the timeliness and cost of dispute resolution. Unnecessarily adversarial conduct — such as lack of cooperation and disclosure, time-wasting tactics and strategic behaviour designed to wear the other party down — works against the timely and effective resolution of disputes and affects access to justice for the parties directly involved.

Adversarial behaviour can also have broader implications for access to justice when cases disproportionately consume court or tribunal resources. This is particularly true in 'mega litigation' (for example, infamous cases such as the C7 or Bell Group litigation), which is characterised by excessive documentary and expert evidence, unnecessarily lengthy pleadings, an absence of attempts to narrow issues in dispute, and costs highly

disproportionate to the amount in issue (AGD 2009). As Caruso, Castles and Hewitt from the Adelaide Law School said:

... it is important to acknowledge that access to justice by less well-resourced litigants is impacted by the use of justice resources by government and well-resourced litigants. This is becoming increasingly apparent with the rise of mega-litigation in commercial disputes which can remove members of the judiciary for substantial periods (up to years) from their normal duties. (sub. 16, p. 1)

Given these potential impacts, access to justice can be improved by making sure that parties who draw on publicly funded resources face the right incentives to efficiently and effectively resolve their disputes. While it has been suggested that moving Australia from an adversarial to an inquisitorial system would address these and other issues in this inquiry, such a fundamental change to the underlying tenets of Australia's legal system is beyond the scope of this inquiry.

This chapter explores a number of options for improving these incentives. These include the use of overarching obligations on parties and their representatives to support timely resolution (section 12.1), as well as specific obligations to address power imbalances in disputes between individuals and government agencies (section 12.2). Responses to vexatious and frivolous litigation are also discussed (section 12.3).

12.1 Duties on parties regarding behaviour and conduct

While courts traditionally allowed parties free rein to run a dispute, this approach is giving way to one in which judges and courts exercise greater control to ensure that resources are used efficiently and proportionately. More active judicial case management is part of this cultural change (chapter 11).

A related set of initiatives seek to directly influence behaviour by placing duties and obligations on parties and their representatives. In addition to promoting more efficient dispute resolution and a less adversarial culture, taming overly adversarial behaviour can reduce the extent to which resource disparities between parties affect the outcome of a dispute.

As part of their general duties to the court, lawyers are required to conduct cases efficiently and expeditiously (Martin 2012b). Overarching obligations, pre-action protocols and model litigant requirements are intended to encourage parties (and their lawyers) to exhibit 'reasonable' or 'genuine' behaviour (ACJI 2013).

Lawyers' professional duties

Lawyers are subject to stricter standards of conduct than other parties to litigation because of their special position of influence. They have additional and separate obligations as

officers of the court, and must comply with the legal profession's ethical standards (chapter 7).

While the legal profession has traditionally developed its own practice standards, there is a trend towards regulating lawyers' conduct via other methods such as court rules and legislation. In Australia, there has been a growing trend to define lawyers' obligations in legislation; for example, in the *Family Law Act 1975* (Cth), or in legislation establishing particular tribunals (ALRC 1999b).

The Australian Law Reform Commission (ALRC) considered that, while professional practice rules play an important role, distilling ethical principles into legal practice rules cannot provide a complete solution:

Lawyers tend to see rules as things to be circumvented in the pursuit of the client's interests. They may be honoured in the letter but ignored in the spirit. This is a potentially dangerous situation, for if lawyers approach codes of professional ethics in the same way they approach, say, revenue law then the underlying aim soon becomes avoidance rather than compliance. (Crispin 1992, p. 7, quoted in ALRC 1999, p. 140)

Overarching obligations to support timely dispute resolution

Overarching obligations on parties and their representatives to facilitate the just, quick and cheap resolution of disputes have been introduced in all Australian jurisdictions except Tasmania (ACJI 2013). These typically include requirements to act honestly, reasonably and proportionately, to cooperate, minimise delays and disclose critical documents in the conduct of litigation.

For example, section 37M of the *Federal Court of Australia Act 1976* (Cth) imposes obligations on parties and their lawyers to act consistently with the overarching purpose of the court rules ('to facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible'), and allows the court to take into account the failure to observe these requirements when awarding costs.

While many tribunals are required to facilitate the just, quick and cheap resolution of disputes, not all tribunals impose obligations on parties and their representatives to cooperate with this guiding principle. One exception is the NSW Civil and Administrative Tribunal, which requires parties and their representatives to cooperate with the tribunal to give effect to its guiding principle.⁵⁸ The Administrative Appeals Tribunal (sub. 65; sub. DR312) argued that similar obligations to those that exist in the Federal Court of Australia should be imposed on parties and representatives appearing before the tribunal (chapter 10).

Similar obligations are sometimes imposed outside the formal justice system. For example, via contract, regulatory requirements, legal services directions, legislation, and

⁵⁸ Section 36 of the *Civil and Administrative Tribunal Act 2013 No.2* (NSW).

requirements to engage in alternative dispute resolution (ADR) or to attempt to resolve a dispute before litigation commences.

Jurisdictions have implemented overarching obligations in different ways. Some place the onus on parties, while others place the onus on courts. For example, the New South Wales *Civil Procedure Act 2005* places the obligation on *parties* to assist the court by participating in the processes of the court and complying with the directions and orders of the court. In contrast, the United Kingdom's Woolf reforms place an obligation on *the court* to encourage 'the parties to co-operate with each other in the conduct of the proceedings' (VLRC 2008, p. 158).

Participants were generally supportive of overarching obligations. Some preferred them to model litigant rules (section 12.2) as they apply to all parties and not just governments. For example, Allens argued that:

... [a legislative obligations] regime is a more appropriate way to ensure that litigation is conducted with a view to merits rather than resources deciding the outcome. The principles that must be applied are clear and they apply equally to both sides of a dispute. There are sanctions for violating them. (sub. 111, p. 5)

A greater reliance on overarching obligations can also pave the way for more confidence in lay advocates in the formal justice system, who otherwise have no separate duties to the court or tribunal. The NSW Bar Association said:

Section 56 of the [NSW] Civil Procedure Act imposes obligations not only on party representatives but parties themselves ... if something modelled on section 56 was to be put in a tribunal context I think then it would tend to capture those issues like a landlord's agent being the representative. ... It also has the advantage of appreciating that the obligations should be on all actors in that system, not just on the legal representatives but each of those with a role to play within it. (trans., p. 108)

However, a number of participants raised concerns about a lack of enforcement (for example, Maurice Blackburn, sub DR197; Law Council of Australia, sub. DR266). Some suggested that proper enforcement of the obligations is inextricably linked with active case management. For example:

Maurice Blackburn supports the overarching obligations but notes that there appears to be a general judicial reluctance to engage in active case management, at least in the more superior courts, this deters complaints about the failure to comply with these obligations being made. More proactive case management clearly fosters the early and just resolution of civil disputes. (Maurice Blackburn, sub. DR197, p. 10)

Similarly, an evaluation of overarching obligations by the Australian Centre for Justice Innovation (ACJI 2013) highlighted judicial support (along with engagement of key stakeholders, and the specificity of the obligations) as key factors influencing their success. Indeed, many of the broadly based reviews of the civil justice system in Australia and overseas have noted the importance of clearly defining the obligations of parties and their

legal representatives prior to, and during, litigation and the importance of effective enforcement mechanisms to promote compliance.

There is some evidence to suggest that courts are becoming more willing to enforce overarching obligations. The Victorian Court of Appeal in *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 imposed cost penalties on lawyers for burdening the Court with excessive material. The decision made it clear that the overarching obligations under the *Civil Procedure Act 2010* (Vic) confer broader powers than under the Supreme Court Rules or the Court's inherent jurisdiction, as it can be used for disciplinary purposes to sanction parties to litigation, including practitioners. This decision has been cited in a number of subsequent judgments in Victoria (Leder and Considine 2014).

In relation to the Victorian provisions, the Supreme Court of Victoria said that:

The obligations do not stand as mere aspirational statements in legislation. Almost invariably, reference is made to the Act in the course of the Court's discourse with parties when there is a concern with the behaviour of a participant. A reminder of those obligations from the Court is often sufficient to resolve the issue. Anecdotally, judges and associate judges report that they have noticed a general decline in the bringing of unnecessary applications since the introduction of the Act. (sub. DR324, pp. 6–7)

But determining whether parties have met their obligations can be difficult. For example, one participant suggested that it is unclear how compliance with obligations to ensure costs are reasonable and proportionate is assessed. As Funds in Court of the Supreme Court of Victoria (sub. 152) observed, there is no costs matrix or formula that can be applied in determining whether parties have met this overarching obligation.

Overseas, the United States Federal Rules of Civil Procedure are an example of a mechanism that requires lawyers to positively attest that they have met their obligations (box 12.1). Reviews of Australian civil justice systems by the ALRC and the Law Reform Commission of Western Australia recommended reforms to overarching obligations modelled on these rules (ALRC 2000; LRC WA 1999). One participant also noted that he was in favour of introducing a similar requirement to certify pleadings in Australia (David Barclay, trans., p. 932).

The Commission's view is that all courts and tribunals should adopt (where they do not already do so) overarching obligations on parties and their representatives to facilitate just, quick and cheap dispute resolution. While there are encouraging developments that courts are becoming more willing to enforce such obligations, further progress should be made in tandem with moves towards more active case management.

Box 12.1 Regulation of litigation conduct in the United States

Rule 11 of the United States Federal Rules of Civil Procedure provides an example of a mechanism aimed at regulating litigation conduct, with the added consequence of explicit sanctions. The rule provides that 'every pleading, written motion and other paper [presented to the court shall] be signed by at least one attorney of record', or, if the party is not represented by an attorney, shall be signed by the party. By signing the document the attorney (or party) certifies that:

- the document is not being presented for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation
- the claims, defences and legal contentions are warranted by existing law or by non-frivolous argument [for the modification of the law]
- any allegation and other factual contentions or denials of such have evidential support (VLRC 2008).

The rule provides the court with positive authority to impose sanctions against attorneys, law firms, or parties who have violated the rule (ALRC 2000).

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.

Pre-action requirements may encourage behavioural change

There are also obligations imposed on parties before they enter the court system, often as a precondition for entry. Pre-action requirements (or protocols) are a series of steps that a potential litigant must undertake before commencing an action in court. They seek to facilitate the early exchange of information between parties and, where possible, remove the need for litigation by encouraging ADR (Legg and Boniface 2010).

In theory, effective pre-action requirements can improve access to justice by promoting early resolution or, where this is not possible, reduce the scope of issues in dispute for court determination. This helps to either avoid or reduce some of the costs and delays associated with court-based dispute resolution. Parties are encouraged to clearly articulate the matters in dispute at an early stage, potentially reducing the time spent on pleadings and discovery. Non-conformance with pre-action requirements can also have adverse cost consequences if litigation ensues, creating incentives for parties to comply.

A number of Australian jurisdictions have implemented a range of pre-action requirements. Pre-action requirements fall within two general categories — broadly based requirements, which apply to all cases within a certain jurisdiction, and those targeted to specific disputes only (box 12.2).

Box 12.2 Types of pre-action requirements

Broadly based pre-action requirements operate in some jurisdictions as a result of legislative, court or tribunal requirements (Sourdin 2012b). For example, the *Civil Dispute Resolution Act 2011* (Cth) operates in the federal jurisdiction and requires potential litigants to file a 'genuine steps' statement when lodging a case with a relevant court, which states that genuine attempts to resolve the dispute have been made. In the Northern Territory, Supreme Court Practice Direction No. 6 of 2009 requires litigants to convey how they have complied with the Direction, which may include providing evidence that ADR was considered and that early and full information about a prospective legal claim was exchanged.

Other pre-action requirements exist in specific areas of law to prevent court proceedings being commenced without mediation or some other form of ADR occurring first (Sourdin 2012b). For example, the *Debt Farm Mediation Act 1994* (NSW) and the *Farm Debt Mediation Act 2011* (Vic) require mediation to occur before a creditor can take possession of property or other action under a 'farm mortgage'. Other areas in which pre-action requirements exist in some states include personal injury, motor accident compensation, commercial arbitration, strata scheme disputes and disputes involving the legal profession. Certain types of family disputes also require compulsory dispute resolution before filing in the family law courts. For example, applications for parenting orders must include a certificate from a registered family dispute resolution practitioner which sets out why dispute resolution was unsuccessful or inappropriate. Pre-action requirements may also be voluntary, as is the case with the Transport Accident Commission in Victoria (VLRC 2008).

Studies that have attempted to quantify the impact of pre-action requirements have had difficulty obtaining sufficiently robust data for analysis. The NSW Young Lawyers Committees supported this view:

Due to the present limited implementation of pre-action requirements, it is not possible to determine their utility or success. In theory, pre-action requirements are a useful step to ensure parties properly consider settlement prior to litigation. However, in practice, this may cause front-loading of legal costs, or cause parties to treat the requirements as merely a [procedural] step to comply with when commencing proceedings. (sub. 79, p. 25)

Experience from the United Kingdom, where pre-action protocols have been in use since 1999, suggests that targeted requirements are more effective than broadly based requirements. Lord Justice Jackson (2009a), in reviewing the role of pre-action protocols in the United Kingdom, concluded that specific protocols serve a useful purpose. However, he argued that the general pre-action protocol was not effective and, in many instances, had resulted in substantial delay and extra cost.

Australian experience also suggests that specific requirements can be effective. For example, Legal Aid NSW considered that:

Pre-action requisites in family law are effective at screening matters prior to court. Legal Aid NSW Family Law service model makes an important contribution to resolving disputes earlier by filtering clients from advice clinics into mediation and where appropriate diverting clients from court. (sub. 68, p. 76)

The National Alternative Dispute Resolution Advisory Council (NADRAC) (sub. 109) referred to some examples from Victoria's Transport Accident Commission (TAC), where pre-action requirements dealing with no-fault dispute resolution, impairment benefit claims, serious injury and common law claims had reduced the number of matters that needed a final determination in a court or tribunal. As described by the Victorian Law Reform Commission:

According to the TAC, since the protocols were introduced in December 2004, there has been a 27 per cent decline VCAT applications for review. It would appear there has also been a reduction in common law litigation and a decrease in the time taken to resolve serious injury disputes. (2008, p. 132)

A number of participants supported the use and extension of targeted pre-action requirements. For example, the Law Council of Australia (LCA) provided qualified support for targeted pre-action protocols in certain circumstances:

... there are differing views about the effectiveness of certain pre-action procedures. The Law Council is advised that measures implemented for civil claims in most jurisdictions have improved case management of the litigation and identification of the issues between the parties. (sub. DR266, p. 59)

The Queensland Public Interest Law Clearing House (QPILCH) (sub. DR247) expressed support for further exploring the use of targeted pre-action requirements. It said that cases that might benefit from pre-action requirements include:

- minor disputes
- disputes within and between not-for-profit organisations, and
- disputes involving self-represented litigants.

South Australia is about to introduce two pre-action protocols in the areas of building and construction, and medical negligence, which will come into force on 1 October 2014. The Law Society of South Australia said:

These are experimental and so we are unable to remark on whether or not they will lead to success or otherwise. The idea in those pre-action protocols is that an emphasis is placed on the compulsory conciliation before you institute legal proceedings and, in theory, that would seem sensible but we have yet to gather empirical evidence about how that may work. (trans., p. 401)

The South Australian Bar Association said that the protocols were developed with the assistance of members of the profession by examining the Woolf Report, the Jackson analysis of the Woolf Report, and comparing it to local conditions (trans., p. 479). The Bar outlined the reasons for choosing to apply pre-action protocols in these two areas:

Building and construction, because ... if they go off the rails [they] are terrible, so there is a serious impetus to get at it early and to have a structure for getting at it early and it's a rich area for disputes, and also because in our jurisdiction there are a relatively small number of people that practice in that area, so the chances of getting them to abide by a protocol is high. ... In medical negligence it's slightly different and one of the reasons we chose that was because there are probably only one or two insurers and we engaged them in the process as well as plaintiffs and we're rather hoping that they will collect private data about the effectiveness of the pre-action protocols. (trans., pp. 479–80)

Participants also identified a number of areas where they considered targeted pre-action protocols were not appropriate. For example, the LCA provided an example of the shortcomings of mandatory internal dispute resolution in Superannuation and Total and Permanent Disability (TPD) claims, where superannuation funds and insurers sometimes use mandatory internal dispute resolution to frustrate or delay claims:

... the experience of some practitioners working in the Superannuation and TPD practice is that in the majority of cases, superannuation funds and insurers will maintain their original denial to pay a claim or will fail to respond within the requisite time frames.

As such, the internal dispute resolution processes often fail to contribute to the earlier resolution of disputes, and may cause further delays and operate to the disadvantage of the complainants. (sub. DR266, p. 62)

The Bar Association of Queensland was critical of Queensland's pre-court protocols regarding personal injury litigation.

... this is an area of litigation I think where it was thought that these processes would reduce costs and it may well have had the opposite effect, particularly for cases that do go on to be litigated because all of the same costs that had the matter ready for trial before are incurred before the litigation commences, and then the parties start over again to an extent. Now much of that groundwork is done, but much isn't, and they end up replicating, or altering even, processes beyond there. (trans., p. 1179)

The Law Institute of Victoria (sub. DR221) also submitted that a range of dispute categories should not be subject to pre-action requirements (box 12.3).

Interestingly, some areas identified as not being amenable to pre-action protocols by certain participants, were considered suitable by others. For example, the Law Institute of Victoria and LCA questioned the suitability of pre-action protocols in respect of medical negligence cases, while South Australia is in the process of introducing a protocol in that same area. Similarly, while QPILCH was generally supportive of targeted pre-action protocols, it suggested that ADR had its limitations, particularly in relation to family law matters; a position seemingly at odds with Legal Aid NSW.

The appropriate use of broadly based protocols proved even more contentious. Consistent with the views of Lord Justice Jackson, a number of participants suggested that broadly based obligations can add to costs. For example, Maurice Blackburn said:

... it appears that [Federal] pre-action requirements have not, in our opinion, been effective. The only impact of the requirements has been to add another layer of costs and provide an opportunity for defendants to cause delay. (sub. 59, p. 10)

Box 12.3 Dispute categories unsuitable for pre-action requirements according to the Law Institute of Victoria

The Law Institute of Victoria submitted that a number of important categories of civil disputes should not be subject to compulsory pre-action protocols, including where:

- a limitation period is about to expire and the cause of action would be barred by statute if the civil proceeding is not commenced immediately
- the civil proceeding involves an important test case or a public interest issue
- a person involved in a civil dispute or civil proceeding has a terminal illness
- the civil dispute involves allegations of fraud
- expert opinion is required
- multi-party civil disputes and civil proceedings are contemplated
- mediation or other alternative dispute resolution processes would result in personal or financial hardship
- the subject matter of the proceeding/dispute has been unsuccessfully dealt with at arbitration or mediation pursuant to a contractual (or statutory) obligation, and the arbitrator or mediator has provided the parties with a certificate that the dispute/proceeding was not able to be resolved at such arbitration or mediation despite the best efforts of the parties
- civil disputes and civil proceedings involving allegations of medical negligence
- mortgagee actions for possession of land
- civil proceedings not involving a dispute
- claims where there already exists a legislative or industry obligation to serve a notice or notices before taking action
- civil proceedings in which additional parties are brought in subsequent to the commencement of the proceeding.

Source: Law Institute of Victoria (sub. DR221).

However, the Northern Territory Bar Association said that the Northern Territory's broadly based pre-action protocol had reduced the number and duration of court proceedings, and was supported across the board:

It's been in our view largely a great success. ... particularly in settling matters before they get to court for the obvious reasons; ... I would think the ratio has gone from less than 10 per cent that settled before proceedings were commenced to 80 per cent which are now settling before proceedings are commenced. (trans., p. 1018)

The Supreme Court of the Northern Territory supported this view, and reported that:

The effect of the introduction of the protocols was that many cases settled early, some before proceedings issued but mostly before the expense of preparation for trial was incurred. The net

effect of this was considerable savings in Court resources and considerable savings in costs for parties. (2013, p. 16)

The Commission is aware that the Commonwealth Attorney-General's Department has reviewed the broadly based pre-action requirements in the federal jurisdiction but its report, while completed, is yet to be released. However, the Department has said:

Some stakeholders predicted that the Act would substantially increase the cost and time to resolve disputes, and encourage satellite litigation. There is little evidence to support these concerns. (sub. 137, p. 32)

Whatever their form, in order for pre-action protocols to be effective, parties must understand the nature of the obligation.

In considering the available evidence, Sourdin concluded that generally:

... for pre-action requirements to 'work' ... there needs to be compliance with requirements and that this can be promoted by education, information ... sanctions and incentives ... there must be exceptions to any ADR referral or pre-action requirement and that not all disputes should be channelled into pre-action processes ... (2012b, p. xiii)

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.

12.2 Model litigant rules to address power imbalances

While overarching obligations and pre-action requirements provide broad mechanisms for encouraging appropriate behaviour, governments, government agencies and statutory bodies are also subject to model litigant rules (box 12.4). These rules seek to bridle excessively adversarial behaviour by setting out acceptable standards and boundaries for the conduct of litigation, and aiming to resolve disputes efficiently and appropriately (see for example, Maurice Blackburn, sub. 59).

Model litigant rules have evolved from the recognition at common law that governments should 'play fairly'. Other than issuing judicial criticism, it is unclear how courts enforce the common law obligation, which continues to apply in the absence of conflicting legislation (Chami 2010).

Box 12.4 Government model litigant rules in Australia

Model litigant rules in Australia are set out in legislation (the Commonwealth Legal Services Directions 2005 and the ACT guidelines) or as a formal part of government policy (the Victorian, New South Wales, South Australia and Queensland guidelines). Tasmania, Western Australia and the Northern Territory do not appear to have legislation- or policy-based model litigant rules.

The Commonwealth Legal Services Directions 2005 sets out, in broad terms, the requirement that the Commonwealth and its agencies, and those who perform legal work for them, are to uphold the highest possible standards of fairness, honesty and integrity in litigation, going beyond the ethical or professional standards of lawyers appearing before a court or tribunal. The Directions are legally binding under the *Judiciary Act 1903* (Cth), but are only enforceable by, or on the application of, the Attorney-General.

Specifically, the Directions require that the Commonwealth and its agencies:

- act honestly and fairly
- deal with claims promptly
- pay legitimate claims without litigation
- act consistently in the handling of claims and litigation
- consider alternative dispute resolution.

This also requires generally keeping costs to a minimum, and not taking advantage of claimants who lack the resources to litigate a legitimate claim. However, it does not require the Crown to take a soft approach; the Crown is not prevented from acting firmly and properly to protect its interests, and can take all legitimate steps in pursuing litigation or testing or defending claims made.

Following the introduction of the Legal Services Directions at the Commonwealth level, New South Wales, Victoria, Queensland and the ACT introduced their own model litigant rules in the form of guidelines that apply to the provision of legal services in matters involving government agencies. In each case, their guidelines closely mirror those in the Commonwealth Directions.

Source: NSW Bar Association (sub. 34).

There are a number of good policy reasons for expecting governments to act as model litigants: the inherent power of government; the proper role of government being to act in the public interest (as it has no legitimate private interest); and the large quantity of resources at governments' disposal. These can contribute to a power imbalance in favour of governments when pitted against private individuals. The Australian Lawyers Alliance provided the following example:

In the personal injury jurisdictions, the injured person is frequently dealing with a statutory body. The power imbalance is enormous. Improper advice provided within the insurer can force an injured person to litigate. It is important to remember, the injured person has no option but to pursue a matter. An insurer cannot be forced to negotiate. (sub. 107, p. 18)

Governments also derive power from their frequent-player status, giving rise to advantages over other litigants through their greater expertise, experience, access to specialist knowledge and established reputation before courts and tribunals (Cameron and Taylor-

Sands 2007; VLRC 2008). Governments can be important role models in setting benchmarks for behaviour and conduct across the system.

Model litigant rules do not require government to ‘fight with one hand behind its back’. As the Commonwealth Legal Service Directions 2005 state:

The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. (schedule 1, appendix B, note 4, Legal Services Directions 2005)

While the common law obligation to ‘play fairly’ applies to all tiers of government⁵⁹ (Davis 2005), model litigant rules do not appear to apply to local governments.

Whether legislation- or policy-based (box 12.4), model litigant rules are overseen and enforced by the Attorney-General of the relevant jurisdiction through his or her department.

Improving the effectiveness of model litigant rules

While participants were generally supportive of model litigant rules, they expressed some reservations about their operation. Concerns spanned three general areas — coverage, content and compliance, with the latter being the major source of concern.

Coverage

Some participants suggested that model litigant rules should apply to legal representatives hired on behalf of governments and their agencies, where this is not already the case. Maurice Blackburn (sub. DR197) suggested that individual legal officers employed by the government or agency, or retained by it, should be liable for professional misconduct if involved in a breach of the guidelines.

QPILCH said that:

... in Victoria, where the model litigant rules are, like in Queensland, policy-based, the model litigant guidelines have now been incorporated in the Standard Legal Services to Governmental Panel Contract, so that they are binding on external providers of legal services to Victorian Government agencies. This includes private lawyers, in-house government lawyers and the Victorian Government Solicitor’s Office. Under the Governmental Panel Contract, sanctions may be imposed on a Panel firm, including removal from the Panel. There are no comparable obligations on legal representatives hired on behalf of the Queensland government. (sub. DR247, p. 30)

⁵⁹ *Scott v Handley* [1999] FCA 404 at [44].

A number of participants suggested that local governments should also be subject to the relevant state or territory government guidelines (Appleby and Le Mire, sub. DR169; Law Council of Australia, sub. DR266; Law Institute of Victoria, sub. DR221; QPILCH, sub. DR247). Data from the Legal Australia-Wide Survey (Coumarelos et al. 2012) show that disputes with local governments were relatively common — local government was the other party to the dispute for around 5 per cent of all legal problems. However, QPILCH (sub. DR247) warned that the vast difference in resources between local governments warrants a staged approach to the adoption of such rules.

The Commission considers that the inherent power of government and its proper role to act in the public interest provides a policy basis for all levels of government (and their legal representatives) to be subject to model litigant obligations.

Content

Some participants suggested that model litigant rules should focus more on early and non-litigious dispute resolution. For example, Legal Aid NSW said:

Existing obligations to encourage cooperation should be strengthened with the aim of resolving legal problems as early as possible, especially those obligations relating to negotiating a settlement and properly conceding liability at an early stage. (sub. 68, p. 74)

NADRAC advocated amending the Legal Services Directions to strengthen and systematise government use of ADR:

... NADRAC favours imposition of an explicit obligation ... to the effect that Commonwealth agencies should participate in ADR unless they actually consider that so doing would be inappropriate. (sub. 109, p. 7)

LEADR also said that there should be model ‘resolver’ rather than model ‘litigant’ rules that place greater emphasis on ADR:

... government departments need to become accountable for when they are choosing litigation instead of ADR. So ADR should be seen again as the default, as what they do as first resort and that they need to present a good reason, a good case for why they have chosen to use litigation. (trans., p. 188)

However, Legal Aid NSW (sub. DR189) warned that ADR should not be compelled in all cases.

Legal Aid NSW believes the nature of the dispute should guide when ADR is compulsory.

Strengthened obligations to resolve legal problems as early as possible would provide the same benefits as formal ADR. For example, a model litigant process should ensure:

- claims are dealt with promptly
- claimants with a legitimate claim but who lack the resources to litigate are treated fairly
- legitimate claims are settled

-
- litigation is avoided where possible, particularly where the issue is quantum not liability
 - costs are kept to a minimum
 - apologies are made where the State has acted inappropriately. (sub. DR189, p. 25)

The Commission considers that government agencies should have dispute resolution management plans to guide their use of ADR. Ways to encourage greater use of ADR by governments are recommended in chapter 8 (recommendation 8.2).

Compliance

Overwhelmingly, criticisms (and suggestions for reform) of model litigant rules related to compliance. The limited research and evidence on compliance presents a mixed picture.

A review in 2007 found that the Commonwealth model litigant rules have been reasonably effective in regulating Commonwealth litigant behaviour (Cameron and Taylor-Sands 2007). Similarly, the Office of Legal Services Coordination (OLSC) said that current arrangements at the federal level are working well, with low levels of non-compliance. It also suggested that complaints about the model litigant obligation are often motivated by an expectation that it is a separate avenue of appeal or review (pers. comm., 29 July 2014).

However, the Commission received anecdotal evidence from a number of participants suggesting that model litigant rules are not always complied with (Australian Lawyers Alliance, trans., p. 231; Jane Carrigan, trans., p. 1077; Legal Aid NSW, sub. 68; Maurice Blackburn, sub. 59, sub. DR197 and trans., p. 638; Women's Legal Service NSW, sub. 32). For example:

... it is the experience of Legal Aid NSW that the model litigant rules as embodied in the *Legal Services Directions 2005* are not always applied by the Commonwealth and State agencies, particularly the rules relating to negotiating a settlement and properly conceding liability at an early stage. There is also variation in the way in which model litigant rules are applied by external legal providers. In particular, Legal Aid NSW has experienced prolonged proceedings and unnecessary requests for particulars. These practices result in increased costs both to applicants and the respondents. (Legal Aid NSW, sub. 68, p. 74)

Maurice Blackburn has represented plaintiffs and applicants in a number of jurisdictions against Commonwealth, State and Territory agencies and yet it is the exception rather than the norm in which we see any evidence of compliance with the model litigant guidelines. (Maurice Blackburn, sub. 59, p. 7)

A more recent review found variable compliance among departments and agencies (Blunn and Krieger 2009). Appleby and Le Mire (trans., p. 455) suggested that Crown Solicitor's offices and the Australian Government Solicitor (AGS) strongly adhere to model litigant rules. AGS (sub. DR307) said that it had not breached the rules in the last four years and, as the largest litigator on behalf of the Commonwealth, it has a considerable role in seeking to ensure that the Commonwealth behaves as a model litigant.

In contrast to the AGS, in-house government departmental lawyers or private lawyers may have weaker compliance cultures. The Victorian Law Reform Commission (VLRC) (2008) pointed out that, according to Cameron and Taylor-Sands, Commonwealth breaches more often involve in-house or private lawyers.

A key issue contributing to the apparently variable compliance among departments and agencies seems to be difficulties in enforcement and sanction, creating weak incentives for government entities to comply with the rules. There appear to be a number of reasons for this.

Some participants pointed to the reactive nature of requirements. For example, the Australian Lawyers Alliance said:

... the Model Litigant Rules lack a significant penalty in situations where there have been breaches. Whilst there may be reporting and investigation, that is an occurrence which happens after the event. It is not proactive in stopping inappropriate conduct before or shortly after it commences. (sub. 107, p. 18)

Other participants, such as the LCA (sub. 96), suggested that allegations of breaches are not effectively policed or reviewed. As noted above, model litigant rules are overseen and enforced by the Attorney-General of the relevant jurisdiction through his or her department. At the federal level, it was said that:

The OLSC focuses on education and information sharing. It does not 'police' compliance, or even monitor cases; it rarely discovers breaches. (Appleby and Le Mire, sub. 63, p. 4)

Even where guidelines have legislative backing and enforcement mechanisms that theoretically ensure governments are more accountable, the consistency and frequency of enforcement has been criticised. For example, the Commonwealth's model litigant rules are enforced through a system of self-monitoring, certification and reporting overseen by the OLSC (box 12.5).

Recent changes to the Commonwealth compliance framework mean that complaints from the public to the Attorney-General and the OLSC about non-compliance are no longer investigated by the OLSC but are passed on to the relevant agency for action. The OLSC said that the changes support compliance by putting resources into improving practices, keeping agencies responsible for their own performance while providing the OLSC with oversight capacity for serious or systemic issues (pers. comm., 29 July 2014). It appears that this approach reduces independent oversight:

... the idea of enforcement and really the message that's being put out there by the current model litigant obligations is [self] enforcement, self regulation, and self resolution of disputes, and that's not really putting a sign out there that these things are taken seriously by government. (Appleby and Le Mire, trans., p. 455)

Box 12.5 **Complying with Commonwealth Legal Services Directions**

Agencies are obliged to report to the Office of Legal Services Coordination (OLSC) as soon as practicable about any possible or apparent breaches of the Legal Services Directions 2005.

After each financial year, the chief executive of an agency that is subject to the *Financial Management and Accountability Act 1997* (Cth) must provide a certificate setting out the extent to which they believe the agency has complied with the Directions. If an agency, approved Commonwealth company or approved government business enterprise contracts in a financial year with an external legal services provider on the legal services multi-use list for legal work, the agency, company or enterprise must ensure the contract requires the provider to report to OLSC.

The Compliance Framework sets out the approach of the OLSC to achieving compliance with the Directions, and how OLSC prioritises its compliance activities. The OLSC also prepares guidance notes to help agencies to comply with their obligations.

Source: AGD (nd).

Similar arrangements apply in Victoria, where ensuring compliance with the obligation is primarily the responsibility of the agency that has responsibility for the litigation (Vic DoJ 2011).

At the federal-level, publicly reported data do not separately identify breaches with Commonwealth model litigant obligations, only broader non-compliance with the Legal Services Directions (Rule of Law Institute of Australia 2013). Data from OLSC show that in 2012-13, it found two instances of failure to comply with the model litigant obligations and 33 notifications of potential non-compliance where agencies were eventually found to have been compliant. In 2011-12, OLSC found one instance of non-compliance with the model litigant obligation (pers. comm., 29 July 2014). However these statistics obviously reflect only those reported by aggrieved citizens and may under-represent the extent of compliance failure.

While legislation-based model litigant rules generally require some form of annual reporting, there seems to be less transparency for policy-based rules. For example, there appears to be no recent data on compliance or breaches of the Victorian guidelines, with the only available data coming from evidence presented to the VLRC in 2008 (VLRC 2008).

Many of these concerns were previously identified in the review *Legal Service Arrangements in the Australian Public Service* (ANAO 2005). It was noted then that the OLSC relies heavily on reporting by agencies or complaints from other sources, but there is also no formalised complaints system. The report also said that the OLSC does not commonly discover breaches, and does not proactively monitor agencies' compliance with the Directions (Rule of Law Institute of Australia 2013).

Concerns about poor compliance are compounded since aggrieved parties cannot take action on their own account (NSW Bar Association, sub. 34; Appleby and Le Mire, sub. 63). Appleby and Le Mire said that:

One of the biggest problems with the current regime of enforcement is there is no real opportunity for persons who appear against the government to lodge a complaint about its conduct in litigation for proper investigation. (sub. 63, p. 4)

The absence of a right of private action has meant that the primary source of public sanction for departure from the standards has been judicial criticism. The NSW Bar Association (sub. 34) and Spender (sub. 135) argued for a review of the current enforcement arrangements to establish whether the ramifications of breaching the model litigant rules are sufficient and appropriate.

Improving compliance

The Commission received a number of suggestions on how to improve compliance with model litigant guidelines.

Enshrining requirements in legislation

At present, only the ACT and the Commonwealth have model litigant rules in legislation. Appleby and Le Mire (trans., p. 453) argued that enshrining model litigant guidelines in legislation or delegated legislation brings more transparency, formality and weight to the rules. QPILCH (sub. DR247) suggested that a statutory compliance system should be implemented by the state and territory governments. The Tasmanian Law Society (trans., p. 933) also said that it wants to see model litigant rules enshrined in legislation.

Greater guidance on what constitutes a breach

Appleby and Le Mire suggested that there needs to be more guidance on what the rules require in certain circumstances, and made the following recommendation for reforming the Commonwealth model litigant rules:

... that the model litigant rules contained in the *Legal Services Directions* are amended to clarify the factors that will be relevant to determining fairness in a particular case and provide some practical illustrations. (sub. 63, p. 1)

The ALRC, in its report *Managing Justice*, made a similar recommendation:

The text of the model litigant rules should include commentary and examples explaining the required standards of conduct of lawyers (and others) representing government, and giving examples concerning ‘unnecessary delay’, ‘technical defences’, and avoiding ‘taking advantage of a claimant who lacks resources’. (2000, p. 33)

Clarity around what the model litigant guidelines require in particular cases could reduce uncertainty about governments being either ‘too hard’ or ‘too soft’ during litigation. During the course of the *Electricity Network Regulatory Frameworks* inquiry (PC 2013c), the Commission was made aware of concerns that the Australian Energy Regulator was taking an overly narrow view of its status as model litigant and not vigorously defending its position before the Australian Competition Tribunal. The final report by the Limited Merits Review Panel said that ‘[t]here was, to say the least, some confusion on these matters’ (Yarrow, Egan and Tamblyn 2012, p. 47).

An independent agency to investigate complaints

Participants expressed a range of views about whether the court/tribunal or an independent agency is best placed to enforce the rules. Some noted the importance of both in a good compliance system, while others argued that greater clarity is needed on the role of government versus the courts:

At the moment it seems that both the government and the courts are involved in enforcing the model litigant obligation ... it’s very unclear as to how they interact and overlap and we think that the roles of the government, the different branches, their powers, their enforcement powers, the level of co-operation between the two should be clarified and formalised. (Appleby and Le Mire, trans., p. 453)

Appleby and Le Mire (sub. 63) suggested that there could be better information sharing between the courts and the government. OLSC advised that it monitors court judgments and uses informal networks to monitor government litigants.

Some participants noted the importance of a separate agency to investigate complaints regarding alleged breaches. Appleby and Le Mire recommended amending the Commonwealth model litigant rules to:

... establish a complaints mechanism ... within the Attorney-General’s Department to receive and resolve complaints, to supplement the current enforcement strategy, which is light-touch education and awareness driven, focussing on self-regulation and reporting by departments and agencies. (sub. 63, p. 1)

In 2000, the ALRC noted its support for the OLSC having primary responsibility for the investigation of complaints relating to the model litigant rules. It said that:

The rules are fundamental to the conduct of government litigation and as such they require a dedicated investigatory and monitoring body. (2000, p. 315)

Some participants suggested that ombudsmen are suitable for performing the investigative role in states and territories (Appleby and Le Mire, trans., p. 456; Legal Aid NSW, sub. DR189).

Legal Aid NSW also suggested that:

For example, the Office of the Legal Services Commissioner (NSW) could have their mandate extended to investigate and/or review complaints about non-compliance with the model litigant policy. (sub. DR189, p. 25)

Appleby and Le Mire also made a number of recommendations regarding a best practice complaints procedure (box 12.6).

Box 12.6 Suggestions for a best practice complaints procedure

Any complaints procedure ought to be crafted by reference to best practice in this area. A good complaints procedure requires:

- a designated complaints handling body separate from the agencies under investigation and composed of properly qualified individuals. At the federal level, the Office of Legal Services Coordination may provide this, although it must be kept at least ostensibly separate from the Australian Government Solicitor and the legal providers within the Attorney-General's Department. At the state and territory level, rather than develop a separate (and costly) complaints body, complaints should be able to be made to existing accountability mechanisms, such as the Ombudsman
- the system sorts complaints so that those involving substantive breaches are considered, to avoid time and resources being spent on frivolous or vexatious complaints
- standards of conduct are public and clear. In this respect, model litigant guidelines in the states and territories need to be formalised and promulgated (where this has not yet occurred) in a similar fashion to the Model Litigant Rules in the Legal Services Directions
- an adequate opportunity to be heard is afforded to both the complainant and the government department or agency involved
- the range of consequences is clear and tailored to the types of transgressions and their degree of seriousness
- the system is sufficiently transparent to promote public confidence in it
- mechanisms exist to protect the integrity of the complaints process so that it cannot be circumvented by government
- administration of the scheme is fair, accessible and timely.

Source: Appleby and Le Mire (sub. DR169).

Improving the role of the courts in proactively responding to behaviour when it occurs

Other participants suggested empowering the courts and tribunals to enforce model litigant rules (LCA, sub. DR266; Maurice Blackburn, sub. DR197). QPILCH (sub. DR247) said that, while a formal complaint mechanism could be supervised by an ombudsman, it would be better to have judges empowered to make decisions on compliance in the course of matters before the court. LCA (sub. DR266) suggested that this could be achieved via schedules to court rules or governing legislation.

Legal Aid NSW (sub. DR189) suggested that, in cost jurisdictions, there is already a cost imperative against prolonging proceedings or engaging in obstructive practices by way of aggravated damages. Relevant court practice notes could be amended to reinforce to lawyers acting for government agencies that non-compliance with model litigant rules may attract a claim for aggravated damages or give rise to a claim for indemnity costs. It also suggested that in a tribunal or no-cost jurisdiction, there could be discretion to award costs in exceptional circumstances where there has been significant non-compliance with the model litigant guidelines.

However, the Law Society of South Australia (trans., pp. 401–2) noted that court enforcement could not adequately address conduct outside the court, such as attempts at ADR.

Allowing private parties to have standing to enforce the guidelines

As discussed above, a number of participants said that it was important that any formal complaint mechanism allowed a party to challenge the other party's behaviour. Appleby and Le Mire also argued for greater clarity on the ability to bring a complaint, and what happens to a complaint:

At least at the Federal level at the moment, complaints, as we understand, are forwarded to the agency involved for them to deal with, to manage, resolve and then report back to the Attorney-General's Department and we think that it's unacceptable insofar as best practice of dealing with complaint systems. It really doesn't tick any of the criteria. (trans., p. 453)

Increasing the range of sanctions available

While the Commonwealth Attorney-General may impose sanctions for non-compliance with the Commonwealth's obligation to act as a model litigant, the range and frequency of sanctions employed is unclear. The OLSC suggested that, consistent with the legislative framework, the best approach to addressing non-compliance is to work with an agency to resolve systemic or work practices (pers. comm., 29 July 2014). However, lack of a credible threat of sanction can affect incentives to comply with the rules.

Others suggested that one problem with leaving it to the courts to impose penalties is that they have blunt tools such as costs orders or stays of proceedings. However, the flexibility of ombudsmen could carry over into the way they impose penalties for transgressions (Appleby and Le Mire, trans., p. 459).

Improving transparency and information on compliance

Appleby and Le Mire (trans., pp. 452–3) suggested that there should be greater clarity and transparency around who is bound by the model litigant obligations and to what extent; and that this is probably best done by publishing guidelines and information. While this is done

well at the federal level and in some states and territories, it is not published in others and there is nothing on the extent to which local governments are bound by the obligation.

Some participants cited a need for greater transparency and information regarding investigation and monitoring of compliance. For example:

Greater transparency about complaints and transgressions provides private litigants with an understanding of the way in which the model litigant obligation is applied, the standards they can expect, and reassurance that the government's enforcement is sufficiently rigorous. It also provides ... litigants with a sense of redress if they feel wronged by government conduct in litigation. (Appleby and Le Mire, sub. 63, p. 6)

The Commission's view is that model litigant obligations should apply to all levels of government as well as their legal representatives. To be effective in regulating governments' litigation behaviour, each jurisdiction should introduce a best practice complaints framework. Ombudsmen are 'ready-made', independent bodies that could receive and review complaints, report to the relevant department and refer appropriate matters to legal profession regulators where a lawyer's professional conduct is an issue.

Should model litigant rules also apply to non-government litigants where there are power imbalances?

There are concerns that imposing model litigant rules on governments in circumstances where the other party fails to reciprocate puts governments at a disadvantage, compromising policy and compliance goals. As Chami said:

It is indeed the case that, very often, government litigants are better equipped to engage in litigation than their private opponents. Yet this is by no means always the case. In circumstances where it is not the case, the imposition of the model litigant obligation has the potential to provide the private opponent with a positive advantage. This was recognised in *ACCC v Leahy Petroleum Pty Ltd*, where Gray J observed that the obligation '*is of significant value to parties against whom the Commonwealth is involved in litigation.*' (2010, p. 49)

Some of the policy reasons supporting model litigant rules for governments also apply more generally to situations where there is a disparity in power and resources between private parties, such as cases involving self-represented litigants:

... in the case of [self-represented litigants], where there are limits on how far judges can go to assist ... (given the judges' duties to remain impartial and to be seen to remain impartial) — it is arguable that some of the remaining imbalance can be made up by the represented opponent being held to the standards of conduct expected of a model litigant. (QPILCH, sub. 58, p. 43, citing Chami (2010))

Where a party is self-represented and opposed by a party that is legally represented, the court or tribunal should ensure appropriate and fair conduct and control of the litigation. Legal Aid NSW suggests that aligning practice rules with model litigant guidelines would also assist in regulating behaviour. (Legal Aid NSW, sub. DR189, p. 26)

Some participants supported extending model litigant rules to other parties. For example:

... the power imbalance between self-represented litigants and corporations and government agencies is such that applicants will not pursue their legal entitlements even in no cost jurisdictions. Legal Aid NSW supports the idea of model litigant obligations being extended where a private party is significantly better resourced ... (Legal Aid NSW, sub. 68, p. 74)

The ALA supports clearer and better adoption of model litigant requirements by government and supports the extension of such obligations to institutional defendants such as government licensed insurance companies. (Australian Lawyers Alliance, sub. DR298, p. 7)

A number of participants favoured imposing model litigant requirements on well-resourced parties through court or tribunal rules (LCA, sub. DR266; Law Institute of Victoria, sub. DR221; QPILCH, sub. DR247). However, Legal Aid NSW pointed out some practical difficulties with this approach:

... Legal Aid NSW cautions against the use of an interlocutory hearing to determine whether there is a disparity in resources, or whether a party is a large corporation and therefore whether the model litigant policy should be imposed, on the basis that this would add further costs and complexity to the litigation. (sub. DR189, p. 26)

Other participants suggested that overarching obligations to the court or tribunal are better suited to reining in non-government litigants. For example:

... in Queensland, some of the principles contained in the model litigant rules are already partly applicable to private litigants pursuant to the overarching obligations found in section 5 of the *Uniform Civil Procedure Rules 1999* (Qld). These obligations require all parties to proceed in an expeditious way so as to avoid undue delay, expense and technicality, failing which the court may dismiss a proceeding or impose a sanction as to costs. (QPILCH, sub. 58, p. 43)

... this is best achieved through an application of an obligation to assist, similar to that imposed upon government decision-makers in section 33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth). In my view, aspects of the [model litigant obligations] which emphasise the rule of law, the public good and the modelling responsibility of the Attorney-Generals should not be watered down by the imposition of the obligation upon a wider group whose activity in litigation should be restrained because of concerns about equality of arms. (Spender, sub. 135, p. 5)

... imposing an obligation on all parties and representatives to assist the tribunal to meet its statutory objectives [would mean that] many aspects of the obligations found in model litigant rules would appear to be covered. (AAT, sub. DR312, p. 5)

In addition, others suggested that the peculiarity of government rather than the economic position of parties creates the policy justification for model litigant obligations (Law Society of Tasmania, trans., p. 933). For example:

The justifications for the application of the model litigant rules flow not only from the disparity in resources between parties, but, we submit, more importantly, from the special position of the Crown and its obligations to pursue the public interest and not private interests. In contrast, non-government parties have legal obligations to pursue private interests. Imposition of the

model litigant guidelines on these parties is irreconcilable with these other legal obligations. (Appleby and Le Mire, sub DR169, p. 2)

The Commission's view is that the practical difficulty in establishing whether there is a situation of 'resource disparity', coupled with the special role of government, mean that model litigant rules should not be extended to private parties. While there are compelling grounds for ensuring that resource disparities do not determine case outcomes, other duties on parties, such as overarching obligations, are better suited to tackling this issue.

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.

12.3 Vexatious litigants

There are a very small number of litigants whose behaviour in pursuing litigation is frivolous, querulent or vexatious. It includes those who take legal action without reasonable grounds, repeat arguments already rejected, disregard the court's practices and rulings, and persistently attempt to abuse court processes (AGD 2009). They often bring multiple actions against the same defendants and sometimes pursue litigation for collateral or improper purposes such as intimidation or harassment. Their behaviour is sometimes characterised as irrational or obsessive.

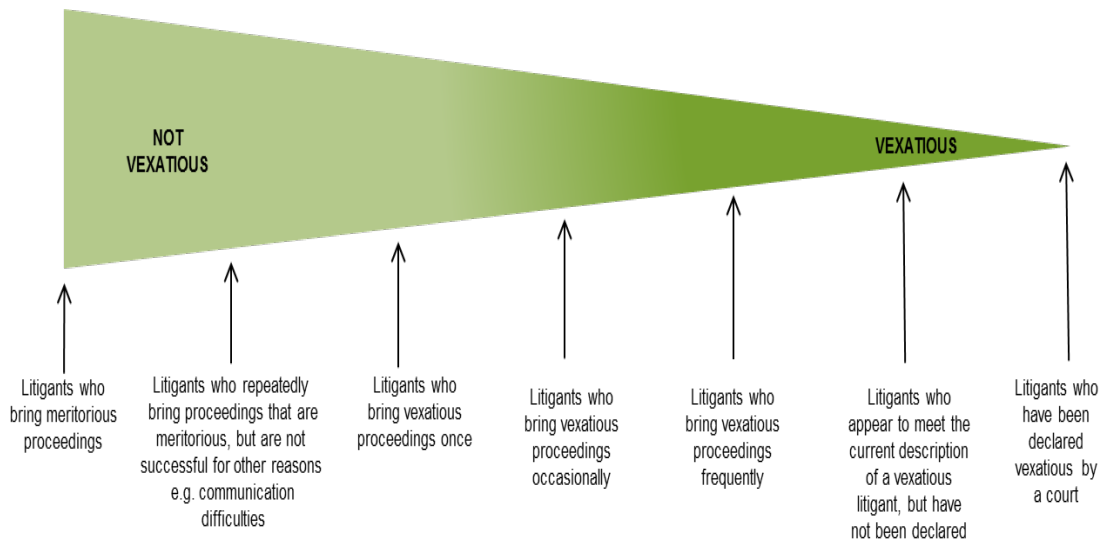
In examining cases involving vexatious litigants in England and Wales, Herman said:

... it is apparent that there are a number of elements to the offence of vexatiousness: the litigation contains no recognised legal claim; a utilitarian calculation concludes the costs of litigation (particularly to 'innocent' parties) hugely outweigh any benefits; the legal system is being used for an improper purpose, including successive attempts to relitigate the same matter; irrationality; and the refusal to take 'no' for an answer. (2012, p. 30)

While there are strict legal definitions on the meaning of a vexatious litigant, the Victorian Parliament Law Reform Committee's *Inquiry into Vexatious Litigants* (2008) noted that in the broader community and in the justice system itself, the term is not so clear-cut — there is a spectrum of vexatious behaviour (figure 12.1). There is also a tendency to describe other categories of litigants on the spectrum as 'vexatious', including people with behaviours that are challenging or difficult (this might range from overtly aggressive

conduct to people who have trouble communicating in the manner expected by the justice system). For the purposes of this report, the Commission uses the term vexatious litigant in this loose sense rather than in the strict legal sense.

Figure 12.1 A spectrum of litigant behaviour



Source: Victorian Parliament Law Reform Committee (2008, p. 11).

How does the justice system respond?

Costs awards and financial disincentives intended to prompt parties to weigh up the costs and benefits of taking action have a limited influence on many vexatious litigants who are often self-represented and/or have few financial resources, which limits their exposure to an adverse costs order. The conclusion of the ALRC almost 20 years ago is still relevant today:

The risk of an adverse costs order seems to the Commission to be an inefficient mechanism for filtering frivolous, vexatious or unmeritorious claims and defences. Detering unmeritorious claims and defences is more appropriately addressed by case management and other procedural controls designed to identify and deal with such claims and defences at an early stage of proceedings. (ALRC 1995, p. 33)

Consequently, most jurisdictions have explicit provisions to manage vexatious litigants, and do so by limiting their access to the justice system once litigation behaviour goes too far and is considered inappropriate by the relevant decision maker. While restricting access is a grave step and not to be taken lightly, the right to access the system must have limits:

Access to justice does **not** mean an unfettered access to the courts to pursue frivolous claims and applications. Justice involves a proportionate amount of time and resources being devoted to a particular case. Where the time and resources devoted to one case are disproportionate, that

effectively denies parties in another case their fair and timely share; and hence denies them justice. (Judiciary of England and Wales 2013, p. 31)

Access is generally limited via a court declaration or order, which requires the person to obtain the court's permission before bringing an action. For example, a person who is the subject of such an order in Western Australia is prohibited from instituting proceedings without the permission of a court or tribunal.⁶⁰

Such declarations or orders seek to balance competing interests, including the right of access to justice, the rights of other parties, and the need to ensure an efficient and effective justice system (Victorian Parliament Law Reform Committee 2008). But balancing these competing interests is challenging:

The Committee believes the aim of vexatious litigant laws should be to strike a fair balance between the interests of possible vexatious litigants, the justice system and other parties to proceedings. ... The more difficult question is what that balance should be, and how it should be expressed in law. (Victorian Parliament Law Reform Committee 2008, p. 15)

Australian jurisdictions have legislation setting out the grounds for declaring a person vexatious (box 12.7). In recent years, there has been a trend towards tightening these laws (Victorian Parliament Law Reform Committee 2008). While courts also have an inherent right to control proceedings, there is a reluctance to terminate the right to litigate.

It is not just courts and tribunals that deal with vexatious behaviour — ombudsmen are also concerned with how to respond to 'unreasonable complainant conduct'. The *Unreasonable Complainant Conduct Project*, a joint project of the Commonwealth and state ombudsmen, led to development of a manual to provide management strategies for staff (Commonwealth Ombudsman 2009a).

Few litigants are declared vexatious ...

From a system-wide perspective there are few litigants declared vexatious, or who exhibit vexatious behaviour more generally. This view was supported by various participants in Victoria's *Inquiry into Vexatious Litigants*, including government agencies, courts and tribunals and legal representatives (Victorian Parliament Law Reform Committee 2008).

Only some jurisdictions maintain public registers of vexatious litigants (for example, New South Wales and Queensland). As at 2008, there were 305 orders in Australia (table 12.1). Most orders were made in the last few decades and were overwhelmingly in the Family Court of Australia, which had 224 orders. More recent information suggests that 21 individuals have been declared vexatious in the Supreme Court of Victoria (County Court of Victoria, pers. comm., 21 August 2014).

⁶⁰ Section 4, *Vexatious Proceedings Restriction Act 2002* (WA).

Box 12.7 Vexatious litigant legislation in Australia

Western Australia was the first Australian state to significantly reform its vexatious litigant laws in 2002.^a The new laws ended the Attorney-General's monopoly on applying for vexatious litigant orders by allowing other parties to apply, and lowered the threshold for making declarations (Victorian Parliament Law Reform Committee 2008).

In 2004, the Standing Committee of Attorneys-General (now replaced by the Law, Crime and Safety Council) approved a model Bill based on the Western Australian reforms, which allows a range of people to apply for orders, has a lower threshold for making orders, and attempts to address forum shopping across Australian courts (Victorian Parliament Law Reform Committee 2008). Queensland,^b the Northern Territory,^c New South Wales^d, the Commonwealth^e and Tasmania^f have passed legislation based on this model Bill.

In Queensland, legislation allows for varying types of orders including staying all or part of any proceeding already instituted and prohibiting institution of a proceeding or proceedings of a particular type. Court rules^g also enable the court to prevent interlocutory applications by a party who has previously brought more than one interlocutory application that is frivolous, vexatious or an abuse of process (QPILCH, sub. 58).

New South Wales legislation authorises the Supreme Court, Land and Environment Court and the Industrial Relations Court to make various vexatious proceedings orders on their own motion or on application by the Attorney-General, Solicitor-General, court registrars, or a person affected (Supreme Court of New South Wales 2014).

The Family Court of Australia^h can dismiss proceedings and make a costs order if satisfied that proceedings are frivolous or vexatious. Judges also have authority to control proceedings where self-represented litigants use cross examination of their former spouse as an opportunity for harassment (Family Law Council 2000).

In Victoria,ⁱ only the Supreme Court can declare a person vexatious. It is the only jurisdiction where the Attorney-General has a monopoly on applications for vexatious litigant orders — most other jurisdictions allow other public or court officials to apply, and all except for the High Court allow parties sued by possible vexatious litigants or persons with a sufficient interest to apply (Victorian Parliament Law Reform Committee 2008). Family violence matters are the exception,^j where the Magistrates' and Children's Courts can make orders restraining family violence intervention order applications without leave, and applications for orders can be made by other people (Victorian Parliament Law Reform Committee 2008). The Victorian Parliament is currently considering the Vexatious Proceedings Bill 2014, which would introduce a regime akin to the United Kingdom's graduated response system and give a wider range of parties access to apply for litigation orders (box 12.8; box 12.9).

^a *Vexatious Proceedings Restriction Act 2002* (WA). ^b *Vexatious Proceedings Act 2005* (Qld). ^c *Vexatious Proceedings Act 2006* (NT). ^d *Vexatious Proceedings Act 2008* (NSW). ^e *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth). ^f *Vexatious Proceedings Act 2011* (Tas). ^g Rule 389A Uniform Civil Procedure Rules 1999 (Qld). ^h Section 118 *Family Law Act 1975* (Cth). ⁱ Section 21 *Supreme Court Act 1986* (Vic). ^j *Family Violence Protection Act 2008* (Vic).

Table 12.1 Vexatious litigant orders in Australia

By decade, up to 2008^a

<i>Jurisdiction</i>	1930s	1940s	1950s	1960s	1970s	1980s	1990s	2000s	Total
High Court	na	-	1	-	1	-	2	-	4
Federal Court	na	na	na	na	-	-	3	6	9
Family Court	na	na	na	na	-	2	75	147	224
NSW	na	na	na	na	-	-	2	11	13
Vic	1	1	1	2	1	2	2	5	15
Qld	na	-	-	1	-	3	3	11	18
WA	1	-	-	-	-	1	-	15	17
SA	-	-	-	-	-	-	1	5	6
Tas	na	na	na	na	na	na	-	-	-
ACT	na	na	na	na	na	na	-	-	-
NT	na	na	na	na	na	na	na	-	-
Total	2	1	2	3	2	8	88	200	306

^a Number of orders is based on information provided by state and territory Attorneys-General and federal courts. The table does not include orders made by the Federal Magistrates Court/Federal Circuit Court. The figures for the Family Court refer to the number of individual litigants subject to orders rather than the number of orders. Where a jurisdiction did not have a vexatious litigant provision in place in a particular decade, this is marked **na** in the table.

Source: Bedford and Taylor (sub. DR328); Victorian Parliament Law Reform Committee (2008, p. 32).

Not much is known about vexatious litigants. Anecdotal observations are often the only insight into their nature. For example, Douglas (2012) noted that:

In general, they have a belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss was personalised and directed towards them in some way. They have over-optimistic expectations for compensation, over-optimistic evaluation of the importance of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self or others). There will be evidence of significant and increasing loss in life domains, driven by their own pursuit of claim. Over time, they begin to pursue claims against others involved in the management of claims, be it their own legal counsel, judges and other officials. While claiming a wish for compensation initially, any such offers never satisfy and their claims show an increasing need for personal vindication and, at times, revenge, rather than compensation or reparation.

There is no apparent common reason for their behaviour:

Thousands of people are involved in legal proceedings in courts and tribunals every year but only a few ever become vexatious litigants. To deal with their behaviour effectively, it would help to understand why this happens. The Committee found very little consensus about this issue during its Inquiry. Some participants pointed to frustrations caused by the justice system itself. Others emphasised characteristics of the litigants themselves — their motivations, expectations, personalities, even possible mental or behavioural disorders. (Victorian Parliament Law Reform Committee 2008, p. 53)

There are very limited demographic data available. Some evidence suggests that vexatious litigants are more likely to be middle-aged males (Douglas 2012; Victorian Parliament Law Reform Committee 2008). A recent study of the then 190 individuals on the vexatious litigants list in England and Wales found that (based on a reading of first names) just 44 were women (Herman 2012).

... but their impacts are disproportionate

The number of people declared vexatious is unlikely to reflect the true extent of the problem in the justice system. People can engage in vexatious behaviour without meeting the very high legislative thresholds. Numbers of vexatious litigants are also a poor indicator of the effect they have on the court system and on others (in terms of extra time and other costs).

While there is a diversity of views about vexatious litigants — from ‘serial pests’ to ‘legal mavericks’ (Victorian Parliament Law Reform Committee 2008, p. xxiii) — it is generally reasoned that proceedings brought by vexatious litigants hinder access to justice because their actions inconvenience other parties, and divert finite court resources towards unmeritorious actions (AGD 2009).

The conduct of unreasonable litigants impinges on the effectiveness and efficiency of the justice system and makes the process of litigation more expensive and protracted for everyone. (LRC WA 1999, p. 33)

But there is no extensive research on the impact of vexatious litigants. The Victorian inquiry found that it was not possible to quantify the effect of vexatious litigants on the justice system (Victorian Parliament Law Reform Committee 2008). However, it found that:

- there is anecdotal evidence that, although vexatious litigants are small in number, they consume disproportionate amounts of resources in courts and tribunals. There are also reports that some vexatious litigants cause stress and security issues for judicial officers, court staff and lawyers
- the impact of vexatious litigants is felt more in the Supreme Court and County Court than in the Magistrates’ Court or the Victorian Civil and Administrative Tribunal
- vexatious litigants have a significant financial and emotional impact on the people they sue. Financial costs are only likely to be partially recovered through costs orders
- there are particular problems in family violence proceedings in the Magistrates’ Court. The new *Family Violence Protection Act 2008* (Vic) aims to address these issues.

The Commission also heard that vexatious behaviour can affect those involved in family violence proceedings. As the Women’s Legal Service Victoria said:

Vexatious litigants are a significant problem for some of the women we assist.

The nature of family violence is such that it is characterized by issues of control and dominance. In some instances this translates into prolonging family law proceedings by refusing to negotiate a settlement.

It also can result in vexatious litigation, where numerous applications are made over a long period of time in several different jurisdictions — for example multiple applications in the family law jurisdiction together with cross-applications and appeals in the criminal and family violence intervention order jurisdiction

This conduct is very stressful and upsetting for parties who are the focus of the excessive litigation, particularly those who have also been previously subjected to stalking or family violence by the vexatious litigant. In some cases the persistent litigation can continue for 12 years or more. (sub. 33, pp. 24, 28)

Regarding the effect of vexatious behaviour on ombudsmen, the NSW Deputy Ombudsman told the Victorian inquiry that between 2 and 6 per cent of complainants consume between 20 and 25 per cent of resources in ombudsmen’s offices (Victorian Parliament Law Reform Committee 2008).

How can the justice system response be improved?

There are mixed views about the efficacy of current arrangements. Some believe that the present arrangements are working relatively well. For example, QPILCH’s opinion is that the process in Queensland adequately deals with vexatious litigants (sub. 58, p. 44).

Others are more critical of current arrangements, citing a range of concerns.

Some participants pointed to a judicial reluctance to make orders:

... the Law Council is advised that courts are generally reluctant to declare a party ‘vexatious’ and it may take several findings by the Court that a party’s claim is frivolous or vexatious before such an order is made. This is understood to be a particular problem in family law matters. (Law Council of Australia, sub. 96, p. 97)

The reluctance to make orders arises both because the threshold for intervention is high and the consequences significant — with civil rights being curtailed. An additional downside from setting thresholds so high is that harmful behaviour is not addressed as it emerges:

The problem is to identify such litigants at an early stage of proceedings before they do too much damage to their opponents and the system. An early warning sign is their common inability to articulate their claims in the form required by the rules of court or at all. (Douglas 2012)

Indeed, some adverse behaviours are not captured by current arrangements since they do not trigger the strict legislative criteria for declaration as a vexatious litigant. This includes the behaviour of ‘unreasonable litigants’, which the Law Reform Commission of Western Australia identified generally as:

... people who litigate in a manner that may abuse opposing parties and other participants in the justice system. These litigants may or may not be legally represented. They often engage in ‘solicitor shopping’ and excessive interlocutory and pre-trial manoeuvres. They may raise spurious claims or defences, flout time limits to cause delays, pursue unmeritorious actions, refuse reasonable settlement offers, fail to pay orders for costs and launch frivolous appeals. (1999, p. 33)

Other jurisdictions have sought to give courts more options to respond to vexatious behaviour, such as the ability to choose between a series of orders which increase in severity depending on the extent of the problem. For example, the United Kingdom’s system of civil restraint orders provides for a more ‘graduated system’ (box 12.8).

Box 12.8 United Kingdom reforms offer a wider range of responses

Courts in the United Kingdom initiated reforms to the way they deal with vexatious litigants. In a 2003 decision, the United Kingdom Court of Appeal described the behaviour of several vexatious litigants as ‘a very serious contemporary problem facing the dispatch of business in this court’ and set out a new system of civil restraint orders.

The system, set out in the United Kingdom’s Civil Procedure Rules, provides for a series of graduated orders:

- *Limited civil restraint orders* — restrain further applications in the proceedings in which the order is made without leave. A judge can make an order where a party has made two or more applications that are ‘totally without merit’.
- *Extended civil restraint orders* — restrain future claims or future applications that effectively re-litigate issues without leave. Specified judges may make these orders where a party has ‘persistently’ issued claims or made applications that are ‘totally without merit’.
- *General civil restraint orders* — restrain a litigant from issuing any claim or making any application without leave. Specified judges may make an order if the litigant persists in issuing claims or making applications that are totally without merit, ‘in circumstances where an extended civil restraint order would not be sufficient or appropriate.’

Parties to proceedings can apply for orders themselves. The courts are also required to consider making one of the orders whenever they strike out or dismiss a claim that is totally without merit. Orders last for two years and prevent a litigant from issuing further applications without first obtaining the court’s permission. The names of individuals with such orders issued against them are on the public record.

These orders are separate to the list of official ‘vexatious litigants’ who are the subject of an order under the *Supreme Court Act 1981*, which is maintained by the Court Service where a person’s name may, potentially, be placed forever.

Sources: Herman (2012, p. 29); Victorian Parliament Law Reform Committee (2008, pp. 8, 157).

The Victorian Government is currently reforming its legislation based on recommendations from the *Inquiry into Vexatious Litigants* (Victorian Parliament Law Reform Committee 2008; box 12.9). The Committee concluded that its preferred approach was to:

... prevent vexatious litigants wherever possible, and to manage one-off or infrequent vexatious proceedings more effectively without restricting general rights of access to justice ... access to

the courts should only be restricted when there is clear evidence of an established pattern of vexatious litigation. (Victorian Parliament Law Reform Committee 2008, pp. xxvi–xxvii)

Box 12.9 **Victoria moves to reform its approach to vexatious litigants**

The Victorian Parliament is currently considering the Vexatious Proceedings Bill 2014. The Bill proposes the introduction of a three tiered regime.

- At the lowest level, a limited litigation restraint order may be made where a person has made two or more vexatious applications in a proceeding. The order can prevent a person from continuing or making further interlocutory applications in the proceeding, without leave. This order encourages early intervention and sends a clear message that vexatious litigation of any kind will not be tolerated in the courts or the Victorian Civil and Administrative Tribunal.
- The mid-level order, an extended litigation restraint order, can be made where a person has frequently commenced or conducted vexatious proceedings against a specified person or other entity, or in relation to a specified matter. This order applies more broadly than a limited order and may prevent a person from continuing or commencing any proceedings against a person specified in the order or in relation to the matter specified in the order, without leave.
- The highest-level order is a general litigation restraint order, and can be made where a person has persistently and without reasonable grounds commenced or conducted vexatious proceedings. The order may prevent a person from continuing or commencing a proceeding in any Victorian court or tribunal, without leave. This order is reserved for the most serious vexatious behaviour, and in circumstances in which a lower-level order would be ineffective. Due to its gravity, the Bill gives the Supreme Court exclusive power to make this order.

The current regime has been of limited utility in controlling vexatious behaviour in the courts and tribunals. The introduction of the Bill aims to overcome these limitations by introducing a comprehensive new regime for the management and prevention of vexatious litigation.

The Bill also aligns the existing regimes in relation to vexatious litigants under the *Family Violence Protection Act 2008* (Vic) and the *Personal Safety Intervention Orders Act 2010* (Vic) with the new regime, ensuring that a single framework for managing vexatious litigation operates across Victoria. Persons who are sued by vexatious litigants and other persons with a sufficient interest in the matter will for the first time be able to apply for limited and extended litigation restraint orders. This provides a mechanism for such persons to protect their own interests and prevent vexatious litigation against them. However, to ensure that the process is not abused, the person will be required to obtain leave from the relevant court or the Victorian Civil and Administrative Tribunal before they are able to make an application.

Source: Clark (2014).

In addition to considering the United Kingdom's graduated model, the Victorian inquiry also considered the Standing Council of Attorneys-General model. That model retains an order as a sanction of last resort, but strengthens it in a number of ways. For example: allowing a broader range of people to apply for orders; lowering the threshold test for making orders; expanding the definition of 'vexatious legal proceedings' so courts can consider a broader range of proceedings and conduct; and addressing 'forum shopping' between different Australian jurisdictions.

The inquiry favoured the introduction of the United Kingdom’s graduated system. The view was that, not only does it provide a more proportionate response by restricting access to justice only to the extent necessary to deal with behaviour, it also offers more effective protection for the justice system and other parties by providing for vexatious litigation to be restrained at an earlier stage and not just as a last resort (Victorian Parliament Law Reform Committee 2008). Bedford and Taylor (sub. DR328) also favoured this approach, and said that it offers a more structured and graduated approach to vexatious behaviour.

In addition to considering changes to the legislative regimes, changes in judicial culture may also be required. The need for the judiciary to be more assertive in managing vexatious behaviour was recognised in the United Kingdom:

The Working Group recommends that judges are strongly encouraged, through appropriate judicial leadership channels, to take a proactive and robust approach to dealing with vexatious litigants, in particular, where appropriate, by declaring claims or applications ‘totally without merit’; and the use of appropriate orders restraining individuals from bringing or pursuing claims and applications without express permission of the court. (Judiciary of England and Wales 2013, p. 31)

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.

13 Costs awards

Key points

- Costs awards are appropriate in many courts to compensate successful parties for their legal costs and deter unnecessary litigation. However, if not properly constructed, they may also increase litigation costs and deter potential litigants with meritorious cases.
- In lower tier courts, the amounts to be awarded for costs on a standard basis should be based on fixed scales (rather than activity-based scales) since these:
 - do not encourage parties to engage in excessive spending on legal costs
 - provide greater certainty to parties of the amount they will receive or be required to pay
 - reduce the need for disputes to arise over party-party costs.
- The amounts set out in fixed scales should be determined by taking account of:
 - the stage reached in proceedings
 - the amount that is in dispute
 - the legal costs typically incurred in cases with similar characteristics.
- Superior courts should introduce discretionary powers for judges to impose costs budgeting on parties at the outset of litigation. A move towards systematically implementing costs budgeting processes should also be considered, pending further evaluation of the processes recently introduced in England and Wales.
- Successful parties that are self-represented or represented on a pro bono basis should not be prevented from obtaining an award for costs.
- Protective costs orders should be used to safeguard public interest litigation. Courts should establish formal criteria to assess the eligibility of a party for a protective costs order.
- Courts should continue to award costs on an indemnity basis against parties that are frivolous, vexatious or reject reasonable settlement offers.
 - Parties that reject a settlement offer more favourable than the final judgment should generally be required to pay their opponent's post-offer costs on an indemnity basis.

The resolution of legal disputes in courts can come at a significant financial cost to the parties involved (chapter 3). These legal costs are essentially transactions costs associated with the determination of a legal dispute, and are distinct from any compensation or outcome awarded in the judgment of a case. Courts have provisions to identify who should bear responsibility for legal costs and how much should be paid in reimbursement.

The effects of costs awards on access to justice are mixed. On the one hand, the potential awarding of costs may allow some parties to pursue claims that they otherwise would not have been able to afford. On the other hand, others may be discouraged from pursuing their

legal rights by the risk of being faced with an unaffordable adverse costs award. Costs awards can also influence the behaviour of parties in other ways — affecting their incentives to settle and the amount of legal costs they are willing to incur during litigation.

This chapter begins by providing a general description of how costs are awarded (section 13.1), followed by a discussion of how costs awards can affect access to justice (section 13.2). Potential reforms to the structure of costs rules and scales are then described in section 13.3. Finally, section 13.4 outlines recommended changes to determining which parties should be subject to costs awards.

13.1 Overview of rules to award costs

There are two broad questions that describe rules for awarding costs between two parties to a dispute (party-party costs):

- ‘*Who pays?*’ — which party should be required to pay party-party costs?
- ‘*How much is paid?*’ — what method determines the amount of costs to be paid?

These factors can vary both between tiers of courts and between jurisdictions.

Who pays?

There are two general approaches to awarding legal costs — the ‘English rule’ and the ‘American rule’. The English rule is based on the principle that ‘costs follow the event’, which means that the successful party is entitled to payment for legal costs from the unsuccessful party. Alternatively, the American rule requires litigants to pay for their own legal costs regardless of whether they are successful.

Most Australian courts award costs according to the English rule. However, there are some circumstances where Australian courts may deviate from the ‘loser-pays’ principle, including if a winning party has rejected a reasonable settlement offer, and protections afforded to specific cases on public interest grounds (section 13.4).

There are also a number of Australian courts and tribunals where the American rule is used, often referred to as ‘own-cost’ jurisdictions. In Australian courts that deal with family law disputes, costs awards are infrequent under longstanding conventions, and are only awarded in exceptional circumstances, such as in vexatious or frivolous cases. In most tribunals, rules set out where costs may be awarded — generally only in more complex and expensive matters, or cases where a reasonable settlement offer has been rejected.

How much is to be paid in costs?

When awarding costs, courts must also determine the amount that should be paid by one party to another. Most Australian courts base the amount awarded on the amount of activity undertaken by the successful party. However, there are some Australian jurisdictions that award costs using fixed, event-based amounts.

Activity-based scales

Costs awards in most Australian courts are awarded on an activity basis, meaning that the amount of costs awarded is tied to the tasks performed, and the resources deployed, by the winning party's legal representative. These costs are generally calculated on what is referred to as a 'standard basis' using the scales of costs set out in the court's rules. The scales assign a value to each task undertaken by a paid representative (table 13.1). In most jurisdictions, only those costs deemed to have been reasonably incurred and of proportional amount are awarded to the successful party.

Table 13.1 An example of an activity based scale of costs
For selected tasks in the Federal Court of Australia, as of 9 May 2013

<i>Task</i>	<i>Units</i>	<i>Amount</i>
Attendance by a lawyer requiring the skill of a lawyer ^a	per 6 mins	\$56.00
Preparing documents (excluding correspondence)	per 100 words	\$51.00
Preparing correspondence	up to 50 words	\$21.00
	up to 100 words	\$41.00
	over 100 words	\$51.00
Reading all documents (excluding correspondence)	per 6 mins	\$56.00
Reading correspondence	up to 50 words	\$15.00
	up to 100 words	\$31.00

^a Including attendances in conference, by telephone, on counsel, appearing in court and travelling.

Source: *Federal Court Rules 2011* (Cth).

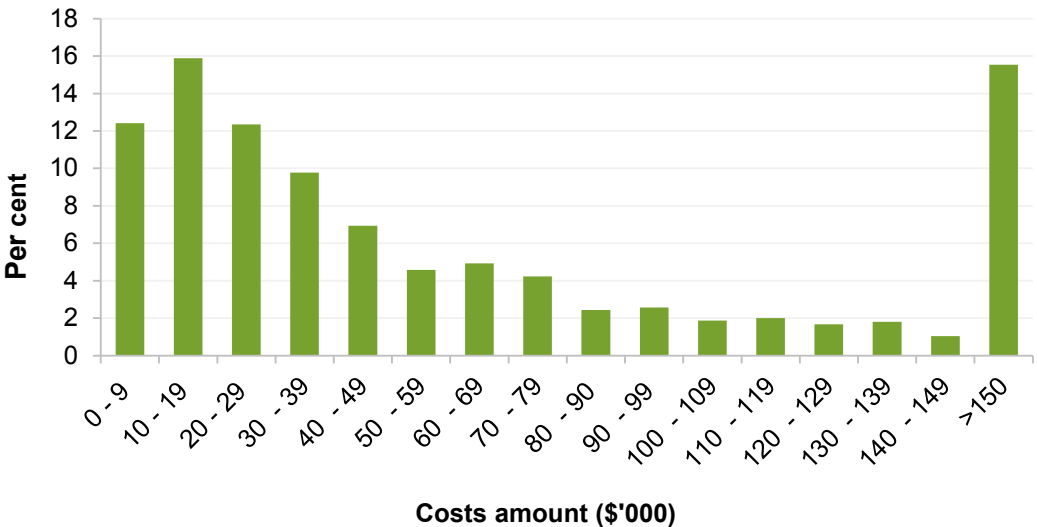
Lawyers generally charge their clients at rates higher than those set out in the court scales. As such, costs awarded on a standard basis usually only partially indemnify a successful litigant. It has been previously estimated that the share of a litigant's fees covered by a costs award usually ranges from 50 to 70 per cent, but may be as high as 65 to 85 per cent in some jurisdictions, such as New South Wales (Hodges, Vogenauer and Tulibacka 2010). Another estimate from Queensland puts the recovered share of legal costs at approximately 60 to 75 per cent (QPILCH 2009). The difference between the actual amount paid by a successful party to its solicitor, and the amount awarded in party-party costs, is referred to as 'solicitor-client' costs.

In a small number of cases, costs are awarded on an indemnity basis, usually where actions are vexatious or frivolous. Unlike standard costs, indemnity costs take into account the costs agreement between the successful party and their solicitor. Unless the amount of costs is deemed unreasonable, indemnity costs will roughly match the actual costs incurred by the winning party. Indemnity costs not only fully compensate parties who are victims of vexatious claims, but also discourage such claims from being brought in the first place.

The amounts awarded under activity based scales can vary widely between cases — data provided to the Commission by the NSW Costs Assessment Scheme illustrates the distribution of party-party costs amounts submitted for assessment in New South Wales in 2012 and 2013 (figure 13.1). While the median amount of awarded costs in this sample was roughly \$40 000, there was a ‘long tail’ of cases where party-party costs amounted to hundreds of thousands or — in a few cases — millions of dollars.

Figure 13.1 Party-party costs amounts submitted for assessment in NSW in 2012 and 2013

Share of total sample (per cent), by costs amounts in 2012-13 dollars^a



^a Converted to 2012-13 dollars using implicit price deflators for final consumption expenditure (all sectors), ABS Cat. No 5206.0. The total sample size was 1442 cases from the New South Wales courts.

Data sources: Data provided to the Commission by the NSW Costs Assessment Scheme; ABS (Cat. No 5206.0).

The capacity of many parties, particularly individuals and small businesses, to accurately predict their expected costs liability under activity-based scales is limited, regardless of whether costs are calculated on a standard or indemnity basis. While court scales clearly set out the value assigned on a standard basis to tasks undertaken, a party has little idea how many tasks their opponent will undertake. Predicting expected liability is even more

difficult on an indemnity basis as parties may not be aware of the terms of their opponent's costs agreement.

Legal professionals in many jurisdictions are obligated by professional rules to provide their clients with an estimate of their potential liability for costs. However, activity-based scales limit the ability of professionals to provide an accurate estimate. Further, there is some evidence to suggest these estimates are not disclosed in all cases. In a survey of court users in South Australia conducted by the Commission, less than half of those respondents represented by a lawyer at trial were provided with an estimate of their potential liability for adverse costs.

Fixed, event-based scales

In some courts, costs are not awarded on the basis of each activity performed by the successful party's lawyers. Instead, these jurisdictions set out fixed, lump sum amounts in their court scales for each stage reached in the trial process, referred to as 'event-based' scales. The costs of solicitor activity to reach that trial stage are presumed to be captured in the lump sum amount. Event-based scales are currently used in the Federal Circuit Court of Australia (table 13.2), while the South Australian Magistrates Court uses a variant of event-based scales that takes into account the amount in dispute (section 13.3).

Table 13.2 An example of a fixed event-based scale of costs
For the Federal Circuit Court, as of 11 June 2013

<i>Stage of proceedings</i>	<i>Family Law</i>	<i>Other Federal Laws</i>
Stage 1: Initiating or opposing application up to completion of first court day	\$1 994	\$2 663
Stage 2: Interim or summary hearing – as a discrete event	\$1 661	\$1 661
Stage 3: Up to and including conciliation conference	\$1 661	na ^b
Stage 4: Primary dispute resolution litigation intervention	\$1 661	\$2 793
Stage 5: Preparation for final hearing		
For a 1 day matter	\$4 250	\$5 988
For a 2 day matter	\$5 270	\$8 998
For each additional day	\$1 128	\$1 893
Stage 6: Final hearing costs for solicitor	\$271	\$271
Daily hearing fee^a		
Short mention	\$271	\$271
Half-day hearing	\$997	\$997
Full-day hearing	\$1 994	\$1 994

^a For each stage, attendances at a hearing are charged at the daily hearing fee rates. ^b na denotes not applicable.

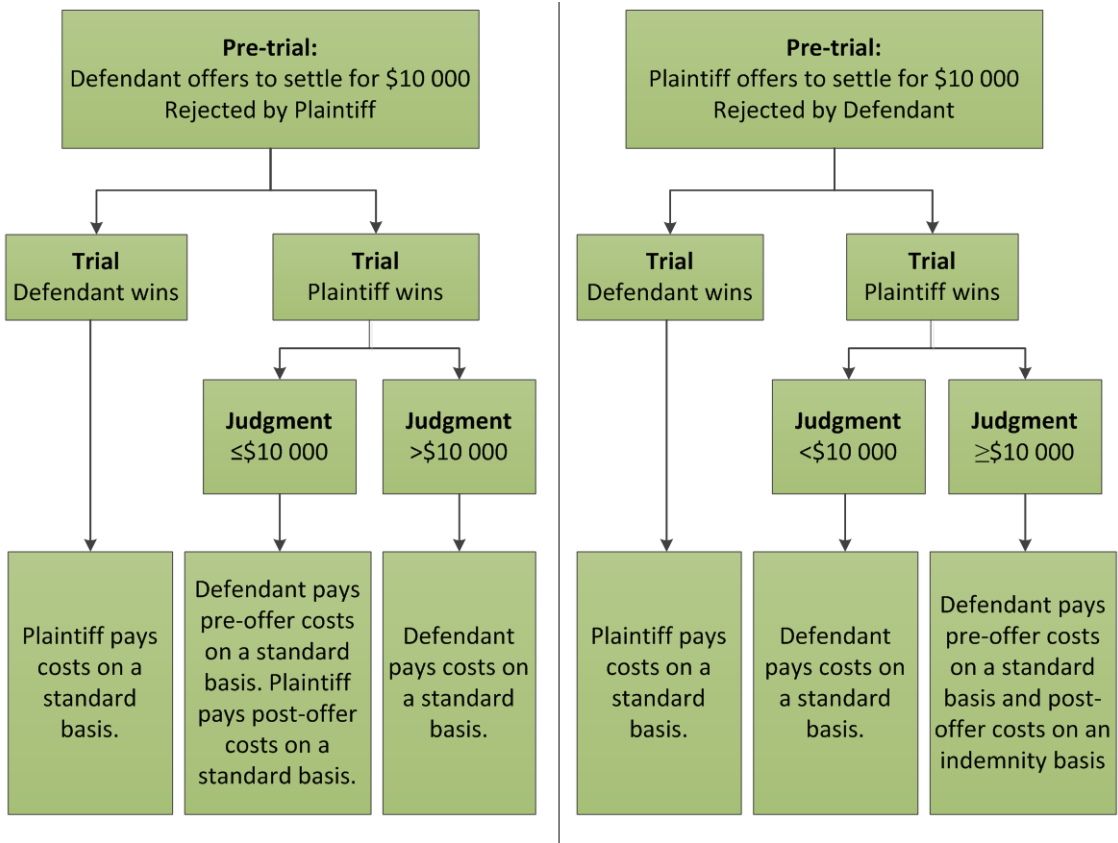
Source: *Federal Circuit Court Rules 2001* (Cth).

The extent to which a successful party is indemnified under a fixed scale is determined by the amount of work undertaken by their solicitor and the rate at which they charge. Because the amount of costs recovered does not vary, a successful party which ‘over-services’ itself will recover less of its costs than a successful party that employs fewer resources. While this is likely to encourage more efficient behaviour, in most cases parties are still unlikely to be fully indemnified under the current fixed scale systems.

Settlement offers

Most Australian courts and many tribunals take settlement offers into account when awarding costs to parties. While the details of individual rules differ, typically if a party makes an offer that is rejected by their opponent and the subsequent judgment is less favourable to their opponent than the offer, the party that made the offer is entitled to apply for payment for costs incurred after the offer was made (figure 13.2).

Figure 13.2 **Costs awards when a settlement offer is rejected^{a,b}**



^a In New South Wales courts and the Federal Court, plaintiffs that reject a more favourable settlement offer must pay post-offer costs on an indemnity basis. ^b The Magistrates’ Courts of Tasmania and South Australia use proportional costs rules to compare offer and claim amounts with the judgment sum.

Many overseas jurisdictions also take settlement offers into account when awarding costs — for example, Rule 68 of the Federal Rules of Civil Procedure in the United States, which applies to settlement offers from defendants that are rejected by plaintiffs.

These cost rules aim to encourage both the offering and acceptance of reasonable settlements, thus avoiding unnecessary litigation:

The purpose of the offer of compromise regime is to encourage settlement. The encouragement comes from having a financial penalty for parties who fail to accept a reasonable offer of compromise. (NSW Bar Association, sub. DR206, p. 4)

However, the Commission considers that these rules do not only act as punishment for those parties who fail to accept a reasonable offer. They also can encourage parties to make offers by providing some assurance that, if a party makes an appropriate offer, they are unlikely to be left out-of-pocket should their opponent reject the offer and proceed with litigation.

In the draft report, the Commission noted that most jurisdictions treat settlement offers by plaintiffs and defendants differently with respect to costs awards. While defendants that reject favourable settlement offers are generally required to pay post-offer costs to plaintiffs on an indemnity basis, most jurisdictions — with the exception of New South Wales and the Federal Court of Australia — require plaintiffs that reject favourable settlement offers to only pay post-offer costs on a standard basis.

Requiring plaintiffs to also pay post-offer costs on an indemnity basis would strengthen the incentive for reasonable settlement offers to be made by defendants and accepted by plaintiffs. Circumstances where a costs penalty may not be warranted — such as where the difference between the settlement offer and judgment sum is negligible, or where unforeseeable facts have subsequently arisen — may be dealt with at the discretion of judicial officers.

Some stakeholders agreed that the existing rules are asymmetric between parties, but argued that the current rules favour defendants:

Unfortunately, under the current structure of the [Uniform Civil Procedure Rules], the penalties for plaintiffs and defendants are disproportionate and, in relation to defendants, ineffective and thus inefficient. (NSW Bar Association, sub. DR206, p. 4)

... under the rules currently in place in most jurisdictions, the penalties for plaintiffs who fail to accept an offer made by a defendant are grossly in excess of the penalties applied to a defendant for failure to accept an offer made by a plaintiff. This disproportionality is unfair and renders the offer of compromise rules ineffective and inefficient. (Australian Lawyers Alliance, sub. DR298, p. 7)

These stakeholders argue that the disproportionality arises from comparing the costs penalty that a plaintiff or defendant must pay if a reasonable offer is rejected (NSW Bar Association, sub. DR206, Australian Lawyer's Alliance, sub. DR298). Their contention is that if a defendant is found to have rejected a reasonable settlement, the only additional

costs they are required to pay is the gap between party-party and solicitor-client costs (assumed to be roughly 25 per cent). They compare this with a plaintiff who has rejected a reasonable settlement offer, and characterise their costs penalty as a loss of the 75 per cent of their costs they would have received in the absence of a settlement offer, plus having to pay costs to the defendant.

However, in the Commission's view, these arguments do not consider the full range of potential costs facing a defendant when considering whether to reject or accept a settlement offer — they only account for the additional penalty arising from the awarding of costs. A defendant will incur additional costs as a result of undertaking litigation, compared with accepting a settlement offer and thus avoiding the costs of proceedings. Thus, if a defendant rejects a reasonable settlement offer from the plaintiff, they are not only incurring the additional 25 per cent of the plaintiff's costs, they are also incurring the additional 100 per cent of their own costs of litigation. Taken together, even though plaintiffs receive a higher costs penalty after the fact, it can be seen that both parties face similar additional costs as a consequence of rejecting a reasonable settlement offer.

One alternative put forth by stakeholders was to award plaintiffs a 10 per cent uplift on damages, in addition to indemnity costs, where a defendant has failed to accept a favourable offer. A similar model has been introduced in England and Wales following the Jackson Review (2009a). Some stakeholders suggested this would strengthen the incentive of defendants to settle (Australian Lawyer's Alliance, sub. DR298; NSW Bar Association, sub. DR206).

But the Commission considers that an uplift on damages would not constitute an appropriate penalty in many cases. A costs penalty that is proportional to damages may be insufficient in low value cases, and excessive in high value cases — some stakeholders broadly agreed with this concern (Australian Lawyer's Alliance, trans., p. 229; NSW Bar Association, trans., p. 115).

Another option put forward by the Australian Lawyers Alliance is to double the amount of costs paid by a defendant that rejects a favourable settlement (trans., pp. 228–229). While this would increase the incentive for defendants to accept settlement offers, it appears to be an excessive penalty. Further, as a doubling of party-party costs could substantially 'over-indemnify' plaintiffs, this could have the unintended effect of encouraging plaintiffs to proceed to litigation with the aim of beating their settlement offer to gain a windfall from the costs awarded.

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.

13.2 A framework for evaluating costs awards

When considering how to structure costs awards, it is useful to first consider their role in facilitating access to justice. Objectives commonly identified include:

- providing accessibility for meritorious claims by indemnifying successful parties
- deterring frivolous or vexatious claims or defences
- discouraging unnecessary costs from being incurred during litigation
- providing simplicity, clarity and predictability to litigants
- encouraging settlement
- giving courts discretion to address extenuating circumstances (ALRC 1995; Manitoba Law Reform Commission 2005).

However, these general objectives cannot all be fully satisfied by the same set of costs rules — they are mutually incompatible and so trade-offs will necessarily arise (ALRC 1995). For example, costs rules that better enable those without means to litigate are less likely to deter unmeritorious cases, as any deterrent based on costs is likely to be strongest for those with fewer resources. Similarly, the greater the level of discretion given to the courts, the less predictable that costs will be for litigants.

The tension between these objectives reflects the broader tradeoff (the indemnity-certainty tradeoff) between enabling successful parties to recover their costs and providing litigants with certainty in the awarding of costs (figure 13.3).

The indemnity-certainty tradeoff

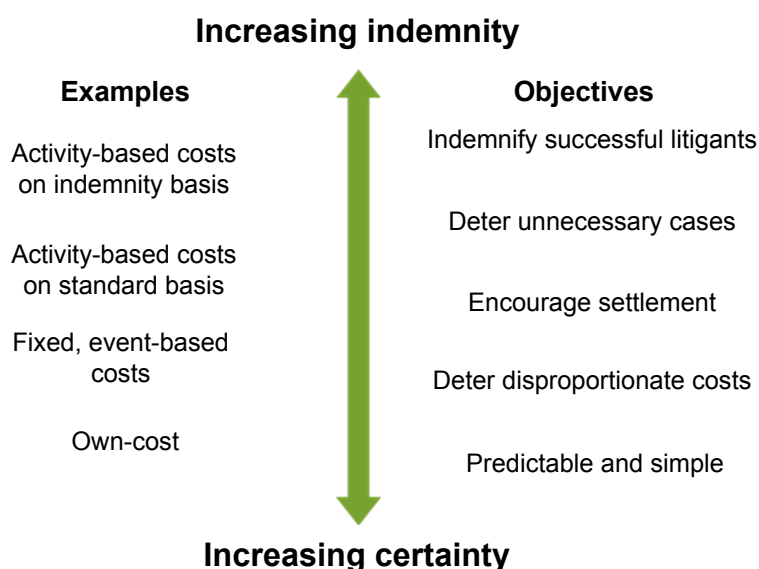
Costs awards are broadly underpinned by the principle of indemnity, which suggests that a successful litigant should be able to recover at least some of their costs from the losing party. This is similar but distinct from the indemnity-basis on which costs can be awarded, where a party is compensated for their full solicitor-client costs. Costs rules that offer greater indemnity will increase the relative amount of costs recovered by a successful party, and thus increase the amount payable by a losing party.

However, prior to litigation, parties cannot determine with any certainty their chances of winning and the costs amount they will be entitled to receive or obliged to pay (ALRC 1995). As such, increasing the level of indemnity increases the amount that a party can expect to either win or lose — essentially increasing the ‘risk and reward’ faced by a party prior to litigation. As noted earlier, uncertainty with respect to costs is more pronounced where costs are awarded based on the activities of the opposing party.

The fundamental difference between the English and American rules for awarding costs is how they trade off indemnity and certainty, sitting at opposing ends of the spectrum. Courts that apportion costs using activity-based scales under the English rule favour

indemnity for successful litigants. Conversely, own-costs jurisdictions provide litigants with absolute certainty at the outset of litigation that they will not have to pay any costs to their opponent, regardless of the outcome. Sitting in the middle, fixed costs provide certainty of the amount of costs to be indemnified, but with uncertainty as to which party will have to pay.

Figure 13.3 **Illustrating the indemnity-certainty tradeoff in costs awards**



This raises the question that underpins the choice of a costs award system — what is the appropriate balance to strike between indemnity and certainty? Arriving at the answer is made more difficult because any given indemnity-certainty tradeoff will affect parties in different ways as different parties — for example, a low income household with dependants compared with a large corporation — can vary widely in their resources, their expectations of success, and their appetites for risk.

What are the consequences of providing indemnity?

Indemnity for successful litigants enhances accessibility for those parties who otherwise could not afford to engage in litigation and believe that they have a strong case that is likely to win. In particular, parties represented on a speculative or contingent basis may rely on costs awards to finance their case (ALRC 1995).

However, awarded costs are generally less than the actual amount billed to a client:

Generally, recoverable costs (party-party costs) do not satisfy the entire costs of undertaking litigation ... The shortfall arises because frequently, the scale does not reflect the actual work

required to properly prepare a case. Often, necessary work is not included in the scale. Often, the scale does not adequately reflect the market rates of undertaking the work or obtaining the evidence required in a particular matter. (Australian Lawyers Alliance, sub. 107, p. 14)

Thus, costs awards currently serve to reduce the costs of litigation for successful litigants, rather than providing them with full indemnity. Partial indemnity may impact most on those seeking non-monetary outcomes, if they do not have an alternative source of funds to pay the difference between their total bill and the costs awarded.

Effect on the costs of litigation

Providing litigants with indemnity by awarding costs can encourage disputants to spend more on legal services, since increasing the amount of legal work undertaken by a party typically increases their chances of winning. As Posner observed:

It appears that, on balance, indemnity does increase the litigation rate ... For it encourages the optimistic litigant to spend heavily on the litigation because he expects that his costs will ultimately be borne by his opponent ... (1998, p. 790)

There are two reasons why greater indemnity encourages spending during litigation. First, awarding costs raises the stakes of litigation. The amount of costs to be paid, whether an activity-based or fixed amount, is added to the amount at stake for the parties. The benefits of winning — and the costs of losing — are now greater, and therefore parties are willing to spend more to increase their chance of obtaining a favourable outcome.⁶¹ Second, where costs are awarded on an activity basis, the amount of costs recovered also increases with additional legal spending by a party. The result is that the expected cost of each dollar of legal expenditure is decreased.⁶²

The incentive for litigants to increase their legal spending under the English rule has been previously demonstrated in a theoretical setting by Braeutigam et al. (1984), and Katz (1987). Similar conclusions were also drawn by empirical research from Hughes and Snyder (1995) on litigation costs during Florida's experimental use of the English rule.

The NSW Bar Association contested the idea that parties can be encouraged by activity-based scales to overspend on litigation, saying:

The notion of 'over-servicing' is in itself problematic. A client who loses a case would be unhappy with a legal representative who failed to take extra steps which may have resulted in its success in order to avoid 'over-servicing'. Parties are unable to ask a judicial officer in the course of proceedings whether they have done enough to win a case. It is simply not possible to finely calibrate the amount of preparation in most cases so that they barely squeak over the line for a win. (sub. DR206, p. 5)

⁶¹ In economic terms, awarding costs raises the expected marginal benefit of each additional unit of legal expenses incurred.

⁶² The costs award effectively acts as a probabilistic subsidy, lowering the expected marginal cost of expenditure (Katz 1987).

However, this argument misconstrues the notion of over-servicing as lawyers undertaking more work than their clients would like them to. Rather, the available evidence suggests that clients are willing to spend more on litigation when activity-based scales of costs partially subsidise each additional amount of services purchased. This is particularly problematic in the adversarial context of litigation, where additional spending by one side can increase the need for further spending by the other side:

... the doctrine of indemnity operates to create a kind of ‘arms race’ in which the parties are each incentivised to pay accelerating costs because it is only if they win that they can get the discretionary and partial indemnity against ‘solicitor and client’ costs that ‘party and party’ costs represent. (Roger Quick, sub. DR270, p. 5)

What are the consequences of uncertainty?

As noted previously, disputants face a great deal of uncertainty surrounding their potential costs liability. Many parties are unable to assess the likelihood of different outcomes and are often more concerned about possible losses rather than possible gains (Reeson and Dunstall 2009). Faced with this uncertainty, individuals can make decisions that ultimately leave them worse off, such as not pursuing a meritorious claim or defence to avoid the potential of paying costs, thus denying them access to justice (ALRC 1995). For example, a party may focus on the unlikely but daunting possibility that costs will blow out to a large amount — essentially focussing on the worst case scenario rather than the range of possible outcomes.

A number of submissions have attested to this behaviour occurring:

The prospect of adverse cost orders in the courts can act as a deterrent for our clients in pursuing legal action. (Consumer Action Law Centre, sub. 49, p. 10)

In our experience, the most significant barrier for people experiencing discrimination is the risk of adverse costs orders ... As a result of the risk of an adverse costs order, many complainants are reluctant to even lodge complaints ... preferring state-based tribunals where parties bear their own costs. (Kingsford Legal Centre, sub. 53, p. 5)

The ever present threat of an adverse costs order will either prevent proceedings being taken in the first place, or as proceedings continue will act as a pressure to compromise the action before a final determination. (Salvos Legal, sub. 122, p. 2)

Queensland Public Interest Law Clearing House suggested that this aversion to cost risks can be exacerbated by threats made by opposing parties:

We have noticed a common theme in the letters our clients receive from solicitors representing the opposing party. Often these letters are drafted in complex language and threaten to seek a costs order against the addressee should they not withdraw the proceedings. Unfortunately, this all too often results in the recipient of the letter withdrawing their action because they are intimidated by the threat. (sub. 58, p. 15)

Some stakeholders have suggested that aversion to costs awards can be a particularly strong deterrent to disadvantaged parties:

The Centre is aware of many cases where the cost implications of litigation have dissuaded disputants from pursuing resolution, particularly where the disputants are experiencing disadvantage. (National Pro Bono Resource Centre, sub. 73, p. 32)

Often pro bono providers cannot offer their services beyond the initial hearing because ... exposure to a costs order should the appeal fail makes the process too risky. Often this means that disadvantaged clients have no opportunity to appeal an adverse finding. (Springvale Monash Legal Service, sub. 84, p. 14)

Costs are also potentially a means of enabling a well-funded litigant to intimidate a less-well-funded litigant and it is clear that courts are mindful of concerns about the unfairness to parties with fewer resources. (Law Council of Australia, sub. 96, p. 102)

That said, some contend that the risk of a costs award disproportionately impacts on those who lie between the extremes of the distribution of wealth — the so-called ‘missing middle’. For the very wealthy, the relative amount of a costs award may be insignificant compared to their available resources, while the very poor may not be concerned by the possibility of paying costs if they have very little to lose and much to gain from pursuing a claim (Cannon 2002). The remaining middle cohort may possess sufficient wealth to lose from an adverse costs order, but not enough for this expense to be insignificant.

This missing middle may be more susceptible to settling cases when it is not appropriate nor just due to the threat of an adverse costs order. Kingsford Legal Centre outlined how aversion to the risk of a costs award affected a client’s willingness to settle:

Darren worked as a labourer. He lived in western Sydney with his young family and had a mortgage. He was sacked from his job as his employer believed he had a medical condition that could affect his job in the future. Darren disputed that he did have a medical condition and therefore did not believe it affected his ability to do his job. Darren’s doctor supported this.

Darren lodged proceedings with the [Australian Human Rights Commission] which failed to settle. A [Community Legal Centre] assisted Darren and told him that his case had the potential to be a test case. Darren lodged proceedings in the Federal Magistrates Court. Despite advice from the CLC and a barrister that his case was relatively strong, Darren accepted a low figure settlement at the Federal Magistrates Court mediation. Darren did this as he was worried about an adverse costs order and the subsequent risk that he may lose his house. He wanted to seek justice but felt the risks just seemed too great. (sub. 53, pp. 5–6)

Legal Aid NSW also suggested that costs awards may be used to unjustly coerce disadvantaged parties to settle, observing:

... that workers with meritorious cases can be pressured into settling and forgoing their rights ... While it is rare for a worker to be ordered to pay legal costs if they lose their claim, it is not unknown for lawyers acting for employers to use the prospect of a costs order to pressure workers into a settlement. (sub. 68, p. 53)

13.3 Reforming the structure of costs awards

Ideally, costs awards would be structured in a way that:

- improves certainty for risk averse litigants
- does not encourage parties to spend more than is necessary on legal costs
- maintains some degree of indemnity for winning parties.

Activity-based scales of costs, as currently used in many Australian jurisdictions, fail to deliver this outcome and result in an increased level of litigation spending and a loss of certainty for all litigants.

The flaws in activity-based scales have long been recognised:

... unless activity based scales are replaced with a cost shifting method with better incentives, improvements to court systems will founder. (Cannon 2002, p. 208)

The Commission considers that a range of reforms to costs awards are required.

Fixed, event-based scales for lower-tier courts

One approach to remedy the flaws in current arrangements is to use scales of costs that prescribe fixed amounts for each stage reached in the process. Under fixed scales, parties can determine with a high degree of certainty the amount of any potential adverse costs award. This will mean that parties no longer have to face the possibility of a costs order that exceeds what they might have expected to pay. The Australian Law Reform Commission (1995) previously concluded that costs award rules should enable parties to accurately estimate their potential exposure to costs at the beginning of proceedings.

The Federal Circuit Court, which currently uses an event-based scale, argued that such scales provide greater transparency:

... an event based scale was more appropriate for a court such as the FCC and was seen to provide a greater degree of transparency for litigants. (sub. DR258, p. 8)

Fixed scales also reduce the incentive for parties to over-service, as the costs a party can recover are unrelated to activity. In response, the NSW Bar Association has argued:

... the Association rejects notions of overservicing in the context of a party-party costs regime where by definition costs are assessed at the level of what is reasonable. Costs assessment processes are in place to ensure oversight of costs awarded. If one or both parties engaged in overservicing (or ‘gold plating’ to adopt the current economic jargon) then any such excess preparation would not be recoverable as ‘reasonable’ party-party costs. (sub. DR206, p. 5)

However, in the Commission’s view, costs assessment processes are not an appropriate mechanism to discourage excessive litigation costs in lower-tier courts for a number of reasons. First, in lower-level disputes, parties are less likely to be willing to expend the

costs, time and effort involved in obtaining a costs assessment. Second, as identified in submissions to a review of the NSW Costs Assessment Scheme, assessment processes often lack transparency and consistency, and determinations can vary widely between assessors, even on identical issues (Law Society of NSW 2011; NSW OLSC 2011).

One concern is that a fixed, event-based costs amount may not provide sufficient indemnity to some successful litigants whose necessary legal expenses exceed the fixed amount. This may occur when there is a wide range of necessary legal costs required by different cases of the same length and amount in dispute:

A fixed scale should not be used because it fails to take into account the individual complexity of cases. Scale rates can also present problems where the nature of the proceedings and the legal representation of the parties varies widely. (Law Council of Australia, sub. DR266, p. 67)

Indeed, any system of scales that chooses a single, representative costs amount for cases of a given length and amount will not fully indemnify a proportion of the cases in that bracket, and will over-indemnify in others.

However, activity-based scales currently used in most courts already fail to provide successful litigants with full indemnity for costs. Further, as discussed in chapter 3, the spread of legal costs incurred across cases in lower-tier jurisdictions is relatively small compared to superior jurisdictions. Thus there are likely to be fewer outlying cases that are not sufficiently indemnified. The Federal Circuit Court has noted that few criticisms of event-based scales have been borne out in reality (sub. DR258).

In some cases, a fixed scale of costs will provide greater indemnity than activity-based scales. For example, a fixed scale can afford full indemnity to a party that undertakes less activity than is expected. This essentially rewards parties that are efficient and do not over-spend on litigation. However, this should not lead to incentives to ‘under-service’, as parties must still undertake sufficient activity to win the case in order to be awarded costs.

Fixed scales also reduce the need for courts to settle disputes regarding the amount of costs to be paid between parties when costs are awarded. This may lead to significant savings for parties and the courts. As noted by the Federal Circuit Court of Australia:

... with the event based scale there is no role for taxation or assessment. (sub. DR258, p. 8)

Fixed scales also address issues concerning how costs amounts should be calculated for self-represented litigants and consumers purchasing ‘unbundled’ legal services (section 13.4). At present, activity-based scales only compensate a party using unbundled legal advice for the work undertaken by their lawyer. This essentially discourages unbundling if a party believes they are likely to recover most of the costs of work being carried out by their lawyer, but not if they do the work themselves.

In contrast, a fixed, event-based scale is based on outcomes, rather than inputs. This means that a party is equally compensated regardless of whether work is performed entirely by a lawyer or shared between lawyer and client on an unbundled basis.

Fixed scales should be proportionate to the amount in dispute

The fixed, event-based amounts awarded in costs by lower-tier courts should also be set in proportion to the amount that is in dispute. The amount in dispute can be defined as the amount awarded in the judgment sum for successful plaintiffs, and the amount claimed by the plaintiff for successful defendants. By tying the amount of costs awarded to the size of the claim or judgment sum, courts can encourage legal costs to remain in reasonable proportion to the dispute. This principle can also discourage overly ambitious claims, as increasing the amount claimed also increases the plaintiff's costs liability. Variants of this approach are employed in Germany, England and Wales.

The South Australian Magistrates Court uses an event-based scale, where the costs awarded for each stage in the process are a percentage of the amount claimed. The percentage is altered for each stage in the process, as well as for some dispute types, and is not tied directly to the work undertaken by either side (table 13.3).

Table 13.3 An example of a percentage scale of costs

For selected events in the South Australian Magistrates Court, for a claim worth \$100 000, as at 26 April 2013

<i>Event</i>	<i>Action type</i>	<i>Rate</i>	<i>\$100 000 claim</i>
1. Pre-action notice	other than for personal injury	1%	\$1 000
	personal injury	2%	\$2 000
2. Filing an action or defence, including directions hearing	liquidated sum	3%	\$3 000
	other than for a liquidated sum	5%	\$5 000
3. Activity after the first directions hearing until the trial date is set	liquidated sum	10%	\$10 000
	other than for a liquidated sum	12%	\$12 000
4. Activity from trial date set until trial		10%	\$10 000
5. Preparing and filing a trial plan		2.5%	\$2 500
6. Fees for counsel at trial	first day	3%	\$3 000
	subsequent days	2.5%	\$2 500
7. Court ordered mediation		2%	\$2 000

Source: *Magistrates Court (Civil) Rules 2013 (SA)*.

In England and Wales, fixed costs regimes have recently been adopted to determine the amount of costs to be awarded in particular dispute types, such as fast track trials and cases within the Road Traffic Accident Protocol. Parties are awarded costs based on a fixed lump sum plus an amount equal to a percentage of the awarded damages. Both the lump sum amount and the percentage of damages awarded increase as a case proceeds through each stage of litigation (Taylor 2013). An evaluation one year after introduction of the Road Traffic Accident Protocol found that average costs in low value traffic claims had reduced by between 3 and 4 per cent, along with small reductions in general damages and delays before settlement (Fenn 2012).

Putting it into practice — the amounts to be contained in fixed scales

Calculating costs as a *direct* percentage of the value of the claim may not be the most effective means of estimating reasonable and necessary legal costs. As the Commission has shown in chapter 3, the costs of litigation currently do not increase in direct proportion with amounts in dispute. Rather, costs appear to comprise a larger proportion of lower value claims, as there will be some necessary costs of litigation that do not vary with the dispute amount. As such, a scale based on direct percentages of claim values may not sufficiently indemnify lower value claims.

Another option, and the Commission's preferred response, is for the costs awarded to reflect the costs typically paid in a case of similar value reaching each given stage of a trial. Where the monetary value of a dispute cannot be specified, or an economic value not reasonably imputed, the scale should set amounts based on the type and length of the case.

The Commission has constructed a practical example of a fixed scale in table 13.4. This illustrative scale is based on data from previous surveys of litigation costs for cases of varying length and dispute type in the County Court of Victoria in 1993. In practice, any scale would draw on a wider range of more recent costs data.

Table 13.4 Illustrative example of a fixed, event-based proportional scale of costs^a

1993 dollars, by stage & amount in dispute, for the County Court of Victoria

<i>Stage of process</i>	<i>Less than \$20 000</i>	<i>\$20 000 to \$39 999</i>	<i>\$40 000 to \$99 999</i>	<i>\$100 000 or more</i>	<i>Non-monetary dispute</i>
Event 1: Pre-trial conferencing to trial	\$1 065	\$1 420	\$1 775	\$3 550	\$1 950
Event 2: Trial	\$1 278	\$1 704	\$2 130	\$4 260	\$2 350
Event 3: Verdict	\$1 917	\$2 556	\$3 195	\$6 390	\$3 500
Total	\$4 260	\$5 680	\$7 100	\$14 200	\$7 800

^a This scale has been put together entirely for illustrative purposes. The figures above do not reflect estimates of the costs of litigation at present.

Sources: Commission estimates using figures from studies of costs in the County Court of Victoria from Worthington and Baker (1993) and Williams and Williams (1994).

Some stakeholders have argued that the complexity and data requirements involved in constructing such a scale make its implementation unfeasible (Law Society of South Australia, sub. DR219; Law Society of Tasmania, sub. DR227).

Others also noted that there are concerns as to whether fixed scale rates will adequately reflect market costs:

Experience shows that scale rates are inevitably set too low and the process for review and increase of those rates is too slow. (Law Council of Australia, sub. DR266, p. 67)

The profession generally considers such regimes too arbitrary, and not being able to keep pace with market charges, and are not reflective of the costs actually incurred. (Federal Circuit Court, sub. DR258, p. 8)

However, this merely underscores the importance of more rigorous and consistent data collection in the courts system (chapter 24). These concerns can be addressed by requiring scales to be periodically reviewed to ensure they continue to reflect the costs incurred by parties. For example, the Law Society of Tasmania suggested a two year period may be appropriate (sub. DR227).

In the Commission's view, the benefits of moving to a fixed, event-based scale in lower-tier courts would outweigh the short term costs of its construction. As noted previously, legal costs appear to be more stable and certain — and thus easier to set out in a fixed scale — in lower-tier courts. While the Federal Circuit Court noted that there were some difficulties in setting events and amounts for its costs scale, the court nonetheless believes that its use of an event-based scale has been appropriate (sub. DR258).

Further, while the construction of such a scale might be complicated, its application need not be. Indeed, to the user, the concept is relatively straightforward. Litigants need only know two things — the amount in dispute and the stage of proceedings they have reached — in order to identify their potential liability for costs.

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.

Costs in superior courts require greater flexibility and discretion

While fixed, event-based costs may be appropriate for some superior court cases, in superior courts there can also be a ‘long tail’ of complex cases for which the required legal costs may be relatively high and variable (chapter 3). As noted by the Law Society of South Australia:

Matters in [superior courts] are vastly variable and complex and the discretion of the court in awarding costs in that context is crucial. (sub. DR219, Attachment, p. 66)

It may therefore be appropriate to maintain activity-based cost scales in superior courts, while introducing reforms for courts to manage and limit costs awards to improve the incentives of disputants.

One approach is for courts to set a maximum amount of recoverable costs at the outset of litigation (often referred to as costs budgeting). This can confer many of the benefits of fixed scales, by giving litigants greater certainty at the outset of litigation, while offering sufficient discretion and flexibility in the amount set to provide reasonable indemnity for atypical cases. As argued by the Public Interest Advocacy Centre (PIAC):

[This] has the potential to remove uncertainty about the level of risk of an adverse costs order, thereby allowing the applicant to proceed in cases where they otherwise might be unfairly inhibited from doing so. (sub. 45, p. 31)

While acknowledging that placing a cap on recoverable costs at the outset of litigation may be beneficial in some circumstances, the NSW Bar Association has argued that its use should be court led, and should form part of the discretionary powers available to judges for case management (sub. DR206; trans., p. 120).

Indeed, this appears to already be the case in some jurisdictions. For example, parties in the Federal Court of Australia currently have the ability to seek an order from the Court specifying a maximum cap on the costs that can be awarded in a case, under rule 40.51 of the *Federal Court Rules* 2011 (Cth).⁶³ Similar discretionary powers to cap recoverable costs also exist in some other courts, such as rule 21.03 of the *Federal Circuit Court Rules* 2001 (Cth), and rule 42.4 of the *Uniform Civil Procedure Rules* 2005 (NSW).

However, there is some evidence to suggest that, where they exist, discretionary powers to cap costs are currently underutilised. For example, Watters (2010) noted that, since the introduction of order 62A in the Federal Court in 1992, less than ten reported decisions on its application have been made. It has been suggested to the Commission that the existing rules for capping costs are underutilised for a number of reasons:

One problem with the Order (and other similar costs-limiting orders in other jurisdictions) is its infrequent use, due to a lack of awareness by practitioners and judges, and in cases where applications have been made, the reticence of judges to make orders limiting costs. (PIAC, sub. 45, p. 31)

⁶³ Formerly order 62A of the *Federal Court Rules* (Cth).

This raises the question as to whether capping recoverable costs should generally be a standard process at the outset of litigation, rather than an order at the court's discretion that must be sought by a party in each matter.

Widespread use of costs budgeting was recently introduced in the County and High Courts in England and Wales. This system of costs management generally requires parties to file costs budgets with the court early in the proceedings (UK Ministry of Justice 2013a). Each party's costs budget provides a breakdown of each stage of the litigation, identifying costs already incurred and those estimated to be incurred thereafter (Kennedys 2013). While parties are encouraged to reach agreement on their budgets, in the absence of agreement the court may make a costs management order to determine the maximum costs recoverable by the parties. These maximum amounts can be updated during litigation on agreement, or if updates are warranted by significant developments in the case.

In the draft report, the Commission recommended that superior courts in Australia introduce costs budgeting regimes similar to those of English and Welsh courts. In response, some stakeholders have argued that requiring parties to undertake additional preparation and pre-trial processes in submitting and negotiating on such budgets may lead to additional costs being incurred by parties (NSW Bar Association, sub. DR206; Law Society of Tasmania, sub. DR227).

Other stakeholders suggested that at the outset of litigation practitioners are unable to accurately predict many factors that may affect costs budgets (Law Council of Australia, sub. DR266; Australian Lawyers Alliance, sub. DR298). The NSW Bar Association also noted that this may be particularly challenging if the Commission's recommendation to abolish formal pleadings was adopted (sub. DR206; trans., pp. 118–119). However, such concerns may be addressed by allowing budgeted amounts to be varied where the court deems unforeseeable circumstances to have arisen, as is currently the case in England and Wales (Flemington and Kensington Community Legal Centre, sub. DR225).

The Commission recognises that while costs budgeting appears to have merit in principle, the relative costs and benefits of its recent implementation as a standard process in some English and Welsh courts are still largely unknown at this stage. This echoes the views of a number of stakeholders, who suggested that it is too early to conclude whether such processes are of benefit to parties and the courts (Law Society of South Australia, sub. DR219; Eqalex Underwriting, sub. DR278).

In the short term, the Commission recommends that superior courts, and those intermediate courts with unlimited civil jurisdiction, should adopt costs budgeting as a discretionary power for use in case management. However, given the potential for these discretionary powers to be underutilised, there remains merit in further exploring the costs and benefits of more systematic use of costs budgeting. Eqalex Underwriting proposed that:

... Australia could learn a great deal by adopting a 'wait and see' position on how costs budgets evolve in the UK, particularly when they are the most contentious subject which the UK courts, law firms, bar and litigants are grappling with at the moment. (sub. DR278, p. 9)

There appears to be merit in waiting for the English and Welsh reforms to be fully implemented for a sufficient period before evaluating whether such a regime is warranted in Australia. The Commission considers that the Australian Law Reform Commission (ALRC), and its state and territory counterparts, would be best placed to evaluate the merits of adopting such a regime. Consideration should also be given as to whether such a regime would also be appropriate where intermediate courts have unlimited civil jurisdiction, for example the District Court of South Australia.

Any future implementation of widespread costs budgeting may require additional court resources — such reforms should be funded accordingly, as noted by the NSW Bar Association (sub. DR206).

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.

13.4 To whom should costs awards apply?

There are some types of litigants that are currently not subjected to the same costs rules as others. This includes some that are unable to seek costs under the current arrangements, such as pro bono clients and self-represented litigants. In addition, there are some public interest litigants that are currently shielded from paying costs.

Should eligibility to be awarded costs be extended to other parties?

Currently, only costs paid to a legal representative can be recovered by successful litigants. This means that pro bono parties and self-represented litigants are generally precluded from being awarded costs, with the exception of some out-of-pocket expenses, such as court fees and other disbursements.

Pro bono clients

Pro bono clients are not able to seek an order for costs against their opponent. The New South Wales Law Reform Commission explained the rationale as follows:

Lawyers acting pro bono cannot recover costs. The purpose of an order that the losing party pay the legal expenses or costs of the winning party is to provide an indemnity in relation to the whole, or usually part, of the contractual obligation incurred by the latter to pay the fees of his or her lawyers. If a successful party is under no legal obligation to pay lawyers' fees, the indemnity principle states that the successful party cannot recover costs from the opponent. (NSWLRC 2012, pp. 57–58)

However, as argued by the National Pro Bono Resource Centre, this principle leads to asymmetric payoffs at the expense of pro bono parties:

Under the current system a litigant who is represented pro bono may not be able to recover his costs even if his claim is successful, whilst still being liable for the other party's costs if his case is unsuccessful. The reverse is that an opponent of a litigant who is represented pro bono may benefit from not having to pay his opponent's costs, even if he is unsuccessful. (sub. 73, p. 36)

This asymmetry means that pro bono litigants face a worst-case scenario of having to pay costs, or a best-case scenario of receiving nothing. The current system also gives rise to asymmetric incentives where the opponents of pro bono clients have reduced incentives to settle, and are less likely to be deterred from bringing an unmeritorious case:

... where the opposing party knows that, based on the doctrine of compensation, they will not be liable for a costs order, such cost deterrents do not exist. Thus the pro bono litigant is in the disadvantageous position of having this vulnerability exploited. (National Pro Bono Resource Centre, sub. 73, p. 37)

... if costs are not recoverable, this delivers an unmeritorious windfall to parties against [Community Legal Centre] or pro bono clients, and removes the checks and balances as to costs in litigation. (Consumer Action Law Centre, sub. 49, p. 25)

Denying costs awards to pro bono clients presents the opportunity for some parties to abuse the legal system to exploit disadvantaged groups that are likely to require pro bono services. Opponents of pro bono clients can be aware that they will not have to pay costs, and thus have reduced incentives to settle or conduct litigation in an expedient or reasonable fashion.

Some pro bono lawyers have attempted to work around the current restriction on awarding costs by employing specific conditional fee agreements, whereby the client agrees to pay the lawyer an amount equal to the costs award if successful, otherwise no payment is due. The Queensland Law Society has recently undertaken efforts to educate legal practitioners and construct a template for costs agreements that comply with legal professional obligations and recent rulings on costs by the courts (trans., pp. 1089–1092).

However, a number of stakeholders have pointed to substantial uncertainty in the existing case law regarding the validity of such costs agreements (Consumer Action Law Centre, sub. 49; National Pro Bono Resource Centre, sub. 73; Flemington and Kensington Community Legal Centre, sub. DR225). This places pro bono parties at the risk of not being awarded costs if their costs agreement is not valid. Further, requiring pro bono parties to sign complex costs agreements in order to obtain an order for costs would appear to be unnecessary and costly. Pro bono clients, particularly those experiencing disadvantage, may also be hesitant to enter costs agreements that are too complex to understand.

Given these ambiguities, a number of stakeholders and previous reports have supported the need to clarify the rights of pro bono parties to be awarded costs (Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202; Allens, Ashurst and Clayton Utz, sub. DR224; Queensland Law Society, sub. DR267; Taylor 2013; NSWLRC 2012). The Commission agrees with this view, and recommends that the right for pro bono parties to seek an award for costs be formally clarified.

How should costs awarded in pro bono cases be distributed?

In its draft report, the Commission canvassed several options for allocating the costs awarded to a pro bono case, including:

- the client
- the lawyer representing the client
- the legal centre or clearing house involved
- a general fund to support pro bono services.

The client is an inappropriate recipient, as they have been provided with a free service.

Distributing costs awarded in pro bono cases to lawyers may encourage a higher level of pro bono service provision. Submissions to the NSW Law Reform Commission have previously suggested that helping lawyers to recoup their costs and time would enable them to increase the amount of pro bono work they can afford to undertake (NSWLRC 2012). Further, lawyers may be more willing to undertake pro bono work on more difficult or lengthy cases if they can recover some costs. However, the pro bono practices of Allens, Ashurst and Clayton Utz also noted that:

... this issue is not a significant barrier for firms in their day-to-day pro bono practices. We are unaware of any pro bono matter ever being refused because of an inability to recover fees. ... over the five years from FY2009 to FY2013, the three Firms provided a total of 561,834 hours of pro bono legal assistance. During that time, the total fees recovered in pro bono proceedings was less than \$500,000. (sub. DR224, p. 17)

It could be argued that awarding costs may actually reduce the willingness of lawyers to undertake pro bono work, as it risks conflating pro bono work with contingency billing.

This may corrupt the social incentive for lawyers to undertake pro bono work, as their motives for undertaking such work may now be perceived as pecuniary, rather than charitable. This has been borne out in other areas of charitable work, such as blood donations (Titmuss 1970).

The Consumer Action Law Centre suggests that there is a clear distinction between awarding of costs to pro bono representatives (where there is no expectation of fees, and any damages recovered are quarantined from fees) with contingency billing arrangements (where matters are taken on an assessment that they will be profitable, and success fees may eat into damages) (sub. 49). They go on to argue that:

... we fail to see the mischief if a small percentage of lawyers are motivated [to] take up matters pro bono because a small amount [of] party-party costs might be recovered. There is considerable upside in allowing those [Community Legal Centres] and pro bono lawyers that are willing to undertake pro bono to recoup their costs, and by extension, provide services to other parties. (sub. 49, p. 26)

Distributing any costs awarded to the relevant bodies providing the pro bono services (rather than individual lawyers themselves) would help improve the resourcing of these organisations to provide more pro bono services to others. This may also lower the risk of corrupting the social capital of pro bono work — as money would not flow directly to lawyers, but rather be used to fund a not-for-profit service. A potential shortcoming of this approach is that it may distort the incentives of pro bono providers towards providing representation in dispute types where costs are awarded, at the expense of no-costs disputes (such as tribunal actions and family law cases).

Many stakeholders argued that allocating pro bono costs awards to a collective fund for legal assistance would undermine incentives to provide pro bono services, and involve substantial administrative costs (Justice Connect, sub. DR290). Some also pointed to shortcomings in the *Access to Justice Fund* that has been established for the same purpose in the United Kingdom (Allens, Ashurst and Clayton Utz, sub. DR224; PIAC, sub. DR246).

In the Commission's view, the most appropriate option is a self-regulatory model, as put forth by the National Pro Bono Resource Centre (sub. DR199; trans., p. 155). This model would grant the awarded costs to the legal professional or law firm providing the representation, for them to use as they see fit. The lawyer or firm would generally use the awarded costs to pay any disbursements, such as counsel and experts, and then use the remaining funds to support other pro bono work. This appears to largely resemble the current practice of the pro bono practices of many large firms (Allens, Ashurst and Clayton Utz, sub. DR224).

Under a self-regulatory model, where an organisation such as a community legal centre or pro bono clearing house is involved, the legal professional and the pro bono organisation may choose to establish an agreement as to how any awarded costs might be allocated. The National Pro Bono Resource Centre noted that where a private firm is awarded costs for

pro bono work, it should be required to allocate any remaining costs to the firm's pro bono program, rather than its general revenues (sub. DR199).

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.

Self-represented litigants and purchasers of unbundled legal services

At present, self-represented litigants (SRLs) can generally only be awarded costs to compensate for out-of-pocket expenses, such as disbursements. The Queensland Law Society also noted that clients who had purchased professional advice on an unbundled basis should also be able to recover the out-of-pocket costs of such advice if successful (trans., p. 1091).

As with pro bono parties, there are asymmetries that arise when SRLs are required to pay costs, but are unable to seek an award for their own legal costs. These asymmetries mean that SRLs have a stronger incentive to withdraw or settle for less than they may be entitled to, while their opponents are not compelled by the possibility of a costs order to conduct litigation in a reasonable or timely manner. In its draft report, the Commission recommended that this asymmetry be addressed by allowing SRLs to seek an award for costs. This logic should also extend to work undertaken by those who 'partially' self-represent by purchasing unbundled legal services.

In response to this draft recommendation, a number of stakeholders have argued that the status quo is appropriate, as SRLs do not incur legal costs:

The Law Council opposes the proposal to allow unrepresented litigants to recover costs from the opposing party, other than out of pocket expenses. By definition an unrepresented litigant has no legal costs to recover. (Law Council of Australia, sub. DR266, p. 68)

Self-represented litigants ought not be able to recover the equivalent for any allowance for professional fees. If they were to do so they would commonly be recovering monies when corresponding outlays have not been incurred. (Bar Association Queensland, sub. DR245, p. 4)

The Society is of the view that an unrepresented litigant should only be entitled to reimbursement for out of pocket expenses incurred by them in the course of the litigation (disbursements). It is a long-held tenet that 'costs' mean the costs of legal representation. (Law Society of South Australia, sub. DR219, Attachment, p. 70)

The Commission remains unconvinced that the legal costs incurred by a party should exclusively be viewed as out-of-pocket costs paid to a lawyer — a misconception which is not made correct simply by being a long-held tenet. The time and effort expended on a

case by SRLs are still costs borne by them. While SRLs are not legal professionals, an SRL obtaining a judgment in their favour suggests that they likely expended as much (if not more) time and effort on their case than a lawyer would have in achieving the same outcome. As such, there is little logical basis for arbitrarily compensating the time and effort of one person over another, when the outcome attained by both is the same.

Some stakeholders argued that awarding costs to SRLs would risk characterising them as legal practitioners, as defined under professional regulation:

An unrepresented litigant should not be entitled to recover for ‘their time’ as this would elevate them to the category of legal advisor which would be contrary to current regulatory regimes. (Law Society of South Australia, sub. DR219, p. 70)

The Society is unlikely to support this recommendation as it would encourage persons to engage in litigation as a means of gaining income and payment and create uncertainty around the definition of an Australian legal practitioner. (Law Society of Tasmania, sub. DR227, p. 18)

However, these arguments misconstrue the core purpose of legal profession regulation. As noted in chapter 6, the primary reason for regulation of the legal profession is to protect consumers from information imbalances and ‘principal-agent’ problems. Given that an information imbalance between lawyer and client cannot exist in the case of someone self-representing, such regulations (and the professional status that they confer) are irrelevant. Regulations that exist to protect consumers should not be used as a barrier to place SRLs at a costs disadvantage to their opponents.

Some stakeholders also raised the concern that awarding costs to SRLs will encourage parties to bring cases to court unrepresented:

The Law Council [of Australia] is concerned that allowing litigants in person to recover more than out of pocket expenses would result in a proliferation of litigation by unrepresented litigants and arguments of costs entitlement and quantification. (sub. DR266, p. 68)

There is a real risk that this will adversely incentivise self-represented litigants, either encouraging them to commence claims or discouraging them from settling claims until costs that have not in fact been incurred are paid. (Bar Association Queensland, sub. DR245, p. 4)

We believe that only amounts actually incurred by the litigant as disbursements such as the cost of expert reports should be recoverable in these circumstances. We are concerned that any further amounts will be difficult to quantify and may encourage unmeritorious claims. (Insurance Council of Australia, sub. DR193, p. 11)

There are a number of reasons why this concern is unlikely to be realised. First, the incentive for SRLs to bring unmeritorious claims are mitigated by the fact that the behaviour of litigants (and in particular risk-averse litigants) tends to be influenced more heavily by the prospect of an adverse, rather than a favourable costs order. Second, the Commission does not believe that denying successful SRLs the right to being awarded costs is the most equitable or effective way of dealing with unmeritorious SRLs. Third, to the extent that parties with meritorious claims may be incentivised to self-represent, the

Commission believes it is squarely within the purview of legal professionals to make the case to such parties that they would be better off paying for professional representation.

On balance, the Commission considers that successful self-represented litigants, including those who have purchased some sort of unbundled legal advice, should be able to recover costs from the opposing party, subject to the costs rules of the relevant court, in the same way they are liable if they lose. This was supported by the Queensland Law Society (trans., p. 1090), and echoes a recommendation made previously by the ALRC (1995).

Calculating the amount of costs to be awarded to an SRL

In response to the Commission's draft recommendation to award costs to successful SRLs, the Law Institute of Victoria argued that it would be difficult to quantify the amount of costs to be paid:

The value challenges presented in ascertaining the true economic value of the non-professional work actually done by a self-represented litigant in litigation are significant. Nor does the draft recommendation make it clear how the costs will be calculated or assessed to enable them to be incorporated into relevant court scales as proposed, or how the relevant costs court or legal costs assessors will determine the value of the work done by a self-represented litigant. (sub. DR221, p. 38)

Similar concerns were also expressed by the Law Council of Australia (sub. DR266) and the Insurance Council of Australia (sub. DR193).

However, the notion that the 'true economic value' of a party's work must be ascertained in order to award costs does not even apply under the status quo, where costs are awarded based entirely on the quantity of professional inputs — for example, two lawyers that charge their clients at different hourly rates are still compensated at the same rate by existing costs scales.

The Commission remains unconvinced that quantifying the amount of costs to be awarded to a self-represented party poses a significant challenge. The appropriate approach will depend on the costs rules of the court hearing the dispute.

In lower-tier courts, the amount to be recovered by SRLs should be an event-based lump sum amount set out in scales, as recommended earlier in this chapter. The ALRC (1995) has made a similar recommendation previously. In these courts, quantification of costs is therefore straightforward — the same costs amount should apply to a party based on the outcome of their case, regardless of the degree of input by a legal professional.

For superior courts where the Commission has recommended that activity-based scales continue to be used, there are a number of possible approaches to calculating costs for SRLs. The simplest option would be to award costs to SRLs using the same scale rates as legal professionals, but this does not appear to be appropriate, given that SRLs do not face

the same unavoidable costs as a legal professional (for example, the costs of a practicing certificate and professional indemnity insurance).

A longstanding arrangement in the United Kingdom has been to award costs to SRLs in accordance with the *Litigants In Person (Costs and Expenses) Act 1975*. This legislation entitles SRLs to the right to recover reasonably incurred expenses in two possible ways. The first option is that an SRL can recover any financial loss they can prove has arisen from time spent dealing with the proceedings — for example, foregone earnings. This financial loss is capped at two thirds of the costs a represented party would be entitled to. Alternately, those SRLs that cannot prove a financial loss can claim any time reasonably spent on their case at a fixed rate — currently £18 an hour — which is also capped at two thirds of a represented party’s costs. The Commission considers that a similar approach may be appropriate in superior courts in Australia, with the amount of costs recoverable by SRLs based on either their actual financial loss or an hourly rate equivalent to average full-time earnings.

For parties who have purchased unbundled legal advice, the share of work performed by a legal professional should be recovered in the usual manner according to court scales. Any reasonable amount of additional work performed by parties themselves should be recovered in the same manner as costs for an SRL.

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.

How should costs be awarded in public interest litigation?

Any set of rules for awarding costs will necessarily carry some degree of uncertainty, which may deter risk-averse disputants from bringing forth meritorious cases. However,

this deterrence will be particularly strong for public interest litigants, who may not have a significant private stake in the outcome of the case to compensate for the costs risk they would be exposed to by litigation (Watters 2010).

The result is that public interest cases may be deterred by the risk of an adverse costs order, resulting in a loss of the potential benefits to the wider community (Consumer Action Law Centre, sub. 49; National Pro Bono Resource Centre, sub. 73; Salvos Legal, sub. 122). The decision not to pursue the case may be in the best interests of the private party, but leave society as a whole worse off. The following section discusses two possible approaches to addressing this problem — protective costs orders and public interest litigation funds.

Protective costs orders

In some cases, courts may decide in advance that a particular party should not have costs awarded against them. Most Australian courts generally do not have a specific legislative regime for addressing these situations. Rather, courts may use their discretion in exceptional cases to depart from the English rule and exempt a losing party from paying costs — often referred to as a protective costs order (PCO).

Courts consider a range of factors in considering whether to grant a PCO. The NSW Land and Environment Court, which is one of the most active in making PCOs, has regard to whether the case affects many people and addresses important issues of statutory construction (PILCH 2011). In other jurisdictions, such as the Supreme Court of Victoria, the court has considered whether a potential public interest plaintiff might otherwise be deterred by the chance of an adverse costs order. This was recently demonstrated in *Bare v Small* [2013] VSCA 204 (box 13.1).

However, some courts appear reluctant to grant protection to parties from costs orders. While protective costs orders are commonly discussed in the context of public interest litigation, the presence of a public interest in a case does not guarantee that a party will receive a PCO:

There is no general ‘public interest’ exception to the operation of the ordinary rule that costs follow the event. Australian courts have differed in their willingness to exercise their power to award costs to make PCOs in public interest matters ... case law provides little guidance on what will constitute appropriate circumstances for making a PCO. (National Pro Bono Resource Centre, sub. 73, p. 33)

A number of submissions suggested that powers to award PCOs should be expanded. The Nature Conservation Council of NSW argued that:

Relevant rules in each jurisdiction should be amended to provide that unsuccessful public interest litigants be exempted from paying costs. (sub. 124, p. 3)

A similar argument was also put forth by Salvos Legal:

... the threat of costs orders discourages public interest litigation. This barrier can be overcome ... through rules of Court which allow a party commencing an action to seek a determination at the outset that the proceedings will not involve a costs liability by establishing to the Court the public interest nature of the case. (sub. 122, p. 2)

Box 13.1 ***Bare v Small***

The recent case of *Bare v Small* is believed to be the first case where a protective costs order (PCO) has been granted to an appeal against a decision of the Supreme Court of Victoria. The decision provides an example of a PCO being granted for a public interest case where the plaintiff might otherwise be deterred by the financial risk of a costs order.

Nassir Bare sought to appeal the Supreme Court's previous dismissal of an application for judicial review of a decision by the former Office of Police Integrity. The Office had declined to investigate an allegation by Mr Bare that police had assaulted and racially abused him. Facing the risk of a significant costs order if unsuccessful, Mr Bare first applied for a PCO before lodging his appeal.

The Court of Appeal granted Mr Bare a PCO, determining that the issue was of public interest and that refusal of a PCO would likely lead to the appeal being abandoned.

The following factors were taken into consideration by the Court in its decision:

- Without a PCO, the appeal would have been abandoned by Mr Bare, as an adverse costs order would have likely bankrupted him.
- Mr Bare had previously sought to reach an agreement with his opponents not to seek costs if unsuccessful.
- The application for a PCO was made early and efficiently.
- No damages were sought by Mr Bare in the appeal.
- The matter raised issues of public interest.
- The claim was not frivolous or vexatious.

Sources: *Bare v Small* [2013] VSCA 204; Brennan (2013); Waters (2013).

The National Pro Bono Resource Centre suggested that there is a need to provide greater certainty and clarity around rules for PCOs to both courts and parties:

... the uncertainty of how courts will exercise their discretion to make PCOs, or relying on the 'goodwill' of the defendant when deciding to pursue litigation in the public interest, is an unsatisfactory state of affairs that dissuades disputants from seeking resolution and submits that there is need for law reform to:

- (a) Confirm every relevant Australian court's jurisdiction to make PCOs and thereby overcome any reluctance to make such orders due to concerns about 'judicial legislating'; and
- (b) Clarify the factors that are relevant to the discretion to make a PCO in public interest matters, one of these criteria being whether the person is being acted for on a pro bono basis;
- (c) Clarify the types of PCO that can be made, and that they can be ordered at any stage of a proceeding. (sub. 73, p. 34)

In addition to seeking a PCO at the outset of litigation, public interest litigants may obtain a ‘no costs’ order on the conclusion of proceedings if the case is not decided in their favour. This approach was first established in the case of *Oshlack v Richmond River Council* (1998) 193 CLR 72. However, there is a great deal of uncertainty surrounding the *Oshlack* principle — its use has been limited, and the power of judges to apply it is widely discretionary (QPILCH 2005). This uncertainty is further compounded by the fact that the costs orders to which *Oshlack* pertains are usually made at the end of proceedings (Watters 2010). Thus the possibility of pleading for a no costs order under *Oshlack* provides little assurance for public interest parties deciding whether to bring forth a case at the outset of litigation.

Public interest cases may include disputes between a private party and government, or between two private parties. PCOs appear to be appropriate in public interest cases involving government. If a matter has been brought before a court in the public interest, it does not follow that the government should be compensated by a private party for the costs of the matter being determined. Ideally — in addition to criteria determining what cases are in the public interest — the granting of PCOs should be tied to requirements for protected parties to conduct the litigation in a reasonable and expedient manner.

The merits of granting PCOs may be more debatable in public interest disputes between two private parties. PCOs shift the costs of public interest litigation onto private parties, by preventing successful opponents of protected parties from recovering their legal costs. It may not be equitable to compel a private party to bear the full costs of a successful case in order to generate public benefits. Further, removing the ability for opponents of public interest litigants to recover their costs increases their incentive to settle out of court. This could unintentionally lead to a loss of the public benefits from a case being determined in court that PCOs aim to encourage.

In response, the Consumer Action Law Centre and Consumer Credit Legal Centre NSW argued that these concerns are not borne out in practice:

... because a central criterion for granting PCOs is the impact such an order would have on a counterparty, and in particular, a private party. The long line of jurisprudence in which a PCO or no cost order has been considered against non-government parties shows that PCOs will not be granted where the impact would be oppressive or disproportionate. (sub. DR202, p. 26)

RECOMMENDATION 13.6

Courts should grant protective costs orders (PCOs) to parties involved in matters deemed to be of public interest that, absent 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.

Public interest litigation funds

A public interest litigation fund (PILF), referred to by some as a ‘justice fund’, is an alternative means of protecting public interest litigants from the effects of an adverse costs award. Such a fund would pay for any adverse costs order against a public interest litigant, in exchange for a share of costs recovered in successful cases that it has funded, similar to existing funds for disbursements in pro bono cases (VLRC 2008). Unlike a protective costs order — where the costs of the public benefits are effectively borne by the opposing private party — a PILF would pass the liability for costs awarded against public interest parties on to the government. In principle, this would be a more appropriate means of addressing costs in public interest cases between two private parties.

Governments already fund public interest litigation to some extent through test case funds, such as funding for Commonwealth public interest and test cases administered by the Commonwealth Attorney-General’s Department. This fund provides grants to cover legal fees and other expenses in cases that may settle an uncertain area or question of Commonwealth law. However, this scheme generally does not provide funding to pay for any costs awarded against public interest litigants (AGD 2012c).

Access to a PILF could be determined by an initial assessment by qualified legal experts of the merits and public interest elements of the case. The criteria used by courts to grant PCOs in disputes with government may provide an appropriate basis for assessment. In its previous recommendation to establish such a fund, the ALRC (1995) suggested that courts should be able to order the fund to pay the costs awarded to a party in public interest cases.

However, given the existing funding constraints facing the legal assistance sector, adequately resourcing a stand-alone PILF would likely prove challenging. The extent to which the fund could be self-sufficient would largely depend on the relative share of cases that lose, requiring the fund to pay costs to opponents, and cases that win, injecting money into the fund. A number of stakeholders pointed out that such a fund would be unlikely to be self-sustaining:

... there are simply far too few public interest cases that proceed to judgment, where the applicant is successful, and where costs would significantly exceed disbursements. (Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202, p. 27)

It is unlikely that the pro bono fund would have sufficient costs to pay for any costs awarded against public interest litigants involving disputes with private parties unless there was some government top up. ... whilst a significant number of public interest litigation cases succeed, the majority fail. (Law Society of South Australia, sub. DR219, Attachment, p. 71)

Given these funding barriers, and the relatively small number of public interest cases, the Commission believes that establishing a PILF as a standalone entity is unlikely to be an efficient use of resources, especially in the light of other uses of funds within the legal assistance space. Rather, the functions of a PILF could be incorporated into existing legal assistance bodies and test case funds. A number of stakeholders supported the integration of a public interest litigation fund into Legal Aid Commissions (Maurice Blackburn,

sub. DR197; Law Council of Australia, sub. DR266; PIAC, sub. DR246). The role of the legal assistance sector in conducting public interest litigation is further discussed in chapter 21.

14 Self-represented litigants

Key points

- Context is important when considering the impacts of self-representation. In some tribunals and lower courts, self-representation is the norm and poses few problems.
- Higher courts dealing with complex disputes and questions of law are less suited to self-representation. While levels of self-representation in these courts are lower, self-representation does, and will continue to, occur.
- There are legitimate concerns about self-representation in higher courts. One concern is the possible impact on a just outcome for the self-represented litigant. While empirical evidence is limited, some studies suggest that self-represented litigants can reduce the efficiency of proceedings, affecting courts and other parties.
- While data are limited, it appears that most people self-represent involuntarily because they cannot afford a lawyer or cannot access legal aid. However, a significant minority choose to self-represent.
- Courts and tribunals already provide users with significant amounts of information, and have substantially changed their processes to make self-representation easier. More tailored training for judges and court staff and clearer guidance on how they can assist self-represented litigants while remaining impartial would help.
- Basic unbundled legal services allow access to legal advice when full representation is unwanted, unaffordable or unavailable. Unbundled services can efficiently and effectively assist self-represented litigants where most needed, such as in complex disputes in formal settings like superior courts — duty lawyer and self-representation services operate in some courts and tribunals, and both have a role to play. However, more could be done to evaluate the effectiveness of these services and to understand how to best extend them to more self-represented litigants.
- Overall, the data on the nature and impacts of self-representation are patchy. More comprehensive data would better inform policy.

The proportion of parties representing themselves appears to be increasing in some tribunals and courts. Some people see this as a problem because they believe outcomes for self-represented litigants (SRLs) are not as favourable as those with legal representation. SRLs are also said to take up more court time and lead to more costly trials.

On the other hand, a number of participants, including members of the judiciary, told the Commission that parties should expect to be able to effectively represent themselves in

many tribunals and magistrates' courts. Indeed, individuals have a right to self-represent in the ordinary course of litigation,⁶⁴ and in all courts exercising federal jurisdiction.⁶⁵

This chapter begins by examining how many people self-represent (section 14.1), their characteristics (section 14.2) and reasons for self-representing (section 14.3). It also looks at the impacts on the individual who is self-representing, other litigants, and the justice system more broadly (section 14.4). The final section examines the effectiveness of current measures to assist SRLs and suggests options for further reform (section 14.5).

14.1 How many people self-represent?

An SRL is a person (or business) seeking to resolve a dispute without a lawyer. Sometimes called an 'unrepresented litigant', 'litigant in person', or 'pro se litigant', the term SRL is used in this report.

Two broad definitions of an SRL include:

... an applicant or a respondent ... on track to appear in a court room in ancillary proceedings, who has given his or her own address for service on documents filed with the [court] ...

... anyone who is attempting to resolve any component of a legal problem for which they do not have legal counsel, whether or not the matter actually goes before a court or tribunal. (Richardson, Sourdin and Wallace 2012, p. VII, citing Family Law Council 2000 and Canadian Forum on Civil Justice 2011)

The second definition captures SRLs outside courts and tribunals, including those who resolve their disputes before or shortly after entering a court or tribunal (Richardson, Sourdin and Wallace 2012).

For the purposes of this report, the Commission has focused on parties without legal counsel who are appearing, or on track to appear, in a court or tribunal. This represents a middle ground between the two definitions above, capturing those areas in which self-representation is of greater concern. While self-representation also occurs outside the formal justice system, there is a lack of information on the extent or outcome of such matters.

People can self-represent for the whole of a matter or engage a lawyer for some parts. For example, they may receive initial advice on their rights from a lawyer, but represent themselves at a court or tribunal hearing.

While there is a perception that numbers of SRLs have been increasing over time, court and tribunal data are patchy and inconsistent. Richardson, Sourdin and Wallace (2012)

⁶⁴ *Collins (aka Hass) v R* (1975) 133 CLR 120, 122.

⁶⁵ Section 78 of the *Judiciary Act 1903* (Cth).

found that very limited data is collected in Australia, and that perceptions of an increase may be greater than the reality.

Across federal jurisdictions, the number and proportion of SRLs varies considerably. For example, actions commenced by SRLs in the Federal Court of Australia were 6 per cent of total cases filed in 2011-12 (FCA 2012), while 75 per cent of immigration applications filed in the High Court in 2012-13 were by SRLs (High Court of Australia 2013). Although the evidence suggests that overall numbers are higher than in earlier decades (Richardson, Sourdin and Wallace 2012), the proportion of litigants who self-represent in the Federal Court and Family Court has fallen over time.

There is even less information available on self-representation in state and territory courts and tribunals. From the limited data available, the proportion of SRLs seems to have increased slightly over time in some jurisdictions. A more detailed analysis of SRLs in federal, state and territory courts and tribunals is provided in appendix F.

14.2 What are the key characteristics of SRLs?

It is difficult to describe SRLs. As the Victorian Law Reform Commission said:

Self-represented litigants are not a homogenous group, but exhibit a wide range of very diverse needs for information, advice and direction as well as exhibiting a wide range of emotional states and responses to litigation. (VLRC 2008, p. 564, citing an internal report from the Supreme Court of Victoria)

Information collected by the Queensland Public Interest Law Clearing House (QPILCH) Self Representation Service suggests that its clients have a diverse set of characteristics (box 14.1). However, QPILCH's clients may not be representative of all SRLs. Given that the Service specifically assists people who are unable to afford legal representation, it is not surprising that its clients are mainly people from low- to middle-income households.

Other studies have found that SRLs are more likely to be male and reliant on welfare payments (Hunter, Giddings and Chrzanowski 2003; Hunter et al. 2002). A report by Dewar, Smith and Banks (2000) found that SRLs in the Family Court were more likely (than the population as a whole) to have limited formal education, limited income and assets, and no paid employment, and that a significant group were dysfunctional serial litigants.

Box 14.1 **Characteristics of users of QPILCH's Self Representation Service (SRS)**

QPILCH's SRS (the Service) was established in October 2007 as part of Queensland's *accessCourts* initiative. Modelled on the Citizens Advice Bureau's self-representation service at the Royal Court of Justice in London, the Service offers discrete task legal advice to individuals, groups and small businesses from a number of Queensland courts and tribunals. All SRLs who approach the Service are given an initial one hour appointment, but ongoing assistance is provided to people who cannot afford private representation.

Between 2007 and 2011, clients of the Service have tended to be:

- *older people*: one half of the clients were between 46 and 65 years of age. Only 3 per cent of clients were below 30 years of age
- *male*: more men than women have approached the Service (54 per cent and 41 per cent respectively, 5 per cent were partners approaching together). However, in 2012-13 an almost even number of men and women sought assistance
- *people with low incomes*: almost half of all clients were dependent on Centrelink for income, with 68 per cent on incomes less than \$26 000 per annum and 83 per cent earning below \$52 000 per annum.

Barriers to access to justice experienced by clients included:

- *disability*: almost one quarter of applicants stated that they had a disability
- *non-English speaking*: only around 3 per cent of clients required an interpreter
- *limited internet access*: just over half of clients indicated that they did not have internet access
- *impaired legal capacity*: these clients accounted for about 10 per cent of the total client base.

Sources: QPILCH (2013a); Woodyatt, Thompson and Pendlebury (2011).

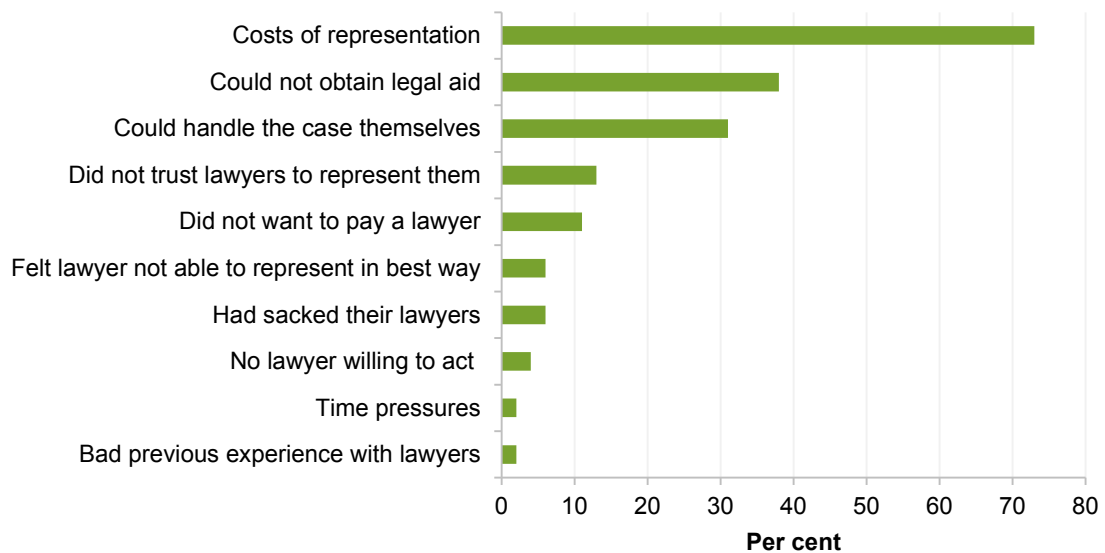
14.3 Why do people self-represent?

SRLs either choose, or may be forced by circumstances, to represent themselves. There is limited evidence on the relative dominance of these factors.

Surveys of QPILCH's Self-Representation Service (SRS) clients indicated a range of reasons for self-representation (figure 14.1). While around one-third considered that they could handle their case themselves, the cost of representation and an inability to obtain legal aid were cited as the main reasons for self-representing.

Figure 14.1 Reasons why people self-represent

Survey results from QPILCH's Self Representation Service^a



^a When the QPILCH Self Representation Service closes a file it sends the client an evaluation survey, which asks the client why he or she self-represented. Clients can indicate more than one response.

Source: QPILCH (sub. 58, pp. 21–22).

Some self-represent by choice

Self-representation can be appropriate in a range of cases, as reflected in the varied motives cited by people for their decision to self-represent:

- *it can be a proportionate response*: for example, in cases where relatively little is at stake or where a dispute can be satisfactorily resolved in a forum set up for self-representation
- *desire for control over proceedings, with a chance to be heard*: some people want to air their complaint in person and manage their case themselves. Others value someone respectfully listening to their case, regardless of the outcome
- *belief that a lawyer is not needed*: a key finding from research in the Family Court of Australia was that, although the majority of SRLs could not afford legal representation, a significant minority did not want or consider that they needed legal representation (Dewar, Smith and Banks 2000). Similar results are seen in QPILCH SRS client surveys (figure 14.1)

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- some may seek a *tactical advantage* from being self-represented: they hope to obtain a stay of proceedings indefinitely, or exhaust the other party's resources⁶⁶
 - *social changes*: growing expectations that the state should provide a system for resolving relatively minor disputes
 - *simpler court and tribunal processes make it easier*: some legal service providers run information sessions to assist individuals to self-represent in low-level matters such as divorce applications and traffic infringements (Senate Legal and Constitutional References Committee 2004; Webb 2007).

Others involuntarily self-represent

The perception is that most people self-represent because legal advice is too expensive or legal aid is unavailable. QPILCH said that:

The phrase 'choose to represent' implies a genuine decision that has been made between competing options. Very few self represented parties would identify as 'choosing' to represent themselves. (sub. 58, p. 21)

The overwhelming majority (73 per cent) of QPILCH's SRS clients reported being self-represented because they could not afford a lawyer (figure 14.1). However, as noted above, this is unlikely to be representative of all SRLs because QPILCH only provides ongoing assistance to those who cannot afford representation.

The Commission's survey of South Australian court users revealed lower rates of involuntary representation, with close to half of partly or fully self-represented survey respondents citing either a lack of affordability or rejection of an application for legal aid as their reason for self-representing (appendix C).

Studies that examine the link between self-representation and legal aid funding are relatively small in number and some are now over a decade old. They provide mixed results on the impact of legal aid funding on levels of self-representation (box 14.2).

However, a number of participants in this inquiry argued that changes to legal aid funding levels and guidelines affect levels of self-representation.

⁶⁶ According to QPILCH (sub. DR247), in its experience, no more than 2 per cent of clients expressed this as a motivating factor. However, it is not clear that this motive would be readily revealed by parties.

Box 14.2 Is there a link between self-representation and legal aid funding?

- The Australian Law Reform Commission (1999b) found insufficient empirical evidence to make the connection between levels of self-representation and levels of legal aid funding.
- The Senate Legal and Constitutional References Committee (2004) concluded (based on anecdotal evidence rather than comprehensive data) that lack of access to legal aid was at least one of the major reasons for an increased number of SRLs.
- In the Family Court, Hunter, Giddings and Chrzanowski (2003) found a strong relationship between legal aid funding for *family law* and self-representation. Around half of SRLs surveyed had applied for legal aid, with 50 to 67 per cent unsuccessful mainly due to means and merits tests and legal aid guidelines. Notably, 25 per cent appeared self-represented while holding a grant of legal aid. An earlier study found that reductions in legal aid funding in July 1997 appeared to have little impact on levels of self-representation in the Family Court (Hunter et al. 2002). Several factors are said to explain this (for example, two out of three registries examined were in New South Wales and it was not until later that restrictions occurred in that state).

The Women's Legal Service Victoria (sub. 33) said that it had seen significant growth in the number of self-represented women in family law proceedings in 2014 due to changes to Victoria Legal Aid's (VLA's) guidelines that came into effect on 1 November 2013.⁶⁷

Other participants echoed this view. For example, Ms McLeay, on behalf of Justice Connect, said:

We saw a 25 per cent increase in inquiries for legal assistance in family law matters when Legal Aid was forced to change its guidelines due to funding restrictions. So we get an increase in demand and a reduction in our capacity to respond. (trans., p. 701)

Changes to legal aid guidelines can affect more than just the numbers of SRLs:

We saw almost immediately a real impact in terms of women seeking our help. ... they were faced with either trying to negotiate a settlement or attending the trial by themselves and arguing their case, and for most of them it wasn't really a choice. You're talking about cases that are high conflict, they've got really complex issues, like drug and alcohol, mental health issues, and it wasn't really a choice for them to attend trial. So we have duty lawyers at the Melbourne Family Court who were negotiating settlements at the door of the court, spending five hours doing that, because we had women who didn't want to go into court to argue their case. (Women's Legal Services Victoria, trans., pp. 804–5)

⁶⁷ In family law cases, VLA's guidelines provide that if one party is unrepresented at trial, the other party will not be eligible for legal aid. Amendments to the guidelines, due to come into effect on 1 September 2014, will partially reverse some of the recent changes. Legal representation will be made available at a final hearing where people who are legally aided meet new eligibility criteria concerning family violence, including matters involving serious allegations of abuse, people with an intellectual disability, acquired brain injury or diagnosed mental health illness (VLA 2014a).

A further reason for self-representing is that sometimes people cannot find a legal representative willing or able to act for them. This may be because of a perceived lack of merit, or difficulties with the personal conduct or behaviour of the litigant which may be the result of disability, mental illness or an inability to communicate effectively in English (AIJA 2001). In some rural and regional areas, the market for legal representation may be thin, providing limited choice for litigants.

As Chief Justice Martin said:

... if you're looking at civil law, there are no private lawyers resident anywhere in the state between Geraldton and Broome ... which is a vast area of coastline if you know the geography of this state — so there's no private lawyer resident in Karratha, there's no private lawyer resident in Port Hedland, notwithstanding that they are substantial centre[s] in their own right. (trans., p. 588)

The type of matter and billing practices used in the private market can also determine whether people can obtain legal representation:

Given the availability of no win/no fee services in personal injury litigation, there are relatively few unrepresented litigants in the field. (Australian Lawyers' Alliance, sub. DR298, p. 9)

Sometimes there is a requirement to self-represent

As discussed in chapter 10, some tribunals require parties to self-represent, subject to limited exceptions. For example, the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) states that parties should represent themselves unless the interests of justice require otherwise (COAT, sub. 98). As the Council of Australasian Tribunals said:

The majority of Australasian tribunals operate under provisions requiring that parties may only be legally represented with the leave of the tribunal. ... there remains, nevertheless, a discretion to allow representation when the proceeding is likely to involve complex questions of fact or law, another party is represented, or all parties have agreed to representation. (sub. 98, pp. 9-10)

The appropriateness and effectiveness of current restrictions on representation in tribunals is discussed in chapter 10.

14.4 What are the impacts of self-representation?

Self-represented litigants can be disadvantaged on a number of fronts

A lack of knowledge about laws and procedures is common among SRLs. The United Kingdom Judicial Working Group on Litigants in Person (Judiciary of England and Wales 2013) found that SRLs frequently have difficulty:

- understanding procedural requirements

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- understanding the concept of evidence and cause of action
 - asking appropriate questions and cross examining
 - identifying and focusing on the determinative issues in a case
 - identifying and paying for expert evidence and interpreters
 - working with opposing counsel.

In more adversarial settings with strict and formal procedures built around a norm of legal representation (such as higher courts), SRLs can be particularly disadvantaged. The NSW Society of Labor Lawyers said:

Whereas the adversarial system generally operates on the assumption that all parties to a dispute [will be] represented by skilled professionals, most self-represented litigants lack a proper understanding of court rules and the substantive law. (sub. 130, p. 20)

While the relative informality of tribunals should remove this handicap, some participants said that increasing legalism in tribunals and growing complexity of the law in areas such as social security and taxation made self-representation in tribunals more difficult. For example, the President of the Administrative Appeals Tribunal (AAT) and former Commonwealth Attorney-General Justice Duncan Kerr said that the way legislation is drafted can be a problem, especially for SRLs in tribunals. The Commonwealth's drafting style — ostensibly purposive but in practice more committed to the ideal of precision — was said to have generated overly prescriptive, detailed, and often impenetrable legislation. This was not only in the obvious areas of taxation and corporations law, but in the definition of welfare rights and their exceptions, and interrelationships with other legislation (pers. comm., 18 July 2013).

In Australia, successful SRLs are unable to recover professional costs, creating disincentives for opposing parties to settle. This contrasts with the position in the United Kingdom where an express statutory provision allows costs to be awarded in such cases. The Australian Law Reform Commission (ALRC) recommended reforms to allow SRLs to recover costs as well as disbursements (AIJA 2001), a position the Commission supports. Recovery of costs for SRLs is further discussed in chapter 13.

SRLs can also be less objective than professional advocates in their approach to litigation (Webb 2007). When the other side has legal representation, participants to this inquiry said that gaps in competency, professional skill and objectivity can make SRLs vulnerable to intimidation and sharp practices from lawyers (box 14.3).

Legal Aid NSW (sub. 68) cautioned on the ability of people to effectively self-represent where they lack the capacity to self-help, for example, because they are illiterate, have English as a second language, or suffer from cognitive impairment, mental health impairment or low educational attainment. These factors are taken into account when assessing applications for grants of legal aid. As Legal Aid NSW said:

... workers with lower education and literacy levels struggle when self-represented at [Fair Work Commission] conciliations and [Fair Work Ombudsman] mediations. Very often self-represented workers do not fully understand the process or the settlement documents that may be used to record any settlement that is reached. The difficulties ... are exacerbated by the fact that employers are usually represented by experienced lawyers and assisted by human resource professionals and conciliators/mediators desire for a quick settlement. (sub. 68, p. 53)

Box 14.3 When SRLs and lawyers go head-to-head, SRLs can come off second-best

Legal Aid NSW said:

[In the Fair Work Commission, without] representation for workers there is a significant power and knowledge imbalance. It is the experience of Legal Aid NSW that workers with meritorious cases can be pressured into settling and forgoing their rights. In many instances, self-represented workers settle for amounts less than their unpaid legal entitlements. Some workers even settle for nothing more than a statement of service. While it is rare for a worker to be ordered to pay legal costs if they lose their claim, it is not unknown for lawyers acting for employers to use the prospect of a costs order to pressure workers into a settlement. (sub. 68, p. 53)

QPILCH also said:

Lawyers for parties in QCAT [Queensland Civil and Administrative Tribunal] often write as if they are involved in litigation in a superior court and this can cause confusion and potential delays where the other party is not represented, and that party is not familiar with the language and formality of legal communications.

An example which we have seen occur several times recently, is where solicitors representing clients in QCAT matters write to the other side, who is self-represented, threatening to seek a costs order if they do not withdraw the proceedings. We have seen several self-represented parties withdraw their proceedings in response to letters like this because they are intimidated and do not understand that costs are only awarded in very limited circumstances in QCAT. (sub. 58, p. 41)

Self-representation can also have social consequences for the litigant. A qualitative study of SRLs in Canada (Macfarlane 2013) found that SRLs experienced a range of negative consequences such as instability and loss of employment caused by the amount of time required to manage their case, and social and emotional isolation as the case became increasingly complex and overwhelming.

Does self-representation affect outcomes?

Identifying whether self-representation *per se* affects outcomes is difficult because of problems in separating the effects from other factors such as the merit of the claim or defence, or the skill of the litigant (ALRC 2000; VLRC 2008). Using Greiner and Pattanayak's (2012, p. 2209) expression, how do we separate the 'hopeless, sure-win, or representation-makes-a-difference cases'? These measurement difficulties mean that the available studies need to be interpreted with some caution.

Supreme Court of Victoria data show that the success rate of appeals by SRLs in the Court of Appeal was very low — 4 per cent in 2011-12, and zero in 2012-13, compared with

29 per cent for all appeals. An ALRC survey of AAT case files from 1997⁶⁸ also found that self-represented applicants were less likely to be successful:

... excluding agency appeals, applicants were successful in 42% of all the sampled AAT cases. An unrepresented applicant 'won' (albeit sometimes only in the sense of getting the case remitted) 23% of the time compared with 51% of the time for represented applicants. Where the applicant had a final hearing the figures were 17% 'success' for unrepresented applicants and 54% if represented. Research conducted by the University of Wollongong and the Justice Research Centre delivered similar results.⁶⁹ (ALRC 2000, p. 795)

The ALRC (2000) noted that some SRLs in the AAT abandoned meritorious cases, or persisted too long with unmeritorious cases. Webb (2007) claimed that SRLs made more serious errors than lawyers when bringing matters before the court (but around the same number of minor or middling errors).

Some participants suggested that self-representation leads to worse outcomes. For example, the NSW Bar Association said:

Data from the New South Wales Motor Accidents Authority shows that claimants with legal representation recover significantly more than unrepresented claimants with comparable injuries. Only a small percentage of the difference in payouts comes from the first group recovering legal costs that the second group does not incur. (sub. 34, p. 21)

However, smaller average claim sizes do not necessarily imply that self-representation led to poorer outcomes. Deciding to self-represent may have been a proportionate response to a smaller claim where legal costs were likely to outweigh any claim recovered. Ernst & Young also found that a lower proportion of the compulsory insurance premium was returned for legally represented claims (EY 2012). For example, less than 28 per cent of the premium was returned to claimants for legally represented claims less than \$50 000, compared to 55 per cent for claims which were not legally represented.

International studies suggest that self-representation negatively affects outcomes, but here too the evidence is relatively limited and comparisons are difficult due to institutional differences. Legal Aid NSW (sub. 68) and Beg and Sossin (2012) cited Canadian and United States studies which showed that representation positively influenced outcomes. Williams' (2011) comprehensive review of the international literature supported this, although few studies controlled fully for case complexity. It also found that in some cases, specialist lay representatives were as effective as legally qualified representatives, and that procedural familiarity was key to this result.

In contrast, a recent United States randomised evaluation found no significant effect on outcomes and, following a review of the literature, found virtually no credible quantitative

⁶⁸ Information was collected from 1665 case files finalised during August, September and October 1997 which were considered representative of cases before the AAT during the 1997-98 financial year, with 'success' deemed if the decision subject to review was set aside, varied or remitted, either by AAT decision or consent (ALRC 1999a).

⁶⁹ Gamble and Mohr (1998).

information on the effect of an offer of, or actual use of, legal representation (Greiner and Pattanayak 2012).

Given the limited availability and age of some of the Australian data and the recent reform efforts from courts, tribunals and the legal assistance sector to better assist and support SRLs, it is difficult to form a view on the impact that self-representation has on outcomes in contemporary Australia.

How does self-representation affect the justice system?

Context is important when considering the impacts of self-representation on the justice system. According to the Australasian Institute of Judicial Administration (AIJA 2001), the extent to which SRLs have an adverse impact on the justice system varies based on a number of factors, including:

- the nature of the jurisdiction (for example, whether it is a court or tribunal)
- whether a matter is regarded as routine or complex.

While some small claims courts and most tribunals are structured around a norm of self-representation, it can be more problematic for higher courts. The adversarial nature of their proceedings places a heavy responsibility on parties to provide all relevant facts and law, which is why legal representation can be expected (Stewart 2011). The AIJA said:

Of particular importance in higher courts are the rules of evidence. The court and tribunal systems are to varying degrees designed around professional people able to work efficiently in these environments. (2001, p. 4)

Self-representation can even have different effects within the same jurisdiction. For example, an increase in SRLs applying for divorce is regarded as a success by the Family Court, although the presence of SRLs in contested matters is regarded as more problematic (AIJA 2001).

SRLs are said to create difficulties for courts by taking up more time and resources than legally-represented parties. Legal Aid NSW (sub. 68), citing a Canadian study, said that SRLs tend to: raise irrelevant concerns to the legal issues in question; cause frustration to judges; prolong the process; submit incomplete documentation; rely on judges to an extent that raises concerns about the appearance of bias; and rely on opposing counsel to an extent that raises concerns about their ability to properly represent the interests of their own client.

The Supreme Court of Victoria keeps track of the hours that staff spend with SRLs in order to assess the impact of self-representation. The Court found that its Self-Represented Litigant Coordinator spent around 44 hours of contact time in total across all SRLs each month during October 2013 to May 2014 in its Trial Division. The Family Court monitors the proportion of SRLs, and has stated that:

Self-represented litigants add a layer of complexity because they need more assistance to navigate the court system and require additional help and guidance to abide by the Family Law Rules and procedures. (AGD sub. 137, p. 14, quoting the Family Court of Australia 2013a)

Although evidence of the impacts of SRLs is mixed, most studies suggest that they use more court resources than represented parties (box 14.4).

There is also evidence that SRLs use more tribunal resources. Legal Aid NSW (sub. 68) stated that in social security matters before the AAT, some processes can take three times longer — for example, a preliminary conference which generally lasts 10 minutes can last at least 30 minutes when the applicant is self-represented, often with little progress. An ALRC (1999a) assessment of the impact of self-representation on case events in the AAT (albeit dated and not taking into account recent reforms) found that:

- cases where applicants are represented more often have consent outcomes and go to a hearing less often
- represented applicants had significantly more case events before finalisation
- self-represented applicants were more likely to ‘drop out early’, or ‘go the full distance’ to a final hearing.

While there is evidence that SRLs take up more court and tribunal resources, these costs are not well quantified. The ALRC (2000) commented that any additional costs caused by self-representation ‘remain unsubstantiated and unquantified’, while acknowledging judicial statements about the difficulties courts face. Similarly, a Senate Legal and Constitutional References Committee (2004) found little evidence of attempts to quantify the costs, although a submission from Westside Community Lawyers Inc. estimated the additional costs of SRLs in the South Australian court system at \$4.8 million (based on a presumption, rather than any empirical evidence, that SRLs caused delays).

Box 14.4 **Mixed evidence that SRLs consume more court resources**

Most studies suggest that SRLs consume more court resources.

- Dewar, Smith and Banks (2000) found that, although matters involving SRLs in the Family Court have shorter disposition times, *so long as they remain in the system* those matters are more demanding of the time of judicial officers and registry staff.
- A Senate Legal and Constitutional References Committee (2004) found that SRLs generally require more assistance from registry staff and take more hours of court time. Further, the strong anecdotal evidence and qualitative research suggested that costs saved by reducing legal aid are outweighed by the potential costs of an increasing number of SRLs, particularly for complex matters and in higher level courts. However, there was no empirical study to confirm this.
- An evaluation of the Dandenong Family Court Support Program found that assisted cases were resolved more quickly and with fewer court appearances (Family Court of Australia 2003).
- The Supreme Court of Queensland (2008) said cases involving SRLs can take longer to hear and determine because their standard of preparation and presentation can be poor and their outlines of argument may be filed late and/or not served on opponents, wasting court time and imposing unnecessary costs.
- A review of Western Australian courts suggested that single judge appeals with SRLs consume on average almost 20 per cent more hearing time than when SRLs are not involved (Malcolm 2004). The assumption that SRLs are 20 per cent more inefficient in court underpinned PricewaterhouseCooper's study into the economic value of legal aid for family law matters (PwC 2009a).
- International studies also suggest SRLs impose higher costs on courts. One study found that cases in which both parties were SRLs had twice the median number of court appearances and a higher number of case conferences, and were more likely to have settlement conferences, trial management conferences and to proceed to trial (University of Toronto Faculty of Law 2011, cited in Legal Aid NSW, sub. 68).

But there are some exceptions, particularly from lower courts.

- Moorhead and Sefton's study (2005) of civil and family litigation in first instance civil courts in the United Kingdom found that there was at best only modest evidence that cases with SRLs had higher numbers of hearings, court orders or other judicial interventions, and that the differences that existed were fairly minor in nature.
- Some studies suggest that it is falsely assumed that SRLs settle less frequently or have more failed hearings. Park (1997) found that SRLs in San Francisco's District Court had substantial settlement rates. Greacen (2002) suggested that the little empirical evidence that does exist suggests that hearings and trials in domestic relations cases take significantly *less* court time when SRLs are involved, and are far less likely to require hearings or a trial than cases with lawyers.

Effects on other parties to litigation

The impacts of self-representation on other parties to litigation has been the subject of some research, with most evidence suggesting that the presence of an SRL creates difficulties for those other parties. Legal Aid NSW observed that:

The economic and social cost of self-represented hearings is not just borne by the self-represented individual and the community, but also the other party to the litigation. (sub. 68, p. 51)

Dewar, Smith and Banks (2000) reported that judges and registrars believed that in 41 per cent of family law cases involving an SRL the other party was disadvantaged. This is consistent with perceptions in other jurisdictions, for example:

In a Nova Scotia study 87.5% of judges thought that self-represented litigants were generally disadvantaged by a lack of representation, while 70% thought the other party was also disadvantaged. (Legal Aid NSW, sub. 68, pp. 51–52, citing University of Toronto Faculty of Law 2011, p. 21)

Perceptions of fairness on both sides of a case can be negatively affected by the participation of an SRL. The represented party may believe that the court has unduly assisted the SRL, while the SRL may feel that the court has failed to provide the level of assistance required to ensure that he or she could properly participate (Stewart 2011).

Several submissions raised concerns about the impact of self-representation on the other party where family violence is involved. The Women’s Legal Service Victoria (sub. 33) and the Law Council of Australia (sub. 96) raised this in relation to the recent changes to VLA’s guidelines. Legal Aid NSW noted that it:

... particularly holds concerns about cases where an alleged perpetrator of violence or abuse who is self-representing is allowed to cross examine the alleged victim or the converse. These practices have led to concern that self-representation can lead to further abuse through a court sanctioned process. These practices can result in the additional social and economic costs that arise from family violence. (sub. 68, p. 53)

Some jurisdictions have special procedures for cross-examining witnesses where an SRL is involved. For example, the *Restraining Orders Act 1997* (WA) limits the ability of an SRL who is bound by a restraining order to directly cross-examine a person with whom they are in a family relationship, or any child witness. Whilst these sorts of protections are appropriate, it is unlikely that they will achieve superior outcomes to having parties represented in proceedings. As VLA said:

It is also a problem for the Court, who has a duty to conduct a fair hearing and to take measures to deal with the manner in which parties engage with each other and also engage with the Court ... There is a situation in Victoria in the state sphere, where the parliament has seen fit to set up a framework to effectively have the Court order legal aid ... to prevent the vicarious trauma to the person from experiencing that cross-examination. (trans., p. 746)

The impacts of self-representation in the context of family law disputes are further discussed in chapter 24.

Some suggest that SRLs make the job of the opposing party's lawyer more complicated by, for example, causing difficulties in meeting professional conduct requirements (QPILCH and Queensland Law Society 2013; NSW Bar Association, sub. 34). QPILCH noted that:

Anecdotally, members of the legal profession offer the opinion that a self represented opposing party makes a case more difficult, and that the Judge will go out of her or his way to provide advice and explanations to the self represented party. (sub. 58, p. 23)

Dealing with SRLs challenges lawyers to work in a more open manner while advancing their client's case, and to communicate with clarity and without jargon (Pulsford 2010). While this can bring advantages, it can also create problems. The NSW Bar Association commented on the difficulty faced by barristers in situations involving SRLs:

The kinds of issues which arise surrounding self-represented litigants mean that some clarification is required regarding the application of the Rules in these situations. For example, there is general prohibition restraining a barrister from conferring or dealing directly with the party opposed to the barrister's client. Further, a barrister must take reasonable steps to avoid the possibility of becoming a witness in the case. Very real difficulties may arise where, for example, a barrister deals directly with a self-represented litigant in relation to settlement negotiations and an issue later arises as to what was or what was not said in the relevant discussions and whether or not an agreement was reached in those discussions. (sub. DR206, p. 7)

The need for clearer guidelines for those who work with SRLs is discussed below.

While participants in this inquiry and domestic and international studies suggest that SRLs can disadvantage other parties and give rise to questions about fairness, the very limited and dated evidence available indicates that self-representation does not appear to raise the legal costs incurred by the other party to a dispute. Fry (1999) found no evidence that a lack of representation by one side increased the costs of litigation in the Family Court of Australia or the Federal Court of Australia.

The overall impacts of self-representation

When assessing the impacts of self-representation — and any consequent policy responses — it is important to look at the costs and benefits from all sides. While policies should acknowledge the right to self-represent, policies should also support people to obtain assistance when it is socially desirable to do so.

In a simple, court-based dispute, a litigant could be better off if they self-represent (for example, in cases where their expected return is not, or is only moderately, affected by having formal legal representation). But in doing so, the SRL could raise the cost to courts. If the savings to the individual outweigh any additional costs imposed on the court system, the community as a whole is better off.

Conversely, where a party self-represents and this imposes substantial costs — to themselves, the opposing party and the relevant court or tribunal — the community as a whole may be worse off. The next section looks at how the costs imposed by SRLs can best be avoided.

14.5 How effective is the system in dealing with self-represented litigants, and what more could be done?

Faulks identified 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)

Although many assume that the solution to the ‘problem’ of self-representation is to arrange for legal representation, the United Kingdom Judicial Working Group on Litigants in Person presented a different perspective:

... litigants in person are not in themselves ‘a problem’; the problem lies with a system which has not developed with a focus on unrepresented litigants. (Judiciary of England and Wales 2013, p. 6)

The former Ontario Court of Appeal Justice Osborne’s 2007 *Civil Justice Reform Project* also said that:

... the civil justice system must exist to serve members of the public — whether represented or not. (Beg and Sossin 2012, p. 197)

Although there is no clear line indicating when self-representation is and is not appropriate, minor or low-level disputes in informal settings with relatively clear and straightforward issues in dispute are more suited to effective and efficient self-representation. While some participants considered that legal representation in minor claims facilitates efficient proceedings (Caruso, Castles and Hewitt, sub. 16), others said that people should legitimately expect to resolve their disputes without legal representation in tribunals and magistrates’ courts.

Making it easier to use the system

Courts and tribunals should be as easy (as possible) to use given that some degree of self-representation is inevitable. Efforts to simplify and demystify Australia’s civil justice system in recent decades have made it easier to self-represent, including through attempts to simplify the underlying law, introduce more informal and flexible hearings, simplify forms and procedures, and assist parties to understand procedures and the issues at hand. There is scope for many of these reforms to be more broadly adopted and further developed.

The use of technologies such as e-filing has also supported the delivery of services to SRLs, and is further discussed in chapter 17.

Simplifying the law

The complexity of the law makes it more difficult for people to self-represent. Some participants suggested ways to address growing complexity that could help all disputants (not just SRLs), such as improving the way legislation is drafted.

As AAT President Justice Kerr observed, altering any established culture of drafting would not be simple: new drafters follow established protocols unless educated otherwise. But laws passed by the Parliament should be intelligible to a well-educated reader — and regulatory costs for litigants, tribunals and courts increase when they are not. Legislation from jurisdictions such as New South Wales and Queensland were cited by Justice Kerr as being generally less detailed and easier to understand (pers. comm., 18 July 2013). The impacts associated with the complexity of the law and possible policy responses are discussed in chapters 3 and 5 respectively.

While addressing complexity of the law would benefit all users of the civil justice system, participants also raised a number of strategies to directly assist SRLs to understand their rights and obligations at law. Providing easy to understand information, such as the Fair Work Commission's bench books on unfair dismissals (LIV, sub. DR221) and plain English factsheets (QPILCH, sub. DR247), were supported by some participants.

However, some participants considered that handbooks and factsheets have their limitations and recommended that either duty lawyers or self-representation services were the most effective and efficient way of assisting some SRLs to understand the law. Legal Aid NSW (sub. DR189) also highlighted the importance of legal assistance services with expertise in specialist areas of law to address the growing complexity. Options for providing information and directly assisting SRLs are further explored below.

Simplifying procedures and forms

While court rules and procedures are understood by lawyers and judges, they can baffle SRLs. Lord Woolf observed:

Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists. The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people. (cited in Webb 2007, p. 167)

Court forms are part of this problem. As the Law and Justice Foundation of NSW said:

All of the legal needs research suggests many in the community have difficulty understanding the legal system, legal processes and legal forms. Therefore, as a matter of general principle, the greater use of plain language in the legal system is to be encouraged. (sub. DR231, p. 12)

Progress has already been made in simplifying rules and procedures. For example, provisions under the *Fair Work Act 2009* (Cth) allow the Federal Circuit Court to deal with certain compensation claims without being bound by the rules of evidence, with parties required to seek leave if they wish to be represented by a lawyer (Federal Circuit Court, sub. DR326). QPILCH (sub. 58) argued that the receptivity of Queensland's courts to SRLs resulted in changes to rules and improvements to access without compromising partiality.

Despite efforts to simplify court rules, procedures and forms, concerns remain (chapter 3). For example, Legal Aid NSW (sub. 68) argued that SRLs in the family law system are particularly disadvantaged by complex court processes, hampering their ability to resolve their problems and increasing costs for parties and legal assistance services. QPILCH suggested looking to other industries for ways to improve court forms:

Courts should consider engaging a plain English language expert to review court forms. While this may appear burdensome and impossible for the complexity of court forms in their current state, the task is not impossible given consumer facing industries such as banks often create disclosure packs for customers in plain English which explain complex provisions. (sub. 58, p. 13)

Strict court timelines also cause difficulties for SRLs. Timelines can be confusing and unfamiliar, and failure to lodge documents in time can completely extinguish rights. QPILCH suggested that:

Registries could assist litigants to understand the complexity of court deadlines through providing a timeline of when documents need to be submitted at the time of filing court documents. This computer generated timeline could serve to alleviate the confusion regarding timelines. (sub. 58, p. 13)

Although simplified procedures and court forms can help, they can be an inadequate response on their own. As the AIJA (2001) pointed out, expert advice must sometimes be given in conjunction with simplified procedure and there is no advantage in creating forms that are simpler than the causes of action for which they are intended.

Shifting towards more active case management

Case management (chapter 11) redefines the role of a judge from a relatively passive role to a more activist one. It provides scope for greater judicial intervention to accommodate SRLs where appropriate by, for example, transferring the initiative in managing pre-trial processes from the parties to the court. Macfarlane's (2013) study of SRLs in Canada found that, although very few experienced case management, those who did were far more satisfied. QPILCH made similar observations with respect to the Australian experience:

The experience we have gained through our Self Representation Service suggests that those courts and tribunals that engage in active case management (such as the federal courts have been doing for a number of decades through the provision of directions and which the Supreme Court of Queensland is starting to undertake after the implementation of Practice Direction 10/2014) are easier for SRLs to navigate. (sub. DR247, p. 33)

QPILCH (sub. 58) also said that case management practices are largely focused on complex and commercial cases, and could be modified to better assist SRLs. It suggested a supervised case list complemented by a practice direction that would allow courts some flexibility for SRLs in litigation against represented parties. A number of courts and tribunals already have practice directions that deal with SRLs.

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.

Assisting those who deal with SRLs

Clearer guidelines for those who work with SRLs

Clearer guidance on when, where and how to assist SRLs can help accommodate self-representation. Judges, court staff and lawyers are currently in a bind:

- judges need to remain (and be seen to remain) impartial and unbiased, while also providing SRLs some assistance to ensure a fair trial and promote a just outcome
- court staff must only offer procedural advice, without overstepping into the realm of legal advice
- lawyers must serve the interests of their client while satisfying their duties to assist the court and adhere to professional ethical obligations.

For judges, the degree and nature of assistance required varies on a case-by-case basis. As QPILCH said:

The nature of assistance to be provided by the court to a self represented litigant depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case. (sub. 58, p. 23, citing case law)

There are a number of sources of guidance for judges on how to deal with SRLs, depending on the court and the jurisdiction. For example:

-
- decisions of the Family Court⁷⁰ set out guidelines for trial judges in that court
 - in Queensland, while the *Equal Treatment Benchbook* (Supreme Court of Queensland Library 2005) provides a detailed set of guidelines, it leaves judges with a great deal of discretion (QPILCH, sub. 58)
 - New South Wales and Western Australia also have bench books that provide judicial officers with guidance on dealing with SRLs (Judicial Commission of NSW 2006; WA DAG 2009).

The AIJA (2001) suggested that courts should have an SRL management plan to deal with SRLs in an appropriate and systematic manner. It has drafted suggested guidelines on how to conduct litigation involving SRLs, which provide a moderately active role for the judge and emphasise the need for neutrality. The guidelines cover issues such as testing evidence, putting hypotheses to experts, questioning witnesses, identifying contradictions and inconsistencies in witness evidence, defining matters in issue at an early stage, and advising SRLs of their procedural and evidential rights (Webb 2007).

Some have raised the need for court staff to be given qualified immunity from rules governing the unauthorised practice of law so that they can more freely assist SRLs (AIJA 2001; QPILCH, sub. DR247; Supreme Court of Queensland 2008). The courts themselves have identified this as an area of concern. The Supreme Court of Queensland (2008) raised the need for court staff to be given qualified immunity numerous times via its annual reports. Dewar, Smith and Banks (2000) reported that judicial officers and court staff at the Family Court of Australia saw the distinction between information and advice as logically and practically unworkable. Others have also suggested that the distinction between information and advice is difficult to make (Giddings and Robertson 2002; Greacen 2001).

Woolf (1995) suggested a more open approach to the role of court staff, allowing staff to advise on remedies, the procedure to pursue those remedies, and the precise manner in which court forms should be completed.

There are also guidelines for lawyers and barristers on how to deal with SRLs. For example, QPILCH and the Queensland Law Society (QPILCH and Queensland Law Society 2013) and the NSW Bar Association (sub. 34) have published guidelines.

Training judges, court staff and lawyers

Effective training can promote confidence in applying the relevant guidelines and helping SRLs navigate courts and tribunals.

Training for judicial and court officers was recommended by the Senate Legal and Constitutional Affairs References Committee (2009). The Australian Government noted

⁷⁰ *In Marriage of Johnson* (1997) 139 FLR 384 and *In Marriage of F* (2001) 161 FLR 189.

the recommendation, observing that various bodies in Australia (court education committees and judicial education bodies) are responsible for professional development of court and judicial officers (Australian Government 2010). While the Commission was unable to determine whether any specific action was taken in response to this recommendation, the need to train court and judicial officers on how to work with SRLs has been recognised for some time. The Supreme Court of Victoria (sub. DR324) noted that the Judicial College of Victoria had conducted a number of programs to assist judges in dealing with SRLs.

Faulks (2013) suggested including such training in the orientation of new judges, and that it should address ethical issues in assisting SRLs and skills on managing them in the courtroom. The National Judicial College of Australia's voluntary National Judicial Orientation Program includes a component on the legal and practical issues for dealing with SRLs (NJCA 2013).

While many courts and tribunals already train their staff and judicial officers, or encourage them to seek such training, efforts are inconsistent and should be improved. For example, the AAT advised that members and staff are provided with a range of training and resource materials relevant to managing and assisting SRLs, including:

- induction programs for members, conference registrars and staff that include components on SRLs
- internal professional development and training over time on relevant topics, including communication skills and working with interpreters
- arranging for attendance at relevant external conferences, courses and seminars
- resources for members and staff such as online learning programs and guides.

In contrast, the ACT Civil and Administrative Tribunal advised that staff do not receive formal training in relation to SRLs, and that staff are trained on the job to deal with clients and to understand the distinction between legal and procedural advice.

It has also been proposed that lawyers should receive training on how best to deal with SRLs. Faulks (2013) suggested that it should be a requirement for admission to practise so that lawyers are aware of their obligations when an SRL is the opposing party. The NSW Bar Association educates its members on SRLs with its *Guide to Barristers on Dealing with Self-Represented Litigants* (sub. 34). Training and education of the legal profession is further discussed in chapter 7.

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.

Providing information to SRLs

Courts and tribunals provide a variety of information to support effective self-representation, including guides and ‘how to’ brochures on law and procedure in print and electronic form, including via video. For example, the Family Court’s YouTube channel has a video explaining the divorce process, and the County Court of Victoria released a short film targeted at SRLs that explains the Court’s administrative procedures. The use of technology to inform SRLs is further discussed in chapter 17.

The information provided by the Federal Court on its website was singled out for praise by QPILCH, which said that it is:

... very easy to navigate, as information is well presented with many helpful links and the website doesn’t over burden the user with content. Rather, content is categorised clearly under one of six main headings (all using plain English) allowing the user to select the most relevant. (sub. 58, p. 13)

In order to maximise its value, information needs to be tailored to reflect the changing circumstances of litigation and the needs of SRLs. The Family Court of Australia (2003) acknowledged that providing information is an ongoing process, and that relevant, comprehensive and comprehensible information at appropriate times during proceedings is better than simply handing out a ‘kit’ at the time of hearing. QPILCH (sub. 58) suggested a need to translate more information into other languages.

Information also needs to reach the people for whom it is intended. The Supreme Court of Victoria introduced an SRL Coordinator in 2006 to provide a single contact point in the registry for procedural and practical advice, as well as referrals for legal advice or representation (Supreme Court of Victoria 2009). The Coordinator has also developed

plain language guides for SRLs on a range of topics (Supreme Court of Victoria, sub. DR324). Following a 12 month pilot in 2013, an SRL Coordinator was also introduced in the County Court of Victoria. An evaluation of the pilot found that the Coordinator reduced the pressure on registry staff and allowed the Court to provide a more even and consistent response to SRLs (pers. comm., 21 August 2014). Canada is moving to introduce ‘triage desks’ in courts, with frontline staff providing litigants with information about where to take their case (Rassel 2014).

Evaluation is necessary to assess whether the time and money spent on producing and disseminating information is achieving its aim of helping SRLs navigate the system. While many courts, tribunals and other organisations are making efforts to provide information, there should be greater evaluation of its usefulness to SRLs. For example, QPILCH said that it evaluates its information via several methods including survey-based evaluations and data mining its website to determine which fact sheets are most popular and which search terms are leading people to its website (‘defamation’ and ‘state of claim’ were the most common phrases in the most recent data results) (pers. comm., 20 August 2014). An evaluation of QPILCH’s fact sheets in 2013 found that, while clients found them useful, improvements could be made such as briefing court staff on their availability and improving linkages between the fact sheets and legal advice (Banks 2013).

Providing general information to facilitate self-help has its limitations. Chiefly, it assumes capability on the part of the SRL. It also does not seem to be what SRLs want — some participants advised that people prefer specific advice about their matter rather than general information. Others suggested that information alone is not effective and needs to be accompanied by advice (AIJA 2001; QPILCH, sub. 58). The American Bar Association said:

Many, if not most, litigants need more than the procedural assistance offered by these resources. They need to know more than which forms to use, how to docket their cases and what time to appear in court. They need assistance with decision-making and judgment. They need to know their options, possible outcomes and the strategies to pursue their objectives. In some cases, pro se litigants need advocates for some portion of their matter. These services can only come from lawyers. (QPILCH 2010, p. 2, quoting an American Bar Association source)

The Senate Legal and Constitutional References Committee also cautioned against overreliance on information alone as a means to assist SRLs:

... undue reliance on legal information services is ill-conceived without ongoing evaluation of the extent to which they actually assist self-represented litigants in resolving their matters. Such evaluation must focus on the extent to which they contribute to resolution of the legal problem and not merely the user’s satisfaction with those services. (2004, p. 198)

Directly assisting SRLs

Notwithstanding the very best efforts to simplify the justice system and make courts and tribunals easier places to resolve disputes, some SRLs would benefit from further assistance. There are a number of options available.

Private or market-based solutions

Making dispute resolution more accessible is one way of directly assisting SRLs. General reform measures recommended throughout this report focus on ways to reduce the cost of dispute resolution by promoting efficient court and tribunal processes and an efficient market for legal services. Implementing these measures means more SRLs could afford and access legal assistance.

A second way of providing more access to dispute resolution is providing parties with more options than choosing between self-representation and full legal representation (table 14.1).

One example of creating more options is to increase the supply of lawyer assistance via unbundled legal services. An SRL might not be able to afford (or want) full legal representation, but might be able to pay a lawyer to assist with certain tasks. The Commission considers that there are good grounds for unbundling, which are discussed in more detail in chapter 19.

Another example is to support assistance from non-lawyers in certain situations. There are three broad types of non-lawyers who help SRLs:

... first, individuals who simply attend court with them to provide moral support or to help take notes; second, individuals who speak as advocates on behalf of the litigant during the hearing; and, third, individuals who conduct the claim for the litigant. (Judiciary of England and Wales 2013, p. 28)

A ‘McKenzie friend’⁷¹ is a non-lawyer who offers an SRL basic assistance such as moral support and help with paperwork, prior to and sometimes during court. McKenzie friends are subject to a number of constraints: the litigant retains the rights to the litigation; McKenzie friends have no rights to be advocates; and the court has discretion to exclude McKenzie friends (CIJ 2013).

Inconsistent rules about the use of McKenzie friends could explain why they are not as common in Australia as they are in some other jurisdictions. Despite the United Kingdom’s familiarity with McKenzie friends, reconsideration of their definition and scope is being urged in that jurisdiction. For example, there may be value in better defining the circumstances in which a layperson may assist a litigant before court, as well as extending

⁷¹ Following the name of the English case *McKenzie v McKenzie* [1970] 3 All ER 1034, which sets out the role of such lay assistants.

the notion of non-legally qualified advocates who are otherwise experts in a field (CIJ 2013).

Table 14.1 The full spectrum of advice and representation options^a

<i>Option</i>	<i>Who performs the task?</i>	<i>What tasks do they perform?</i>	<i>In which forum?</i>	<i>Inquiry chapter</i>
Self-represent without assistance	Self-represented litigant (SRL)	Unrestricted: can perform all components of a legal task	Unrestricted: can appear in any forum	Ch. 14
Self-represent with some non-lawyer assistance	McKenzie friend	Restricted: provide moral support, take notes, assist with paperwork, offer non-legal advice. Cannot act as agent, manage cases outside of court, or represent SRL	Restricted: generally need permission to sit at the bar table with SRL	Ch. 14
	Specialist professional non-lawyer	Restricted: occupational experts (e.g. town planners, industrial advocates) can assist and represent an SRL in certain matters. Some are authorised by legislation to provide a limited range of services (e.g. conveyancer, migration agent, tax agent, patent attorney)	Restricted: depends on relevant legislative scheme. Certain occupational experts are allowed in some tribunals (e.g. VCAT, Fair Work Australia), with permission	Ch. 7 and 14
	Limited licence practitioner (current US model)	Restricted: can advise clients, complete court forms, inform of procedures, explain proceedings, but cannot represent clients in any formal dispute resolution or negotiate with opposing counsel	Not currently in use in Australia	Ch. 7
Self-represent with some lawyer assistance	Lawyer: unbundled	Restricted by agreement to certain actions such as organising discovery or filing applications. Includes duty lawyers and self-representation services	Unrestricted (but may need leave to appear for litigant in some tribunals)	Ch. 14 and 19
Fully represented by a lawyer	Lawyer: traditional	Unrestricted	Unrestricted (but may need leave to appear in some tribunals)	Ch. 6 and 7

^a 'Lawyer' encompasses combined services of barrister and solicitor; essentially, formal representation.

Sometimes non-lawyer representatives (such as migration agents or industrial advocates) are specifically allowed to represent and/or provide advice. For example, section 84B of the *Native Title Act 1993* (Cth) allows parties to appoint an agent. In the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT), generally only registered migration agents can assist applicants. In 2012-13, a registered migration agent assisted 57 per cent of MRT applicants and 73 per cent of RRT applicants:

A migration agent, who may or may not also be a lawyer, can be of assistance to the tribunal member in the conduct of a review, but the inquisitorial nature of the review is such that an applicant without legal representation, or other migration assistance, is not disadvantaged. (MRT and RRT, sub 14, p. 1)

Some people are concerned about the increasing incidence of ‘professional’ lay advocates who charge for their services but may not be subject to duties to the court (Judiciary of England and Wales 2013, p. 29; LIV, sub. DR221; Law Council of Australia, sub. DR266). The Law Council of Australia said that:

... there are strong views within the legal profession that legal practice by non-lawyers should not be permitted. The Law Council does not support the unregulated licensing of lay advocates and other non-lawyers to provide legal services. However, if implemented, all paid lay representation should be subject to the supervision and control of a registered Australian legal practitioner holding an unrestricted practising certificate. This will enable litigants who cannot afford legal representation to have access to a lower-cost alternative, whilst ensuring that the lay associate representing them is supervised and subject to the control of a legal practitioner owing a primary duty to the court and the administration of justice. (sub. DR266, p. 72)

Others suggested that professional non-lawyer representatives effectively assist SRLs in a range of circumstances. Research from the United Kingdom suggested that, in some cases, specialist lay representatives were as effective as legally qualified representatives (Williams 2011). For example, Bill Grant, on behalf of Legal Aid NSW, said that:

... there are perhaps industry people, whether it’s real estate or whether it is some sort of planning or whether it is some form of professional circumstance, where the people would not really be qualified but they are as good an advocate as you are ever going to get and even consumers who have some ability to advocate their own cause will have difficulty matching that level of expertise. ... There are many circumstances where it’s not appropriate to have, not necessary to have lawyers. (trans., p. 182)

Michael Colbran QC, on behalf of the Law Council of Australia, said that:

Once you first identify the specific area in which you don’t really need to be a lawyer to do something that might be allied to legal work and then you provide the panoply of support mechanisms, I’m not sure that there’s going to be that much of a problem. (trans., pp. 1268–9)

While citing the value of professionals such as planning experts and financial planners in certain contexts, the Centre for Innovative Justice (CIJ) also suggested that:

Rather than encouraging an indiscriminate increase in legal work performed by non-lawyers, it is more useful to focus on effective identification of the work that requires qualified legal knowledge and the work that does not. The benefits of better targeting of legal knowledge and expertise are ... that consumers’ resources are more efficiently directed. ... The CIJ therefore suggests that [a] separate inquiry be undertaken to identify further areas of the law which may operate successfully — and potentially more efficiently — without legal representation. (2013, p. 45)

The Commission considers that non-lawyers play an important role in expanding the range of options available for SRLs, and that their use could be improved and promoted.

The role of McKenzie friends could be encouraged through the use of consistent rules or guidelines that define their role in assisting SRLs in courts and tribunals. A code of conduct could also clarify the appropriate boundaries of their role in a hearing, and was

recommended by a United Kingdom report on access to justice for SRLs (Civil Justice Council 2011).

The Commission also considers that there are potential benefits in identifying which areas of law, beyond those for which self-representation is the norm, could operate more effectively and efficiently with non-lawyer assistance. This issue is considered broadly in chapter 7, including the possibility of introducing limited scope practising licences.

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.

An additional option for SRLs is pro bono assistance. The private legal profession coordinates a number of pro bono schemes. For example, the Victorian Bar's Duty Barrister Scheme places duty barristers in the Melbourne Magistrates' Court, the Dandenong Magistrates' Court, and on an ad hoc basis in other courts (Victorian Bar nd). In October 2013, a pilot scheme was introduced in the Victorian Court of Appeal. The NSW Bar Association's Duty Barrister Scheme provides SRLs with advice on a range of civil matters (debt recovery, contract disputes, payment for goods and services).

Some publicly-funded assistance also relies on pro bono support from the private profession, such as the QPILCH SRS. Pro bono services are discussed in chapter 23, while publicly-funded SRL assistance is examined in the next section.

Publicly-funded or subsidised options

Despite the potential of market-based solutions, some SRLs who would benefit from assistance are unlikely to be served by private options. While government-funded legal aid commissions (LACs), community legal centres (CLCs), Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (chapters 20, 21 and 22) play a key role in improving access to justice, they are not accessible by some SRLs. As ACT Legal Aid said:

Most SRLs fall into a 'justice gap' between those who can afford private legal representation and those who are ineligible for a grant of legal assistance. (sub. 27, p. 20)

The two main models that have emerged to fill this gap are duty lawyers and self-representation services SRS (table 14.2). However there are also a number of other

initiatives to assist SRLs. For example, the Federal Circuit Court (FCC) (sub. DR326) said that it is looking to secure funding for a pilot to have financial counsellors present at FCC bankruptcy lists to assist SRLs understand their financial situation, assist in negotiations with creditors and provide referrals for other assistance services. In the United States in 2014, New York State introduced ‘court navigators’ — specially trained and supervised non-lawyers who provide one-on-one volunteer assistance to SRLs in housing court cases in Brooklyn and consumer debt cases in the Bronx (Lippman 2014).

Table 14.2 A snapshot — duty lawyers and self-representation services

	<i>Duty lawyers</i>	<i>SRSs</i>
Nature of service provided	Legal advice on a drop-in basis, including representation in court/tribunal	Unbundled legal advice via pre-arranged appointment; does not extend to representation in court/tribunal Some offer other services such as free mediation
When provided	Last minute, door-of-court	Before or once a matter reaches a court/tribunal
Who provides	LACs, some CLCs and ATSILS	QPILCH; JusticeNet SA; Justice Connect; Legal Aid WA; law schools
Where available	Within court/tribunal	Within court/tribunal
Who receives	LACs: generally not subject to a means test, but targeted at disadvantaged SRLs CLCs and ATSILS: set own criteria, usually based on SRL’s need and type of matter	An initial 45 minute to 1 hour appointment for people with certain existing or prospective matters, with ongoing assistance only provided to those who cannot afford lawyer

Duty lawyers

Duty lawyers have been described as the ‘emergency room professionals’ of courts and tribunals (Buckley 2010). Operating on a drop-in basis rather than by prior arrangement, they provide short, timely intervention (completing documents, seeking adjournments, and appearing on behalf of SRLs) rather than ongoing casework. First introduced to assist SRLs facing criminal charges, duty lawyer services are now available for a range of civil matters.

SRLs come across duty lawyers when their matter reaches the hearing stage at a court or tribunal. Services are provided within, or connected to, the court or tribunal building, and court staff are the prime referral source.

The provision of duty lawyer services is fragmented across a range of organisations and dispute types (box 14.5).

Box 14.5 Examples of duty lawyer services in courts and tribunals

Partnerships between courts/tribunals and legal aid commissions (LACs)

In relation to court-based civil matters, LACs predominantly provide duty lawyer services for family law matters. The Australian Government funds LACs to provide such services in the Family Court of Australia, the Family Court of WA and the Federal Circuit Court (FCC) (Australian Government 2010). A national protocol sets out the basis for service, with principles on prioritisation, conflict of interest, relationships between judicial officers and duty lawyers, and the obligations of duty lawyers (NLA, sub. DR228). For example, Legal Aid NSW's Family Law Early Intervention Unit (EIU) provides duty services at the principal Family Court registries in New South Wales, working closely with counter staff to ensure that SRLs are referred prior to filing documents (Legal Aid NSW, sub. 68).

Certain LACs provide assistance with other court-based matters. For example, VLA provides migration duty lawyers in the FCC in Melbourne.

LACs also provide assistance for a broader range of matters in some tribunals.

- The AAT has schemes with LACs in New South Wales, Queensland, South Australia, Victoria and Western Australia. A legal aid solicitor attends each registry (weekly or fortnightly) and provides initial advice and minor assistance, with the majority for SRLs in the social security jurisdiction. The legal aid bodies fund the cost of these schemes (Commission survey).
- Legal Aid NSW has duty lawyers at a number of other tribunals, including the NSW Civil and Administrative Tribunal and Social Security Appeals Tribunal.
- Duty assistance is available for certain matters at mental health tribunals. For example, Legal Aid ACT provides assistance at the ACT Civil and Administrative Tribunal for SRLs detained under the *Mental Health (Treatment and Care) Act 1994* (ACT), and VLA assists with compulsory involuntary treatment orders at Victoria's Mental Health Tribunal.

Community legal centres (CLCs)

A number of CLCs offer duty lawyer services at various courts, mostly in relation to family law matters. For example, Peninsula CLC (sub. 28); Women's Legal Service Victoria (sub. 33); Hunter CLC (sub. 26); Central Highlands CLC Inc. (sub. 13); and Wyndham Legal Service Inc. (sub. DR163).

While LACs, CLCs, and ATSILS all offer duty lawyer assistance, LACs partnering with courts (and sometimes other agencies) are the main providers, using both in-house and private lawyers. In 2012-13, Australia's LACs provided 382 000 duty lawyer services, although the majority of these involved criminal matters. Duty matters were 14 per cent of ATSILS services in 2011-12, although the bulk of this is also likely to be for criminal matters (chapter 22).

Eligibility for duty lawyer assistance depends on the provider. Services are generally rationed according to a combined assessment of the SRL's need for assistance, the type of matter at hand (and the organisation's ability to assist), as well as a 'first come first served' principle. Legal Aid NSW said that:

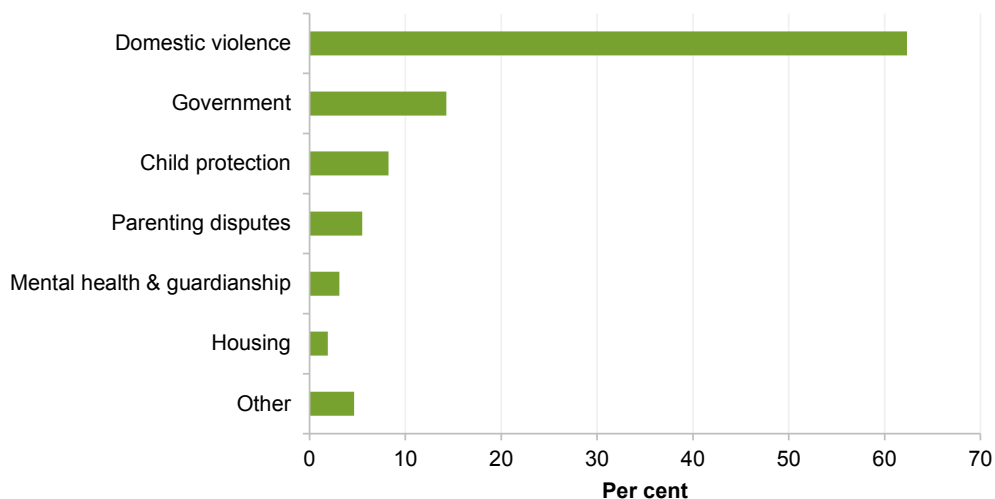
In determining the extent of assistance, our lawyers consider the characteristics and capacity of the self-represented litigant, complexity of the area of law, impact on the self-represented litigant if assistance is not provided and the cost/benefit in providing assistance. (sub. DR189, p. 29)

While LAC duty lawyer services are generally not subject to a means test, they are targeted at disadvantaged SRLs. As National Legal Aid (NLA) said:

The assistance by duty lawyers is sometimes more extensive by reason of the person being assisted being ineligible on means, but clearly not having the capacity to engage a private lawyer, or to continue unassisted. (sub. DR228, p. 22)

Data from VLA show that its duty lawyer assistance for civil matters overwhelmingly focuses on family disputes (figure 14.2).

Figure 14.2 Duty lawyer sessions performed by Victoria Legal Aid^a
Civil and family law only, by matter type, 2012-13



^a 'Other' denotes equality/discrimination; debt; consumer; rights; financial matters; other family; migration; and other civil (civil matters which do not fall within any other specified category).

Data source: Victoria Legal Aid unpublished data.

Of the 18 205 duty lawyer services provided in 2012-13 for civil law matters, 62 per cent were concerned with domestic violence, 8 per cent with child protection and 5 per cent with parenting disputes. Government matters also comprised a substantial proportion of services (14 per cent).

Self-representation services

Like duty lawyers, self-representation services (SRSs) offer unbundled legal assistance, but can offer more than 'last-minute' assistance at the court door.

QPILCH's SRS (the Service) (box 14.1) pioneered the SRS model in Australia. The Service offers assistance at all stages of litigation including drafting and amending pleadings, advice on disclosure and evidence, settlement negotiation and preparation for trial (Woodyatt, Thompson and Pendlebury 2011). The Service also offers a free mediation service, and coordinates a Settlement Conference Service for small claims commenced in the FCC under the *Fair Work Act 2009* (Cth) (QPILCH, sub. DR247).

In contrast to duty lawyer services, SRS providers do not generally appear on behalf of SRLs.

SRSs are provided across eight jurisdictions by the following four providers: QPILCH (Queensland), Legal Aid WA (Western Australia), JusticeNet SA (South Australia and Northern Territory), and Justice Connect (ACT, New South Wales, Victoria and Tasmania) (AGD, sub. DR300). While QPILCH's SRS has been operating in some Queensland courts since 2007, other jurisdictions have only established SRSs during the last year or so.

A number of law schools also provide SRLs with unbundled assistance analogous to SRSs. For example, the South Australian Magistrates Court Legal Advice Service (operated by Adelaide Law School since 2002) and Monash University's Family Law Assistance Program provide free legal advice from law students who are overseen by qualified lawyers.

Eligibility for assistance depends on the nature of the legal problem, whether the matter has a good chance of succeeding, and the SRL's ability to afford a private lawyer. If eligible, an initial 45-60 minute consultation with a solicitor is offered, with further appointments made as necessary. For example, both QPILCH and JusticeNet SA offer assistance for SRLs in the FCC or the Federal Court for bankruptcy, judicial review, anti-discrimination, competition and consumer law, information privacy, Fair Work and appeals. For assistance in the relevant state courts, SRLs need only have an existing or prospective proceeding in the civil jurisdictions of those courts.

Compared with the number of duty lawyer services, SRSs deal with a much smaller volume of matters. For example, in 2012-13, QPILCH provided 559 one-hour appointments (282 in the Supreme and District Courts of Queensland and 277 in the Queensland Civil and Administrative Tribunal (QCAT)) (QPILCH 2013a). Since beginning its service in the Supreme Court of South Australia in September 2013, JusticeNet SA advised that it had provided 52 appointments (sub. DR280).

SRSs currently offer assistance for matters that are not well serviced by duty lawyers. In 2012-13, QPILCH's SRS dealt with mainly business and commercial, consumer and debt, wills and estates, mortgage repossession and property dispute matters in the Queensland state courts. In QCAT, guardianship and administration, residential tenancy and appeals were the main areas of law (QPILCH 2013a). From JusticeNet SA's limited period of operation in the Supreme Court of South Australia, the majority of clients sought assistance with appellate proceedings or as defendants in mortgage repossession proceedings (sub. DR280). Data from QPILCH's SRS at the Federal Court from February

to June 2014 show that a majority of applications for assistance were for Fair Work and bankruptcy matters (sub. DR325).

Which model works better?

One measure of effectiveness is the ability to divert inappropriate matters away from courts and tribunals. The evidence suggests that both models are successful on this front, providing a ‘reality check’ for clients as well as advice on resolving their dispute without taking it to a court or tribunal.

- An evaluation of Legal Aid NSW’s Early Intervention Unit Duty Service at Parramatta Family Law Courts found that the service was effective in diverting matters from the court and ensuring appropriate court documents were filed (box 14.6). Legal Aid NSW also reported that after getting legal advice at the SSAT and AAT, clients often withdrew their appeal or obtained the evidence they needed to qualify for a social security payment (sub. 68).
- In 2012-13 just over 60 per cent of SRLs who were encouraged by QPILCH’s SRS to discontinue or not commence proceedings, accepted that advice and took steps to bring their proceedings to an end (QPILCH 2013a, sub. 58).
- In Queensland’s trial divisions over 2008–10, 82 clients were diverted from the Supreme and District Courts. Of the 18 clients who went on to commence proceedings self-represented, 13 were counselled to pursue alternative dispute resolution, and 8 continued to receive assistance (Woodyatt, Thompson and Pendlebury 2011). Diverting these 82 matters from the courts saved an estimated \$98 000 to \$140 000.⁷²

An evaluation of the Dandenong Family Court Support Program, which provided duty lawyer services and other coordinated assistance to SRLs, found that assisted cases were resolved more quickly and with fewer court appearances (Family Court of Australia 2003).

One often cited drawback of the duty lawyer model compared with the SRS model is its ‘last minute’ nature. QPILCH pointed out that the Civil Justice Council (2011) said that earlier intervention had assisted SRLs in England and Wales:

While duty lawyers can give valuable assistance to SRLs on their trial or hearing day, there are serious limits to the amount of value that duty lawyers can really add to a case. In civil litigation, the pre-trial steps, the pleadings, discovery, are absolutely critical. The day of trial is often too late to amend a document. [QPILCH’s SRS’s] model of discrete task assistance throughout the proceedings addresses that gap in duty lawyer and other legal assistance schemes. (sub. 58, p. 26)

⁷² Commission estimate based on data from the Report on Government Services 2011 (SCRGSP 2013a). Between 2008-09 and 2009-10, the average real net recurrent expenditure per finalisation for civil matters was \$1199 in the District Court and \$1709 in Queensland’s Supreme Court (2009-10 dollars).

Box 14.6 **Legal Aid NSW Family Law Intervention Unit**

The Family Law Early Intervention Unit (EIU) is a statewide specialist service of Legal Aid NSW, funded under the *National Partnership Agreement on Legal Assistance Services*. The broad goals of EIU duty services are to:

- increase SRLs' early access to expert legal assistance at NSW Family Law Courts
- assist clients to take timely and appropriate action to progress or resolve their family law matters efficiently and effectively
- help reduce the impact of SRLs on the workload of the Family Law Courts.

An evaluation of the EIU duty service at the Parramatta Family Law Courts found that, while duty services are not means tested, they reached and assisted disadvantaged clients because of the placement of the duty service (in Family Law Courts that are geographically accessible to a range of relatively disadvantaged areas, communities and clients). Also the 'triage' function of the EIU duty lawyers meant that priority is based on urgency, capacity and need.

Advice was provided in around 84 per cent of matters (in four out of five matters clients received more than one type of assistance). While the service was found to reach some clients 'early' (as they walked into the court for the first time having just separated from their partner/spouse), it also assisted clients in finalising matters before the court. As Legal Aid NSW said, 'a critical feature of the family law duty service is its availability at the time and site of the crisis' (sub. 68, p. 59).

Minor assistance was provided to clients in over 45 per cent of the matters dealt with by the EIU duty service at Parramatta, most commonly in the form of drafting and amending documents. It was found that, particularly if provided at the point of filing, assistance made a material difference to the efficient progress of these matters through the court. Representation was provided in 12 per cent of matters and included some complex and time-sensitive matters, such as child recovery and Airport Watch List matters.

Over a two month snap-shot period, for one-third of matters seen, clients had been seeking to commence an action that was not appropriate to progress their family law matter. The EIU successfully redirected these people to alternative pathways — de-escalating proceedings between parties and saving court time.

The introduction of the EIU Service at Parramatta Family Court resulted in a 160 per cent increase in the number of duty matters assisted by Legal Aid NSW. Where matters did progress to court, the EIU service assisted clients to progress their matters more efficiently, with 16 per cent of matters finalised by the court on the day or finalised by consent. While the evaluation could not measure the difference made by the EIU per se, feedback suggested that the impact could be considerable, particularly in assisting the courts.

Sources: Forell and Cain (2012); Legal Aid NSW (sub. 68).

Macfarlane also found that:

While many SRLs appreciated the assistance they received from duty counsel or other *pro bono* legal services, the study also found dissatisfaction. ... While this model works well for some SRL's, others find a time limited opportunity to speak with legal counsel leaves them more confused, and even panicked, than before. (2013, p. 13)

Woodyatt, Thompson and Pendlebury (2011) suggested that, compared with door-of-the-court services, SRSs enable a deeper relationship with the client and greater potential to develop trust and influence, and more time to help them understand the litigation process. Client evaluation surveys also show positive results (Banks 2012; Woodyatt, Thompson and Pendlebury 2011). However, it is unclear to what extent these benefits translate into better outcomes. QPILCH also said:

Other benefits, including social benefits for self-represented litigants and social and economic benefits for opposing parties, must not be ignored. Whilst difficult to quantify, in our experience, the benefits of providing unbundled legal services to self-represented litigants far outweigh the costs. (QPILCH, sub. DR. 247, p. 34)

Compared with duty lawyers, SRSs provide a superior opportunity to divert unmeritorious matters from courts. However a recent evaluation of the QPILCH SRS (Giddings et al. 2014) found that many SRLs were referred quite late in the litigation process, suggesting that its greater potential to divert inappropriate cases from courts and tribunals may not be fully realised. A key recommendation from the evaluation was to better promote the benefits of the SRS to enable more timely referrals. It is also clear that duty lawyer services have had some success in diverting unmeritorious cases.

The cost of duty lawyer services can vary considerably, depending on the matter type. For example, preliminary data from VLA⁷³ indicated that while the average cost attributed per duty lawyer session was around \$205, duty lawyer assistance for mental health and guardianship was estimated to cost as high as \$545 per session. For domestic violence (which comprised 65 per cent of VLA's duty lawyer services in 2012-13), the cost attributed to the service was around \$165 per session. These costs can vary for many reasons, including the different intensity of service needed for different complexities of matters.

Cost data from other jurisdictions are less clear. Based on National Partnership Agreement reports, the average cost of a LAC duty lawyer service in Australia was around \$375 per service in 2011-12. However, this figure includes criminal matters, and it is unclear whether the costs differ significantly for civil matters. The costs of providing such services by CLCs and ATSILS are unknown.

QPILCH's SRS has a Queensland-wide annual cost of \$300 000, funded by the Queensland Government from a mixture of recurrent and non-recurrent funding from the Legal Practitioner Interest on Trust Accounts Fund. It also relies substantially on the pro bono assistance of lawyers from private firms. In 2012-13, QPILCH's SRS received 317 new applications for assistance and conducted 559 appointments of at least one hour's duration (QPILCH 2013a). This suggests that each appointment cost around \$530, although resources are also used outside the allocated appointment on research, advice and follow up. Given that each client has an estimated average of three to four appointments

⁷³ VLA provided preliminary data from its Financial Performance Model, which is yet to be finalised.

each, the cost for each person is around \$1600 to \$2130 (QPILCH, pers. comm., 24 July 2014).

The Australian Government decided to invest \$4 million over four years to enable the national rollout of the SRS, based on the Banks (2012) evaluation of the QPILCH SRS. The evaluation concluded that ongoing funding and expansion into other jurisdictions could assist in creating both immediate and longer term cost-savings for the federal courts (AGD, sub. DR300). As noted above, the SRS is now provided in eight jurisdictions.

Given the different nature of assistance provided and types of matters serviced by duty lawyers and SRSs, a simple cost comparison does not compare like with like. The available data suggest that SRSs and duty lawyers focus on different areas of law, and service clients in different ways.

Where to from here?

Although a number of studies confirm positive effects on litigant and court staff satisfaction when SRLs receive assistance, there is little evidence for either model on how the services led to better *outcomes* for SRLs. While QPILCH collects data on the outcomes of applicants eligible for assistance, it said that current resources do not make it possible to quantify the social impact of the service, or the economic benefit to the court/tribunal achieved by assisting litigants to be better prepared or convincing litigants to take more appropriate steps in their proceedings (sub. DR325).

Inquiry participants had mixed views. Some viewed duty lawyer services as more effective (Allens, Ashurst and Clayton Utz, sub. DR224; NLA, sub. DR228), while others preferred SRSs (JusticeNet SA, sub. DR280; and QPILCH, sub. DR247, both of whom are also providers of SRSs).

The expansion of duty lawyer schemes has been recommended in the past. For example, the Senate Legal and Constitutional References Committee (2004) and Senate Legal and Constitutional Affairs References Committee (2009) recommended further funding for duty lawyers on the basis that they assist SRLs to better prepare their evidence and narrow the issues in dispute. However, it was also noted that lawyers who merely perform a role as a mouthpiece, consulted only minutes before the matter is heard, would not adequately address problems raised by lack of legal representation.

NLA raised the prospect of a national duty mediation service at all family law courts, to pick up those matters that had, for one reason or another, reached court but still had the capacity to settle without needing to proceed to a hearing (trans., p. 945).

It is also important to reflect on how these services and their providers fit together in the legal assistance landscape. Some courts and tribunals are host to more than one organisation providing duty lawyer services and/or SRSs. For example, VLA and Peninsula CLC both offer a duty lawyer service at the Dandenong FCC. While this may

sometimes assist with resolving conflict of interest issues (Hunter CLC, sub. 26), there may be some duplication in assistance for SRLs.

A further consideration is the possible scope for co-contributions from SRLs to offset costs to taxpayers so that funding could be used to assist more litigants. User contributions would create better incentives (although user contributions from individuals with extremely limited means would be inappropriate: chapter 21). While some participants suggested that the cost of administering this would outweigh the benefits (LIV, sub. DR221; NLA, sub. DR228; and QPILCH, sub. DR247), the Commission considers that a pilot, as suggested by the CIJ (2013), could be worthwhile. Given that the SRS has recently been expanded on a national basis, the CIJ suggested that a pilot could be adopted at one site:

... legal aid commissions have, at various times, accepted a level of fee or contribution from some clients for a limited range of services or ... taken out a caveat over a home. It is feasible, then, for legal aid commissions to investigate the development of a fee for service model on a wider basis — in which clients with moderate means, who would otherwise be ineligible under Legal Aid guidelines, can elect to pay for representation by a legal aid lawyer, or a private lawyer who conducts legal aid work, on the basis of the relevant statutory scale. (2013, p. 35)

Ultimately, the Commission can see a role for both duty lawyers and SRSs in the legal assistance landscape. A court or tribunal hearing will remain the first entry point into the civil justice system for many people, so there will always be a need for the sort of last minute assistance provided by duty lawyers. However, the unbundled legal assistance offered through SRSs is quite a different service. While providing a valuable service for SRLs, SRSs may also help to normalise the general provision of unbundled legal services.

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 also be beneficial.

Learning more about the experiences of SRLs

Not enough is known about SRLs in Australia. There is almost no qualitative data that explain their experiences (Richardson, Sourdin and Wallace 2012). Internationally, a good example is the recent qualitative study of the experience of SRLs in three Canadian provinces (Macfarlane 2013).

Over the past decade or so, several reports have recommended further and ongoing research into SRLs' characteristics and needs, so that services can be better designed to meet those needs (AIJA 2001; Senate Legal and Constitutional References

Committee 2004; VLRC 2008). These also recommended that data on SRLs be collected, analysed and published — yet little progress has been made.

Court and tribunal case management systems need to move beyond collecting data for immediate operational needs and move towards collecting data for evaluation and strategic planning. Richardson, Sourdin and Wallace (2012) reviewed the data on SRLs collected in the Commonwealth civil justice system and recommended that agencies:

- supplement existing case management IT systems with a mandatory SRL field
- develop and agree on a common definition of an SRL
- collect information on the basis of this clear definition and report on a range of information about SRLs and how they interact with the civil justice system.

The Commission understands thatQPILCH is working with the Queensland courts to collect data so that SRLs coming through QPILCH's SRS can be compared with other SRLs who go on to represent themselves in court. The Commission commends this project as a way to enable robust evaluation of the effectiveness of the SRS model.

The need for better evidence and data is discussed in chapter 25.

15 Tax deductibility of legal expenses

Key points

- The tax system allows parties that incur expenses that are sufficiently connected to gaining or producing assessable income, including legal expenses, to deduct those costs from their taxable income.
- Not all parties who incur legal expenses do so in the course of earning income, and so the entitlement of disputing parties to deduct litigation costs can be asymmetric, with only one party — typically business — able to claim a deduction.
- The asymmetry of tax deductibility arrangements is seen by some as inequitable and considered particularly problematic where it accentuates imbalances of bargaining power in litigation — providing taxation relief to well-resourced parties and/or parties that are acting strategically.
- In practice, the asymmetric treatment of tax deductibility is only relevant in a very small subset of disputes between individuals and business.
- Various solutions have been proposed for addressing the perceived inequities in tax deductibility arrangements and ensuring the tax treatment of legal expenses does not stymie incentives to resolve disputes early and efficiently, though few stand up to policy scrutiny. The few that do would be costly to implement.
- More targeted solutions, as set out elsewhere in this report, would be more effective in addressing imbalances in bargaining power than amending the tax law.

Arrangements governing the tax deductibility of legal expenses are commonly featured in reports on improving access to justice. Their perennial presence reflects two factors.

- First, the ability of some parties to a dispute to claim their legal expenses as a tax deduction while others cannot is seen by many as inequitable, particularly where it further accentuates resource imbalances between parties.
- Second, any measures to address these perceived inequities need to be considered not only through the lens of ‘access to justice’ but also through the lens of tax policy — with all of the latter’s associated complexities.

Suggested policy responses can vary markedly depending on the perspective adopted. While the issue is often raised, solutions are seldom identified, with most reviews concluding that the issue warrants further analysis and investigation.

The chapter begins by briefly outlining current arrangements governing tax deductibility for legal expenses and how they impact on parties’ access to justice (section 15.1). The following section (section 15.2) explores a range of proposals that have been put forward

as a means of addressing the perceived inequities inherent in current arrangements — taking into account both the access to justice and tax policy implications.

15.1 Why does tax deductibility matter for access to justice?

Section 8-1 of the *Income Tax Assessment Act 1997* (Cth) allows parties that incur expenses related to producing or defending income (including legal expenses) to deduct those costs from their taxable income. These expenses are often referred to as ‘revenue’ expenses — for example, legal costs to recover debts owed to a business.

In contrast, costs or outgoings of a private or capital nature are not deductible. Hence, legal costs incurred in defending a Family Court proceeding or costs incurred by an individual in dispute about the provision of goods and services consumed in a private capacity are considered ‘private’ costs and are not tax-deductible (Chow 2014).

It is not the tax deductibility of legal expenses per se that gives rise to access to justice concerns. Rather, it is that the entitlement to deduct litigation costs can be asymmetric, with one party — typically business — able to claim a deduction.

Justice Sackville characterised the consequent imbalance in the following way:

Thus, in a sense, the general body of taxpayers is subsidising the business litigant’s decision to litigate, to engage expensive legal representation (if this course is adopted), and to use the publicly funded court system. By contrast, the private litigant must bear the full costs of the litigation including court costs, unless he or she recovers costs from the opposing party in the proceedings. (AJAC 1994, p. 219)

Further, some argue that tax deductibility works against the efficient resolution of disputes, including by reducing the deterrent effect of the costs indemnity rule (see chapter 13), since parties are also able to deduct costs associated with an adverse costs order.

Arrangements are seen as particularly problematic where they accentuate imbalances of bargaining power in litigation — for example, where they provide taxation relief to well-resourced parties, or parties that are acting strategically. As the Law Reform Commission of Western Australia said:

While there are general obligations not to waste court time and resources, there is little attention paid to the meaning of these obligations when lawyers act for well-resourced clients who can, in practice, pursue every avenue for tactical purposes without regard to the taxpayer. The tax deductibility of legal fees as a business expense aggravates this problem. (1999, p. 331)

However, it is important not to overstate any imbalance. Legal expenses are only deductible to the extent that the litigant has assessable income from which they can be deducted and deductions are only available after the legal expense has been incurred. And not all businesses seeking to deduct expenses are big, strategic players:

Care must be taken not to overstate this argument. Many business litigants are small businesses that are forced to resort to legal proceedings in order to recover debts, enforce contracts or otherwise pursue necessary commercial objectives. (AJAC 1994, p. 220)

Beneficiaries of current arrangements also argue that there are other incentives to discourage overly litigious behaviour:

Suggestions that tax deductibility of litigation expenses is in some way an incentive for a business to pursue litigation do not take account of the reputational consequences, the supervision of proceedings by the court and the potential for adverse costs orders for a litigant pursuing unmeritorious claims. (Australian Bankers' Association, sub. 121, p. 4)

A further concern relates to the ability of business litigants to claim tax deductions for legal expenses without any assessment of the merit of the case or the reasonableness of the expense. However, tax deductions are generally available for any expenses incurred in gaining or producing assessable income. To do otherwise would put the tax authorities in the invidious position of having to determine what expenditure is, and is not, meritorious for a business to undertake. There is already a strong financial incentive for businesses to incur only those expenses from which it expects to gain. Even a full tax deduction only reduces the tax payable by the percentage tax rate that the business faces, not the total cost incurred.

What share and type of disputes are affected?

It is important to understand the share of disputes affected by asymmetric tax arrangements, since it informs both the potential scope of the problem, as well as the potential gains from any reforms.

Both parties can typically claim legal expenses in business to business disputes, and disputes between individuals tend to be of a private nature and so neither party is entitled to claim a deduction. A similar situation exists in disputes between individuals and governments. Hence, asymmetry of tax deductibility generally only affects those disputes in which one party is an individual and the other a business.

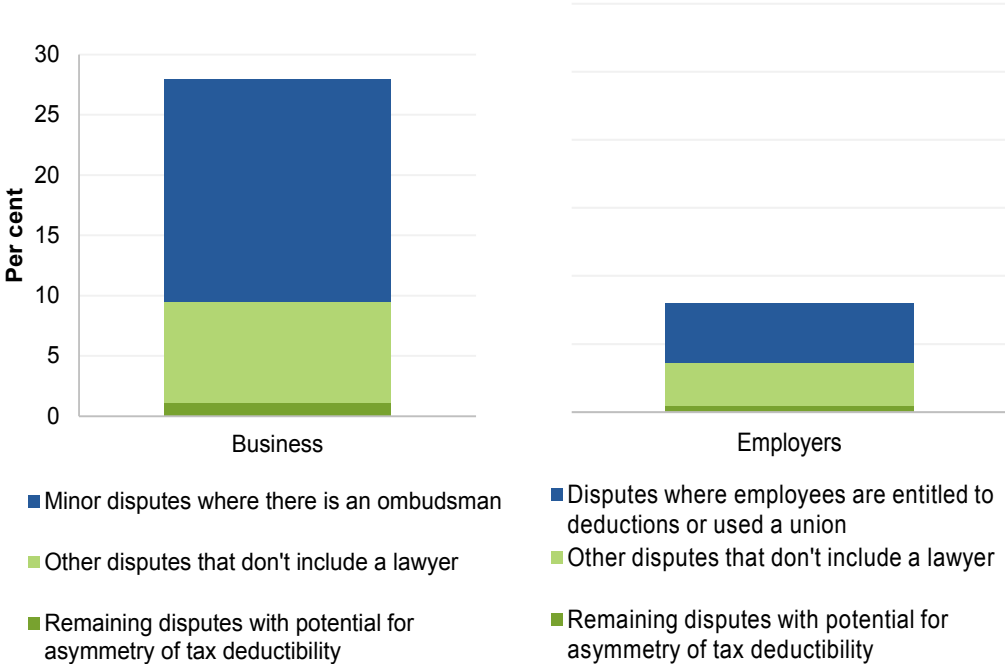
The Commission has used unpublished *LAW Survey* data to obtain estimates of what share of disputes may be affected.

Based on those data, disputes between individuals and businesses, financial institutions or employers constitute about 36 per cent of all disputes.⁷⁴ However, not all disputes between individuals and businesses necessitate the use of a lawyer and therefore deductible expenses. Many disputes are minor and/or can be resolved through industry ombudsmen

⁷⁴ The 36 per cent is broken down into two categories in figure 15.1 — disputes with businesses and financial institutions (the left hand column) and disputes with employers (the right hand column). Some respondents nominated as owning a business themselves, and so a proportion of these disputes may be among businesses, which may mean that a smaller proportion are subject to an asymmetry of tax deductibility.

(such as those that operate in the insurance, finance, telecommunications, energy and water sectors) (figure 15.1). These ombudsmen are funded by businesses on an industry-wide and per-case basis, and they provide services at no cost to consumers (chapter 9). Tax asymmetry is therefore not an issue.

Figure 15.1 Disputes with potential asymmetry of tax deductibility
 Measured as a percentage share of all problems



Source: Commission estimates based on unpublished LAW Survey data.

Of all disputes between individuals and businesses or financial institutions (excluding employee disputes), only 4 per cent involved a lawyer.

Less than 10 per cent of all disputes relate to employment matters. Employees can generally claim deductions in disputes arising out of employment agreements (ATO 2000) — two fifths of employment problems — and so there is no asymmetry in these cases. Further, in employment disputes, employees sought advice from a union or other professional association in 28 per cent of cases, in contrast to seeking the advice of a lawyer (utilised in 14 per cent of cases). Union costs can generally be claimed as tax deductions and raise no asymmetry issues (ATO 1999). Excluding the cases where employees are entitled to deductions or unions are involved leaves 45 per cent of all employment matters, and further excluding cases where lawyers were not consulted leaves 6 per cent of all employment matters.

Where individuals are involved in class actions and/or meet their legal expenses through a litigation funder, the litigation funder can claim legal expenses as part of its business operations, so there is again no asymmetry with respect to tax deductibility (chapter 18).

Therefore, out of all disputes between individuals and businesses, financial institutions or employers, less than 5 per cent involve both an asymmetry of tax treatment and substantive legal costs (using the cases where the individual consulted a lawyer as a proxy). This represents less than 2 per cent of all disputes (figure 15.1).

The small number of disputes for which asymmetry in tax deductions would make a substantial difference suggests that reforms in this area are unlikely to yield significant benefits.

15.2 A framework for considering the options

A number of reform proposals have been put forward, in the course of this and past inquiries, to address perceived inequities in current tax deductibility arrangements. These include proposals which seek to:

- withdraw deductibility for legal expenses either generally or where the other party cannot claim legal expenses as a deduction
- withdraw deductibility for particular aspects of legal work, with a view to bolstering incentives to compromise prior to litigation, such as allowing tax deductibility for alternative dispute resolution but not for litigation
- remedy any perceived inequity by extending deductibility to both parties, by permitting certain non-business litigation expenses incurred by individuals to be tax deductible, up to specified limits. (This would be akin to insurance arrangements, since it has been suggested that it would best apply to the category of costs that are ‘over and above’ those to be expected in the ordinary transactions involving most people (analogous to the medical expenses rebate))
- ensure that deductions can only be made where the costs incurred are ‘reasonable’.

Looking through the lens of tax policy

As foreshadowed in the introduction to this chapter, any consideration of tax deductibility for legal expenses needs also to be considered through the lens of tax policy. In this context, equity takes on a different dimension — referring to the equity between income earners. As highlighted by the report on *Australia’s Future Tax System* (the Henry Review) with respect to deductions for the costs incurred in producing income:

There are important equity reasons for maintaining this approach; that is, it is fair to recognise that people with the same level of income may incur different costs in earning that income. (Australia’s Future Tax System Review Panel 2010, p. 53)

In addition to being equitable, ideally, the tax system should also be efficient — raising revenue at the least possible cost to economic efficiency and with minimal administrative and compliance costs — as well as being easy to understand and comply with.

How do the options fare?

A number of suggested reforms can be quickly ruled out because they give rise to perverse incentives and are inequitable from a tax policy perspective.

Withdrawing tax deductibility

The Commission considers that proposals to remove tax deductibility entirely, or where another party cannot claim legal expenses as a deduction, would compromise equity between taxpayers. As Justice Sackville observed:

From the point of view of taxation policy, there seems to be no obvious justification for removing the tax deductibility of business litigation expenses that satisfy the tests laid down by the ITAA [Income Tax Assessment Act] and the courts. If litigation expenses are sufficiently connected with the earning of assessable income, or with the conduct of business carried out for that purpose, to make them deductible, there is no clear reason to distinguish them from any other legitimate business expense. (AJAC 1994, p. 291)

The Australian Bankers Association expressed similar sentiments:

The [Australian Bankers Association] notes that banks may need to resort to litigation to recover loan funds from customers who default in their repayment obligations or to recover possession of property provided as security for loans.

The costs of legal proceedings to recover monies due to banks are a necessary and ordinary business expense that ought to be tax deductible. Recovery actions are a part of the management of lending risk.

... a business' costs in defending litigation is a legitimate and necessary tax deductible expense. (sub. 121, p. 4)

The impact of removing tax deductibility would also be questionable from an access to justice perspective. Such a proposal would not improve access to justice in disputes between businesses. And in relation to disputes between individuals and businesses, removing deductibility might discourage business from taking early legal advice, possibly increasing rather than decreasing litigation.

Limiting tax deductibility to particular types of work

The Commission also considers that options to limit tax deductibility to particular aspects of legal work — such as allowing tax deductibility for alternative dispute resolution but not for litigation — are a ‘blunt’ means of encouraging parties to resolve their disputes quickly and efficiently. These options would do little to enhance access to justice, particularly if

the legal paths for which deductibility was allowed were not the most appropriate paths for a particular dispute. More direct policy measures aimed at achieving the quick and efficient resolution of disputes are canvassed in chapter 8.

This option also presents down-sides when it comes to tax policy. Aside from compromising equity between taxpayers, there are also questions about the administrative simplicity of such an arrangement. For example, what would be the tax deductibility treatment of alternative dispute resolution that was either compelled or encouraged as part of litigation? And how would legal advice provided in support of alternative dispute resolution in this context be sensibly differentiated from advice in support of the litigation more broadly?

The Commission considers that withdrawing tax deductibility and limiting tax deductibility to particular types of legal activities do not warrant further consideration.

Special treatment for large and unusual costs

The Commission does not consider extending deductibility to all legal expenses to be an effective way of mitigating the risk of legal costs that are ‘over and above’ those to be expected in ordinary transactions. Many disadvantaged users pay little or no tax and so would gain little or no benefit from tax deductibility. There are other, more direct avenues for enabling individuals to risk-pool to deal with high-cost, infrequent events.

Deduction of ‘reasonable’ expenses

Using a particular test to restrict deductibility to ‘reasonable’ legal costs has limited precedent in other tax approaches. For example, if a business purchases a luxury car, it cannot claim the full depreciation — although the running costs are still deductible. However, this example does not apply under the general provision (section 8-1), and the general rule is stated in *Ronpibon Tin NL v FCT; Tongkah Compound NL v FCT* (1949) 78 CLR 47:

It is not for the Court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent.

A ‘reasonable’ test would be harder to enforce in the legal sphere because there is no blanket definition of what is reasonable. Case-by-case determination of reasonable expenses would tie up valuable resources and would increase the uncertainty faced by businesses attempting to calculate the potential gains or losses from litigation.

One option is to assume that all costs associated with unsuccessful claims are ‘unreasonably’ incurred. However, there are many reasons for losing a case that do not imply that it was ‘unreasonable’ to pursue it. It is not in the interests of justice to deter litigants from pursuing reasonable claims where the result is uncertain.

Likewise, the award of an adverse cost order does not necessarily imply that the litigation should not have proceeded, and even where costs are awarded, no assessment is made of the reasonableness of the unsuccessful party's legal costs. Therefore, removing the capacity for parties to claim a deduction for an adverse cost order does not satisfy the aim of targeting unreasonable legal costs. Neither does it pass a test of taxpayer equity — that is, if a favourable order is taxable, an unfavourable one should be deductible. Further, this could have the unintended consequence of discouraging early settlement, as an extra penalty would be associated with losing. Realistically, only a small proportion of disputes actually go as far as adjudication by a court or tribunal. Therefore, it is not likely that the tax revenue would outweigh the costs of implementing either of these options.

A second avenue for determining reasonable expenses in a simple manner would be to use amounts contained in a fixed event based scale of costs, although the Commission notes some criticisms of these scales — for example that they are not always up to date (chapter 13). Assuming that scales were appropriate, deductions could then be limited to the value calculated on the scale, rather than actual legal costs. This would be less complex to implement but again would apply only in a small number of cases and, therefore, may not satisfy a net benefit test.

Various submissions to this inquiry have supported the recommendation that existing rules remain unchanged (the Law Council of Australia, sub. DR266; the Law Society of South Australia, sub. DR219; the Law Society of Tasmania, sub. DR227; and the Law Institute of Victoria, sub. DR221).

Alternative and superior ways of addressing the imbalance that can exist in disputes between individuals and businesses include model litigant rules or further powers for judges to manage the behaviour of parties (chapter 12).

RECOMMENDATION 15.1

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

16 Court and tribunal fees

Key points

- Currently, court fees are not set according to a consistent framework, vary widely, and provide a significant subsidy to many who do not require such assistance.
- Cost recovery currently ranges from 3 per cent in the Family Court to 50 per cent in the Magistrates' Court of Victoria.
- Court and tribunal fees tend to comprise a small share of legal costs and do not appear to be a significant barrier for most parties accessing the justice system.
- Low cost recovery means that most court expenditure must be funded by taxpayers, with the risk that fiscal pressures can reduce court resourcing and increase delay.
- Regardless of their level of cost recovery, many Australian courts and tribunals should adopt a more consistent framework for structuring their fees, informed by fully distributed cost models. Fees should be differentiated where possible based on a party's willingness and capacity to pay for litigation. Factors used to differentiate fees should include:
 - the amount in dispute (where relevant)
 - the type of litigant
 - the length of proceedings.
- Cost recovery should be increased for many matters, with increases set in accordance with the factors outlined above.
 - This should extend to full cost recovery in cases where the parties have a substantial private interest at stake, for example large commercial cases.
- Circumstances where minimal levels of cost recovery are justified include:
 - matters concerning personal safety, or the protection of children
 - minor disputes dealt with by tribunals
 - where fee relief has been granted to a financially disadvantaged litigant
 - cases that seek to clarify or resolve untested areas of law.
- Fee relief for disadvantaged parties can be better targeted by:
 - establishing formal criteria to determine eligibility for fee relief
 - postponing fees where a party is able to recover an award for costs
 - granting fee relief on an automatic basis to the clients of state and territory legal aid commissions and approved pro bono and legal assistance providers.
- Significant increases in court fees may justify adoption of partial fee waivers for parties with lower incomes or small businesses that are not eligible for full waivers.

When private parties litigate, society at large can also benefit from the strengthening of the rule of law and the development of precedents. This implies that society — effectively taxpayers — should partly fund some of the costs of running dispute resolution forums. Governments across Australia spent over \$820 million on providing courts for resolving civil disputes in 2011-12 (SCRGSP 2013b). The Commission has estimated that a further \$508 million was spent on civil tribunals in that year, bringing total expenditure on civil courts and tribunals to over \$1.3 billion in 2011-12.

Governments have historically sought to reduce this fiscal burden by charging fees to litigants. In 2011-12, just under one quarter of the cost of civil courts — roughly \$190 million — was recovered from litigants through fees. This shortfall in cost recovery represents a subsidy to court users by taxpayers. This chapter examines whether these subsidies are set at an appropriate level and applied in the right circumstances.

This chapter begins by considering the principles that underpin the charging of court and tribunal fees (section 16.1). Section 16.2 outlines the shortcomings of existing court and tribunal fee arrangements, and the rationale for reforms. Section 16.3 outlines the appropriate fee structures to ensure that subsidies for court use are effectively targeted, and suggests a move towards increased cost recovery in some Australian courts and tribunals. Options for improving the use of fee relief, such as waivers, reductions and postponements, are then explored in section 16.4.

16.1 Why do courts and tribunals charge fees?

Governments often charge users for the services they provide

Government bodies often recover all or some of the costs of the services and infrastructure they provide by charging fees to users. The current practice of charging fees to parties using the courts to resolve their disputes is just one example of this. Other government activities for which costs are fully or partially recovered include many types of economic infrastructure (for example, tolls on roads and bridges), regulation of private industries (such as air safety, pharmaceuticals, industrial chemicals and financial services) and the provision of utilities such as water and sewerage.

Recovering the costs of a service through user charges can help ensure that its funding base is sufficiently demand-driven, and can provide signals to providers of the service about where changes in funding and resources may be warranted. User charges also help to provide users with a price signal about the cost of the service, thus giving them an incentive to use it efficiently. Further, user charging can also address equity concerns that would otherwise arise when the primary beneficiaries of a service (that is, users) are not the ones who pay for it (taxpayers).

Given these benefits, in its draft report the Commission expressed support for the charging of fees in courts and tribunals, and suggested that it was appropriate in many cases for such fees to reflect the cost of providing court services. In response, a number of stakeholders argued that courts do not provide services, and instead function as a third arm of government (see box 16.1).

Box 16.1 Selected stakeholder objections to descriptions of the courts providing a service

Judicial Conference of Australia:

It is incorrect to typify the function of the courts as providing a 'service' in return for a fee ... This misconstrues the function of the judicial arm of government in our society. The courts are much more than service providers. (sub. DR195, pp. 4–5)

Supreme Court of Victoria:

The courts are not merely 'another public service'. They are the third arm of government. Public funding of courts is not a subsidy for court users. (sub DR324, p. 9)

New South Wales Bar Association

Judges ... are a third arm of government and they should not be perceived as being a service provider. They are not. (trans., p. 106)

Bar Association of Queensland

... courts are not, as it were, service providers. They are an arm of government that are there as part of our institutions to resolve disputes between private citizens as well as disputes between the state and citizens, when those disputes are unable to be resolved otherwise between them. (trans., p. 1172)

Consumer Action Law Centre and Consumer Credit Legal Centre NSW

This default position sees access to courts as a private transaction — a litigant pays an application fee and receives a service in return. ... This transactional view of access to courts is in our view incorrect. (sub. DR202, p. 28)

While the Commission acknowledges that the courts comprise the third arm of government, it is unclear why the judicial arm should not be seen as a service provider for those parties who choose to use the courts, particularly for the resolution of a range of civil disputes, which in recent times have increasingly been resolved either by the executive arm of government (through tribunals) or the private sector (through mediation and arbitration services).

Some stakeholders, such as the Northern Territory Bar Association, similarly described courts as providing a service in exchange for fees:

I think the question has got to be put back to the court to say that, 'If you're going to charge for the provision of a service,' which, in effect, is what it's doing, 'you need to give certain commitments in return for that.' ... So I think the principle of recovering those costs is fine if the court is doing its job properly and administering a system which sees parties come to court with only the real issues in dispute and then managed as efficiently as possible. (trans., p. 1023)

Further, irrespective of any debate regarding the definition of a ‘service provider’, the fact remains that courts and tribunals are currently funded through appropriations from government. While the Law Council of Australia has suggested that the courts should not be required to compete with other government services for finite resources (sub. DR266), the scarcity of such resources remains an unavoidable reality. Drawing upon private funding sources, such as court fees, can reduce reliance on these scarce government funds. It is therefore in the interests of the community for courts and tribunals to charge such fees where it is efficient and equitable to do so (chapter 4).

Courts and tribunals produce a mixture of private and public benefits

Like many of the services and infrastructure provided by governments, courts and tribunals produce both private benefits for parties directly accessing them, as well as benefits to the wider community.

Private benefits

When individuals and businesses engage in civil litigation, it is generally because they have a private interest in the matter being brought. The logic underpinning this is rather straightforward — a party would not contest a matter in court unless the expected private benefits of taking action outweighed the expected private costs of bringing the matter to court. The Bar Association of Queensland contested this notion, arguing that the courts do not confer private benefits (sub. DR245). However, the decisions of many parties to currently engage in litigation, even when the costs to themselves can be significant, necessarily implies that there are private interests at stake.

The private benefits to a party of winning a case may be financial (for example, payment of damages) or non-financial (for example, vindication of one’s reputation). In many cases, the financial interests of a party in a case may be substantial, especially in superior courts that handle large civil claims.⁷⁵ Large commercial cases, such as the Bell Group case, are an example of disputes where the private financial interests of parties can significantly outweigh the public costs and benefits of the litigation (box 16.2).

⁷⁵ For example, state and territory Supreme Courts generally handle civil claims of more than \$750 000.

Box 16.2 **The Bell Group case**

An example of a dispute with substantial private benefits was the Bell Group case, one of the longest running and most expensive cases in Australia. A bankruptcy matter between liquidators of the Bell Group and a number of banks, the dispute ran for almost 20 years in the courts of Western Australia before the parties eventually reached a confidential settlement.

The dispute involved damages originally totalling \$1.6 billion, which were revised on appeal to almost \$3 billion. Legal fees in the case were estimated to have exceeded \$500 million.

Providing court services for the long-running case came at a substantial cost to the taxpayer, as described by the Chief Justice of Western Australia, Wayne Martin:

... 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)

Source: Gluyas (2013).

Public benefits

In addition to private benefits to disputants, court-based dispute resolution can produce wider public benefits, including:

- the 'rule of law' — where the 'shadow' of the formal justice system helps enforce legal rights, deters parties from engaging in unlawful conduct, and encourages informal resolution when rights are breached
- the setting of precedents or clarification of the law
- the protection of vulnerable parties for whom safety or liberty is at risk.

Enforcing the rule of law

A broad public benefit arising from litigation in the courts is the 'shadow' that it casts over activities outside the civil justice system. This shadow helps to ensure that legal rights and obligations are respected, deters unlawful behaviour, and encourages parties to resolve disputes informally, where possible, when their rights or obligations are breached. This promotes the rule of law. Numerous stakeholders to this inquiry expressed similar arguments regarding the role of courts in establishing the rule of law (Judicial Conference of Australia, sub. DR195; Supreme Court of Victoria, sub. DR324; Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202).

The effectiveness of this shadow is dependent on the accessibility of the justice system, and parties knowing that legal rights can be enforced by the courts in the event that a dispute arises. In contrast, the rule of law may be weakened if a party has a reasonable belief that their opponent could not afford to enforce their rights in a court. This could

occur if the fees charged to access courts or tribunals were prohibitively high for many parties — however this does not appear to currently be the case (section 16.3).

Establishing precedents and clarifying the law

Public benefits can also arise from litigation if the resulting decision resolves an uncertain area of law. As noted in the Rule of Law Institute’s submission to the Senate’s inquiry on federal court fee increases:

A determination by a court may not only provide finality for the parties concerned, it can provide other, broader benefits such as establishing precedents, evidencing open justice and elucidating the law. (Senate Legal and Constitutional Affairs Committee 2013b, p. 10)

Protecting vulnerable parties

The Commission recognises that there are many types of cases where there is a clear public interest in ensuring the safety of vulnerable parties. This is based on the premise that a justice system is intended to support social norms (chapter 4), of which the protection of vulnerable people who lack the means to defend their own rights is a key element. This may include parties in matters involving family violence, child protection, deprivation of liberty and claims to seek asylum. Ensuring sufficient access to the justice system for these vulnerable parties has implications for the charging of court and tribunal fees (section 16.3).

Balancing private and public benefits in user-charging

As previously noted by the Commission, the mixture of private and public benefits arising from use of the courts has implications for the efficient balance between the public funding of courts and recovery of costs through fees:

Spillover effects may have an influence on the way in which cost recovery is implemented and who is charged. Where a government supplied activity or product has positive spillovers, subsidies to decrease the costs to users may be appropriate. (PC 2002, p. 17)

While it is generally acknowledged that use of the courts provides positive spillovers, the Law Council of Australia goes further, arguing that the courts constitute a public good and should not engage in cost recovery:

Reducing the courts to a user-pays system could not be justified on either empirical or philosophical grounds. Courts are a public good, with immeasurable public benefits, both socially and economically, upholding the Rule of Law and supporting the systems of government, commerce and trade. (sub. DR266, p. 107)

This characterisation of the courts as a public good was echoed by the Public Interest Advocacy Centre (sub. DR246, p. 11).

However, spillovers and public goods are not necessarily synonymous (box 16.3). In the Commission’s view the courts themselves are not, in an economic sense, a public good, as:

- their usage is rivalrous — when two parties litigate, they tie up resources of the court that could otherwise be used to service other parties
- there are excludable private benefits produced by litigation — for example, if a party receives an award for damages.

Instead, a more appropriate characterisation of the courts is that their use by parties for private benefit also produces positive spillovers to the rest of society, such as the ‘rule-of-law’, which can have public good characteristics.

Box 16.3 Public goods and spillovers

Public goods exist where provision for one person means the product is available to all people at no additional cost. Public goods are said to be non-rivalrous (that is, consumption by one person will not diminish consumption by others) and non-excludable (that is, it is difficult to exclude anyone from benefiting from the good). In practice, there are very few examples of public goods — the most commonly used examples include lighthouses and national defence.

Spillovers or **externalities** occur where an activity or transaction has positive (benefits) or negative (costs) economic welfare effects on others who are not direct parties to the transaction. Governments often subsidise activities that have significant positive spillovers. Public goods and spillovers can be similar analytically — spillovers often have public good characteristics if they are non-rivalrous and non-excludable.

Source: PC (2002).

The distinction between a pure public good and a service that produces positive spillovers has important ramifications for the appropriate balance between public funding and user charging. The rivalrous nature of the service means that user charging may be an appropriate mechanism for ensuring that courts and tribunals are accessed efficiently and that their sources of funding are sufficiently demand-driven. Further, the excludable private benefits arising from litigation can ensure that many parties have a sufficient incentive to pay a fee to access those benefits. This contrasts with a pure public good — such as national defence — where the lack of excludable benefits can incentivise ‘free-riding’ and make user charging impractical.

Where public benefits are generated by the production or consumption of a product or service, it may be efficient for governments to provide subsidies. However, the necessity (and efficiency) of such subsidies is ultimately driven by the relative difference between the private costs and private benefits for a party using the service. If the private benefits exceed the full costs of the service, there is no need for government to provide a subsidy — doing so would simply transfer resources from the taxpayer to the private parties, potentially at the expense of other government services. However, where the private benefits are exceeded by the cost of the service, a subsidy may be warranted, provided the associated public benefits exceed the costs of the subsidy.

Box 16.4 Drivers' licenses — an example of mixed private and public benefits where fees are charged

Many of the services provided by government convey benefits to both the private parties using the service as well as the wider community. For example, governments operate licensing regimes to determine who is able to drive on public roads. There are clear public benefits in ensuring that only sufficiently qualified drivers can drive on public roads — an absence of licensing could lead to hazards for drivers, passengers and pedestrians alike.

However, despite these public benefits, it remains efficient for governments to charge fees for the issuing of driver's licenses. These fees are charged because those seeking a license also have a strong private interest in being able to drive on public roads. As a result, many individuals still choose to pay these fees, despite the alternatives to obtaining a driver's license — for example, driving unlicensed, using public transport, walking or cycling. The fee revenue that is collected by governments can then be used to fund public services, such as road safety and maintenance.

In response to the Commission's position, the Law Council of Australia has argued that:

... the Draft Report places a distorted emphasis on the 'private benefit' of the justice system, with the result that its recommendations are weighted toward a 'user-pays' model. ... Those who enforce their rights or seek court determinations regarding their rights may be perceived to garner a personal or individual benefit, but there are broader societal benefits, both economic and social, which belies the overt focus on the individual in the Draft Report. (sub. DR266, p. 13)

However, this emphasis on private benefits is not distorted, nor is it negated by the presence of public benefits. Rather, it is based on the well-established notion that — given scarcity of resources — a service should only be subsidised by government where the private benefits from using the service are likely to be otherwise insufficient.

The ability of governments to charge fees for services where sufficient private benefits arise suggests that, from an efficiency perspective, a greater share of costs should be recovered through court and tribunal fees from parties that have greater private interests at stake (section 16.2). In some cases, such as where the private benefits are substantial, it may be appropriate for the full costs of the court's services to be recovered (section 16.3). However, consideration also needs to be given to the public benefits that arise from the accessibility of the system.

Equity considerations can be addressed through targeted subsidies

While the efficiency benefits are desirable features of court and tribunal fees, the pursuit of efficiency should not undermine the equity of the system by unreasonably impeding access for those who require the assistance of formal processes to resolve their disputes. Further, where public benefits arise from the accessibility of the system — such as enforcement of the 'rule-of-law' — measures to ensure equity can also lead to efficient outcomes.

Courts and tribunals are used by a diverse range of parties, who differ in their resources, legal costs, appetite for litigation and the availability of alternative dispute avenues. A fee level that encourages a well-resourced party to first attempt private negotiation could be an insurmountable barrier for a low-income party with no alternative avenue for obtaining justice. Fee arrangements need to be sufficiently flexible to accommodate these differences and target fees accordingly; this can be achieved through a combination of differentiated fees (section 16.2) and providing fee waivers, reductions and postponements — collectively referred to as ‘fee relief’ in this chapter — for disadvantaged parties (section 16.4).

16.2 A framework for structuring court and tribunal fees

Policymakers should have regard to three main objectives when structuring court and tribunal fees:

- recovering public costs where private funding is available
- sending price signals to potential litigants to, where appropriate, first consider alternative means of legal resolution or assess settlement options
- ensuring reasonable access to justice is not impeded.

Ideally, from an efficiency perspective, court fees should take into account the net cost to the public of providing court services. If there was no public benefit associated with a case being heard, the parties involved should bear the full cost of the court or tribunal resources devoted to the case. However, in cases where the private incentives to conduct litigation are insufficient, but a trial would generate substantial public benefits that exceeded the court’s expenses, the parties’ legal expenses theoretically should be subsidised. This is currently the case for some public interest cases funded by the Commonwealth Attorney-General’s Department, and tax law test cases funded by the Australian Tax Office.

However, there are two problems with the broad adoption of the above principles. First, on practical grounds, it is very unlikely that governments would ever have sufficient information or resources to estimate the public benefits of each and every case and benchmark it against the public costs incurred. The costs of assessing court fees on a case-by-case basis would also likely exceed any potential benefits. Second, as emphasised throughout this chapter, other factors are relevant to the setting of court fees, including the capacity for some groups to realistically pay the full costs for the court services they use, even in matters primarily relating to their own interests.

Broadly, the efficiency of cost recovery can be improved by targeting fees at those with the highest willingness to pay, while addressing equity concerns by ensuring that fees are only levied from those with the capacity to pay. This section sets out a framework for setting fees which reflects these principles. The Commission considers that there are good grounds

for applying such a framework regardless of the overall level of cost recovery that is targeted by government (section 16.3).

Fees are often set without an underlying framework

There is currently no consistent methodology or framework guiding the setting of fees in most Australian courts. Rather, governments tend to set fee amounts (and thus cost recovery rates) on an ad hoc basis to satisfy budget priorities. This is evident in testimony from the Attorney-General's Department to the Australian Senate's inquiry into federal court fee increases:

The courts do not actually go through an activity based costing process which determines what fee is appropriate for each particular court event. ... Court fees are automatically increased by [consumer price index] every two years. Other than that, it is really the decision of the government of the day as to what it wants to do with court fees in terms of overall budget settings. (2013b, p. 35)

The Australian Bar Association also suggested that the current process of setting court fees lacks any underlying principle or framework. However, they also questioned whether developing such a principle would be of benefit:

First, I'm not sure that fees were ever set in a principled way. I think they were set historically in ways which are no longer understood. Second, I'm not sure that they're now being set in a principled way or that to search for a principle is going to yield any beneficial outcome as to how to set them in the future. (trans., p. 784)

On this last point, the Commission's view departs from that of the Australian Bar Association. It is in the interests of the whole community, including those parties using the courts, that subsidies for public services, including the courts, be set according to a transparent and consistent framework. Failing to do so can lead to both inefficiency and inequity in the provision of such services.

Fee setting processes should be informed by a fully distributed cost model

Determining the appropriate fees to charge users of a service requires an understanding of the cost of providing the services in question — even where those costs are not fully recovered. Otherwise it is possible that fees may be arbitrarily set too low or too high relative to each other or the costs of service provision. Courts should use fully distributed cost models to identify these costs (appendix G). Use of a costing model on an ongoing basis would also allow fees to be appropriately updated to reflect any changes in workload or the costs of service provision.

While costing models are currently not widely used to inform the setting of court fees in Australia, some jurisdictions have recently taken steps toward such an approach. For

example, the Supreme and District Courts of Victoria have recently undertaken activity-based costing to assist with developing proposed reforms to their court fee structures (Vic DoJ 2012b). A pilot project was also recently undertaken in the District Court of Western Australia to develop a model for linking fees to the costs of individual court services (WA DAG 2012). Other courts, such as the Family Court and the Federal Circuit Court, use activity based costing to assist with resource planning, but not to set court fees (appendix G).

Fee items should reflect where direct costs are incurred by the courts

Direct costs are costs that can be directly and unequivocally attributed to the particular service for which a fee is charged (appendix G). In the case of courts and tribunals, these costs are largely labour costs associated with judicial officers and court staff providing the service, but may also be for materials (for example, paper and printing expenses in the production of documents or transcripts).

At present, fees in many courts and tribunals appear to be set without regard to differences in the costs directly imposed on the court by the various services which it provides. This can mean that the fee charged to a party may bear little relationship to the court resources that it has consumed.

A particularly notable example of this is the Supreme Court of Tasmania, which only requires parties to pay a single filing fee at the outset of litigation, as described at a public hearing by the Law Society of Tasmania:

We're back in the dark ages in our Supreme Court; \$650 and that's it for filing of a writ. There's no hearing fees, there's no nothing, just a simple filing fee. (trans., p. 932)

A single flat fee, without any other charges such as daily hearing fees, means that a party is required to pay the same contribution to the court regardless of whether it ties up the court's resources for a single hearing day or 10 hearing days.

However, it is also likely to be impractical and excessively complex for fees to be precisely matched to every single activity or service provided by the court in each case. This would require a long and complex fee schedule and could impose significant burdens on courts in keeping track of the many individual fees incurred by each party.

To balance the tradeoff between precision and simplicity, fees should be charged at the outset of an action, at a number of subsequent discrete stages throughout litigation, as well as for some specific activities (for example, the issuing of a subpoena). This approach has already been adopted in the fee scales of a number of courts and tribunals. The stages of litigation where fees are charged should reflect the main points where costing models indicate that parties impose direct marginal costs on the court or tribunal.

For a given party or type of dispute, the fees that are charged for the various services available should also be proportional to the direct costs that each service imposes on the

court or tribunal. For example, if it is more expensive for a court or tribunal to provide the resources for a hearing compared with a mediation, it follows that daily hearing fees should generally be higher than mediation fees.

This can ensure a closer relationship between costs and revenue, and can signal to administrators where resources should be deployed. It also means that parties' decisions to consume the court's resources are priced appropriately throughout the litigation process.

Fees should be charged using differential pricing

As noted throughout this chapter, one of the main public benefits of litigation is the enforcement of the rule of law. As a number of stakeholders have noted, this benefit is dependent on the accessibility of the civil justice system to all. There are two approaches to account for this benefit when setting court fees:

- subsidising all parties equally by cost recovering at a low rate in all cases, or
- targeting the subsidy by charging lower court fees to those who would otherwise be deterred by more cost-reflective fees.

The first approach involves setting court fees at a low rate of cost recovery for all cases. It assumes that the 'rule-of-law' public benefits arising from each case are uniform across cases and litigant types. However, this approach has two primary shortcomings. The first is that subsidies would be provided to improve court accessibility where they may not be needed. For example, there may be many disputants for whom the difference between a subsidised court fee and a full-cost court fee would not affect their decision to litigate. In these cases, the additional accessibility offered by the subsidy — and therefore the additional rule-of-law benefit — is negligible. The government resources spent on the subsidy could be better spent elsewhere, such as additional funding for the courts or legal assistance.

Because public benefits from the rule of law arise from the accessibility of the system, it follows that any subsidy should be targeted towards those for whom accessibility is affected by court fees. Parties using the courts can vary widely in both their willingness and capacity to pay for court services — thus there is merit in adopting an approach to court fees that reflects these differences.

The Commission considers the most appropriate approach to be differential pricing, that is, by charging higher fees to litigants who are likely to proceed with actions even where a higher fee is charged, such as those with more resources or a greater stake in the outcome. This approach is generally considered efficient as it closely reflects principles of Ramsey pricing.⁷⁶

⁷⁶ For a detailed explanation of Ramsey pricing, see Baumol (2008).

A number of submissions to the Commission expressed support for differentiated court fees. The NSW Bar Association favoured a tailored approach, suggesting that:

... current court fees regimes should be reviewed with a view to ensuring that more appropriate fees are charged in each case. ... The calculation of court fees may take into account matters which include:

- the nature of the dispute;
- the type of relief sought;
- relevant characteristics of the parties; and
- the financial means of the parties by reference to their income and/or assets. (sub. 34, pp. 14–15)

A number of other stakeholders expressed broad support at public hearings for such an approach, including the Law Societies of South Australia (trans., pp. 405–406) and Tasmania (trans., p. 932).

Differential pricing of court fees is already used in a number of courts and tribunals (table 16.1). Methods of differentiation include basing fees on the amount in dispute, the type of litigant, and the length of proceedings. The various approaches are discussed below.

Amounts in dispute

Fees based on the amount in dispute are common in both tribunals and magistrates' courts, where different fees are levied for civil claims of specified amounts (table 16.1). This practice is also used in overseas jurisdictions, including England, Wales and Germany (Albert 2007; Marfording and Eyland 2010).

Basing court fees on the amount in dispute can improve the efficiency of cost recovery by targeting the willingness to pay of a party — if the private benefits are high, it is worthwhile for a party to pay higher court fees.

There may be particular benefit in extending this principle to family law disputes that exclusively involve financial matters, such as the division of property or assets. In 2012-13, applications for purely financial matters comprised approximately half of final orders applications in the Family Court, and one third of final orders applications in the Federal Circuit Court (Family Court of Australia 2013a; FCC 2013). In such cases, both parties have a strong private pecuniary interest in these matters, while in most cases the public benefits would appear to be relatively small. As such, providing the parties are of adequate means, the Commission believes that charging parties the full direct cost of the court's services is appropriate, with the amount of indirect costs charged through fees set in proportion to the amount of assets or property in dispute.

Table 16.1 Factors used to differentiate fees in selected Australian courts and tribunals

As of December 2013, excluding family law courts

■ Used □ Not used

	<i>Court</i>	<i>Type of litigant</i>	<i>Staged hearing fees</i>	<i>Amount in dispute^a</i>
Commonwealth	Federal	■	■	□
	Circuit	■	□	Small claims
New South Wales	Supreme	■	■	□
	District	■	□	□
	Local	■	□	Small claims
	NCAT	□	□	■
Victoria	Supreme	□	■	□
	County	□	■	□
	Magistrates'	□	□	■
	VCAT	□	■	■
Queensland	Supreme	■	■	□
	District	■	■	□
	Magistrates	■	□	■
	QCAT	□	□	■
South Australia	Supreme	■	□	□
	District	■	□	□
	Magistrates	■	□	Small claims
Western Australia	Supreme	■	□	□
	District	■	□	□
	Magistrates	■	□	■
	SAT	■	□	□
Tasmania	Supreme	□	□	■
	Magistrates	□	□	Small claims
Australian Capital Territory	Supreme	■	■	□
	Magistrates	■	■	■
	ACAT	■	■	■
Northern Territory	Supreme	■	□	□
	Local	□	□	■

^a In some courts, lower fees are charged for small claims that fall under a specified amount in dispute.

Source: Productivity Commission analysis of fee schedules in Australian courts and tribunals.

The Bar Association of Queensland suggested that it would be difficult to differentiate fees on the basis of the amount in dispute because in some disputes the value of what is at stake may be difficult to quantify (trans., p. 1175). In some of these cases — for example, where an injunction is sought in a major environmental or planning dispute — the private benefits, though difficult to quantify, may still be substantial for one or both of the parties, or indeed a third party.

The Commission acknowledged this challenge in the draft report, and put forth a range of possible approaches to charging fees in disputes where a monetary amount cannot be specified, including:

- setting fees based only on other factors, such as litigant type and length of proceedings
- charging fees in non-monetary disputes at the highest rate for monetary disputes, similar to the approach currently used by some magistrates' courts
- using an alternative amount to approximate the value of the dispute; for example any undertaking as to damages where an injunction is sought.

The NSW Land and Environment Court sets fees using a structure that takes into account the value of the development, land or compensation that a dispute concerns. This provides one option for the setting of fees in disputes such as environmental and planning matters. Alternately, where a monetary value cannot be easily quantified, the most appropriate option would be to simply use the other factors to differentiate fees — this was also supported by the Queensland Public Interest Law Clearing House (sub. DR247, p. 37).

The type of litigant

Many courts and tribunals currently distinguish between types of litigants when setting fees, with corporations generally charged a higher fee than individuals for the same activity. Broadly speaking, this method of differentiation is used in most state and territory courts, with the exception of Victorian and Tasmanian courts (table 16.1). Some tribunals — such as the ACT Civil and Administrative Tribunal (ACAT) — also charge different fees to disputants in this manner.

Some courts use more discerning categories. For example, the Federal Court and the Federal Circuit Court differentiate between publicly listed companies and public authorities; corporations; and small businesses, not-for-profits and individuals. Other jurisdictions, such as Western Australia, still use a general corporation–individual split but allow some small businesses and not-for-profits to apply for treatment as individuals for fee purposes.

The arguments underpinning differentiation of fees between corporations and individuals are threefold. First, corporations are often presumed to have greater access to resources than individuals — as well the ability to deduct their fees for tax purposes — and thus may have higher capacity to pay. Second, cases involving corporations may be more complex, and thus consume more court resources. Finally, as profit-driven entities, corporations are

likely to pursue litigation only where there is a clear financial interest in doing so — making it easier to identify the private benefits at stake and making price signals more effective. A number of stakeholders expressed support for charging different court fees based on the type of litigant, such as whether they are a large corporation (Consumer Action Law Centre, sub. 49, p. 29; Law Society of Tasmania, trans., p. 931).

However, the commonly used distinction between corporations and individuals can be blunt, as entities within the umbrella term of a ‘corporation’ can differ greatly in their size, complexity and resources. As the NSW Bar Association noted:

... the approach to the calculation of court fees presently charged to litigants in the various courts is inflexible with only limited distinctions made, for example, between corporations and individuals ... Further, no distinction is drawn between the fees charged to large companies and smaller entities. The same flat rate court fees cover sole director small businesses in the same way that they apply to multinational corporations. (sub. 34, p. 14)

Other stakeholders also noted concerns that businesses can vary widely in their size and resources (Law Council of Australia, sub. DR266; Law Society of Western Australia, trans., pp. 491, 495).

In the Commission’s view, these concerns can be addressed by adopting more refined disputant categories, as has been done in the Federal Court and the Federal Circuit Court. Varying fees with the amount in dispute, as mentioned above, can also help distinguish between entities based on size, assuming that larger entities tend to have greater amounts at stake when they litigate.

Staged hearing fees

As the number of lengthy and complex cases increases in some courts, there is a growing need for hearing fees that sufficiently recover costs. For example, in the Federal Court of Australia, the number of cases with 10 or more hearing days almost doubled from 2009 to 2013, while the number of cases with 20 or more hearing days more than tripled. These cases consume a larger share of judicial resources through increased case management and time taken to hear matters and write lengthy and complex judgments (FCA 2013a).

To address this issue, many courts and tribunals have moved towards charging higher fees based on the length of proceedings through the use of staged hearing fees (table 16.1). Rather than charging a flat rate per day, staged hearing fees charge a higher rate per day to disputants as the number of days in court increases. Staged hearing fees are more common in superior courts, where disputes are more likely to run for multiple hearing days.

Staged hearing fees should be adopted where possible in courts and tribunals. This method of charging can discourage delays and unnecessary activities, and facilitate faster resolution of disputes. Cases that drag on through the courts for an extended period will consume a greater share of court resources at the expense of others who require the court’s services. Thus, there is a public benefit in allocating parties a greater share of costs in these

protracted disputes. Staged hearing fees were previously recommended by the Australian Law Reform Commission (2000) and a recent review of fees in the Victorian Civil and Administrative Tribunal (Vic DoJ 2012c).

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.

16.3 Increasing the level of cost recovery in Australian courts and tribunals

In conjunction with adoption of the fee structure outlined above, the Commission also believes that there is a strong rationale for increasing the overall quantum of fees collected from parties using courts and tribunals. While the overall level of cost recovery is likely to be ultimately driven by a number of factors, including government budget priorities and changes in the workload of courts and tribunals, the Commission considers the existing levels of cost recovery to be inadequate.

In response to recommendations in the draft report to increase cost recovery, the Law Council of Australia has argued that rather than increasing fees, they should be wound back to previous levels (sub. DR266). However, these arguments were not supported by

any evidence to indicate that previous fee increases have led to reductions in accessibility, or any other adverse outcomes.

The Commission supports increasing court fees for many parties, as:

- court fees are currently low and do not pose a significant barrier to parties
- parties do not sufficiently internalise the public cost of courts and tribunals
- an increase in cost recovery can help improve court and tribunal funding
- equity concerns are better addressed through targeted subsidies such as fee relief.

This section outlines evidence suggesting that existing fee levels are inadequate. It further proposes that increases in cost recovery are appropriate for most types of matters, with a move to full cost recovery in matters involving substantial private financial interests. It also highlights a range of matters where higher levels of cost recovery are not appropriate due to social policy considerations and other public good reasons.

Cost recovery in courts and tribunals is currently low

Fees are significantly lower than the costs of running courts and tribunals

While overall rates of cost recovery are highly variable between courts, they are substantially less than 100 per cent in all courts. Cost recovery in most courts is between 20 to 35 per cent, but varies from about 3 per cent in the Family Court of Australia to just over 50 per cent in the Magistrates' Court of Victoria (figure 16.1).

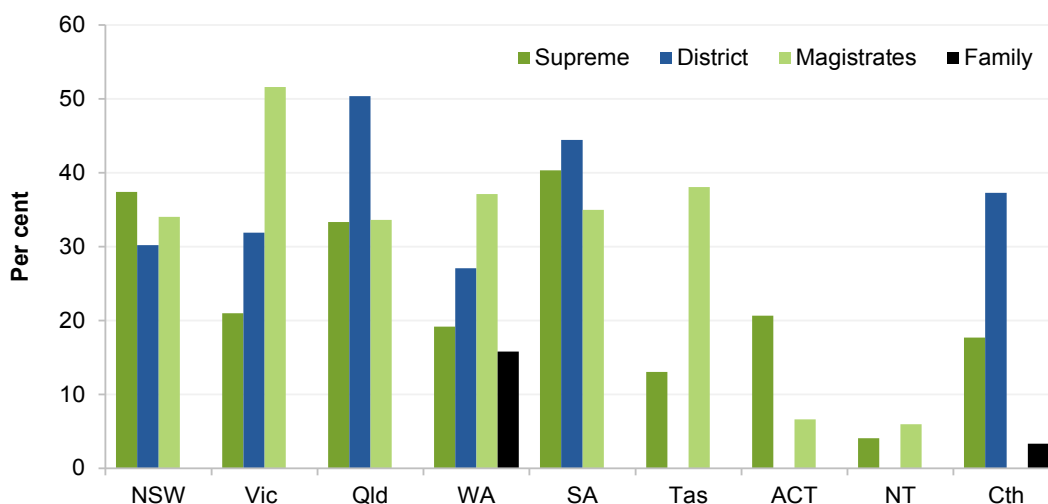
While published data is patchy, the level of cost recovery in tribunals also appears low. The Commission's estimates of cost recovery by tribunals in 2012-13 range from roughly 2 per cent in the Administrative Appeals Tribunal (AAT) and the Western Australian State Administrative Tribunal (SAT), to 10 per cent and 13 per cent in the Civil and Administrative Tribunals of Victoria (VCAT) and Queensland (QCAT) respectively.

Further, these figures represent the average rate of cost recovery, and thus the share of costs recovered may be significantly lower or higher in individual cases. For example, while the average rate of cost recovery in the Supreme Court of Western Australia is currently 19 per cent, the share of the court's costs recovered in the Bell case was less than 5 per cent (see box 16.2). This highlights the need to more proportionally link fees with the costs of hearing a dispute.

Even when fees waived or reduced for disadvantaged parties are counted as recovered costs, the level of cost recovery in Australian courts is still low, meaning that court usage by non-disadvantaged parties is still extensively subsidised by taxpayers (table 16.2).

Figure 16.1 **Cost recovery in Australian civil court jurisdictions, 2012-13**

Court fees collected as a percentage of civil expenditure ^{a, b}



^a Real recurrent expenditure (excl. payroll tax) with no revenue deducted. ^b For notation, supreme courts include the Federal Court, district courts include the County Court of Victoria and Federal Circuit Court.

Source: SCRGSP (2013b).

It is also worth noting that some courts engage in substantial over-recovery of costs when providing services that do not involve determination of a dispute, but rather are largely transactional in nature (such as probate registries). For example, the Commission has estimated that the average rate of cost recovery through probate fees in Australia was roughly 1500 per cent in 2012-13 (SCRGSP 2014).

Table 16.2 **Adjusting cost recovery measures to account for fee relief**

Selected jurisdictions, 2012-13

Court	Cost recovery excl. fee relief	Share of cases granted fee relief ^a	Total value of fee relief	Cost recovery incl. fee relief ^b
	%	%	\$	%
Federal Court of Australia	17.7	16.8	1 578 561	19.3
Federal Circuit Court	37.3	41.8	12 361 921	49.1
Family Court of Australia	3.3	23.1	1 122 763	4.5
Supreme Court of SA	40.3	5.3	122 062	41.6
District Court of SA	44.4	3.1	79 137	45.5

^a Fee relief refers to both waivers and reductions of fees. ^b Foregone revenue from fee relief is included.

Sources: SCRGSP (2014); Federal Court of Australia (2013a); Family Court of Australia (2013a); Federal Circuit Court (2013); Productivity Commission estimates using data on fee relief supplied by courts.

Fees currently have little impact on whether parties access courts and tribunals

A number of stakeholders to this inquiry have argued that court fees currently pose a significant barrier to access to justice:

... court fees in most jurisdictions are already too high and beyond the capacity of many people to pay. (Law Council of Australia, sub. DR266, p. 6)

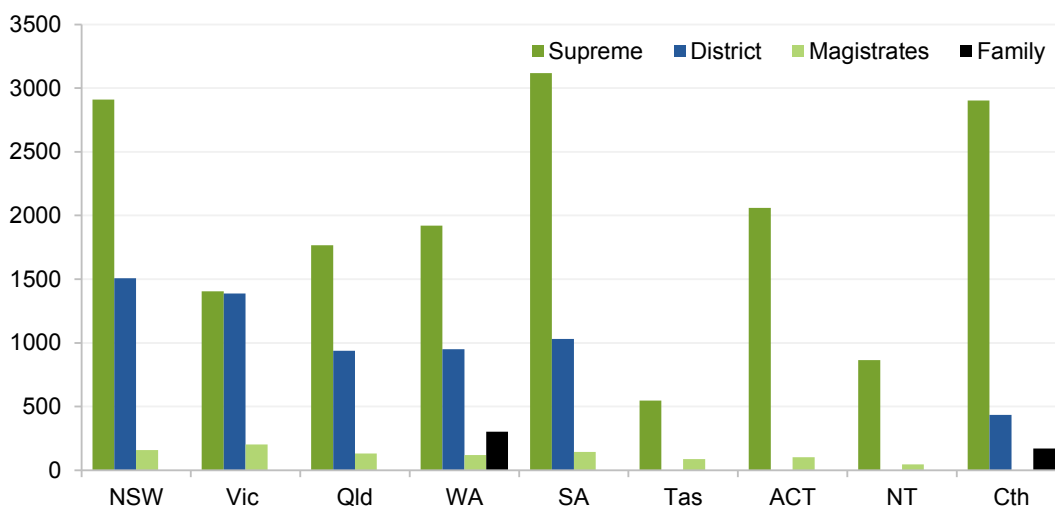
The [Law Institute of Victoria] reiterates concern that court and tribunal fees are a serious impediment to access to justice. (Law Institute of Victoria, sub. DR221, p. 44)

The court fees currently set in the Federal Court are generally regarded as prohibitively high ... For ordinary litigants. (Australian Bar Association, trans., p. 779)

However, in the Commission's view, the available evidence suggests that at their current levels court fees do not pose a barrier to most parties.

While court fees may appear to be large in some cases — averaging in the thousands of dollars in some superior courts (figure 16.2) — they are just one part of the financial costs faced by most potential litigants. Parties often face other more substantial legal expenses such as solicitor fees, counsel fees and other disbursements (see chapter 3). As such, court fees typically comprise a small share of legal costs for a represented disputant (Senate Legal and Constitutional Affairs Committee 2013b).

Figure 16.2 Average civil court fees collected per lodgment^a, 2012-13
2012-13 dollars



^a Some jurisdictions charge corporations higher fees than individuals, so that average fees do not always represent the average charge to individuals. For notation, supreme courts include the Federal Court. District courts include the County Court of Victoria and Federal Circuit Court.

Source: SCRGSP (2014).

The Law Council of Australia pointed to hearing fees in commercial disputes in the Federal Court as an example of fees that are too high:

Complex commercial cases are already subject to significant increases in fees in the federal courts, in many cases costing more than \$16,000 per sitting day on top of other fees. (Law Council of Australia, sub. DR266, p. 76)

While this \$16 000 hearing fee — which is only charged to corporations for the 15th and subsequent hearing days of a case — may appear expensive, it is worth noting that the parties in such disputes may spend a similar or larger amount per day on professional fees for a single barrister, according to advice on professional fees provided to the Commission by the Law Council of Australia (sub. DR167, p. 12).

Further, there is empirical evidence to support the notion that court fees represent a small share of litigation expenses. The Commission has estimated that, on average, court fees comprise roughly one tenth of a party's legal costs.⁷⁷ At the extremes, such as the Bell Group case, court fees appear to have been roughly 0.15 per cent of the parties' total legal costs (see box 16.2).⁷⁸

Consequently, at their current levels court fees do not appear to significantly affect the decisions of most parties to go to court:

Parties' other costs are so high that the court fees have little role in any decisions that are influenced by cost factors. (Cannon 2002, p. 199)

Other studies support this view. As Marfording and Eyland said:

... court fees are not the primary reason for the concerns about litigation costs raised in the literature and by interview participants in New South Wales. Indeed, none of these interviewees mentioned court fees specifically as an issue. (2010, p. 60)

This notion has been borne out in practice. Recent evidence suggests that increases in fees in the federal courts since 2010 have not significantly reduced filings (Senate Legal and Constitutional Affairs Committee 2013b). For example, total lodgments in the Federal Circuit Court remained largely unchanged following an 80 per cent increase in average fees paid over three years (figure 16.3).

The Law Council of Australia also pointed to the existing evidence that court fees currently do not influence parties' decisions to come to court:

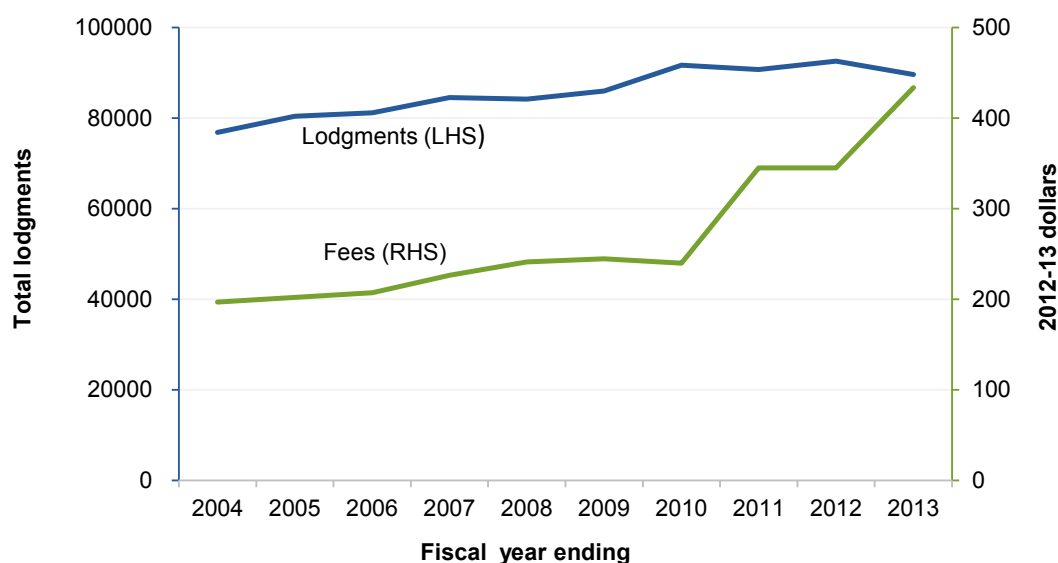
As successive increases in federal courts' fees in 2010 and 2013 have had no demonstrable impact, it appears that the only basis for recommending fees be increased further is driven by ideology, rather than evidence. (sub. DR266, p. 73)

⁷⁷ Based on data from studies of costs in the NSW Supreme and District Courts, the Victorian Supreme and County Courts, the Queensland District Court, and the Family and Federal Courts of Australia by Williams and Williams (1994), Worthington and Baker (1993) and Matruglio (1999a, 1999b).

⁷⁸ Calculated using legal expenses of \$500 million and court fees of \$750 000.

Contrary to the point made by the Law Council of Australia, this evidence suggests that fees are yet to reach a point where they are a barrier for most parties. This indicates that further increases can similarly be undertaken without unreasonably impeding access to justice — especially given the use of differential pricing and fee relief to target the impact of such increases.

Figure 16.3 Lodgments and average court fees in the Federal Circuit Court



Sources: SCRGSP (2009b, 2014).

Courts in overseas jurisdictions are increasing their rates of cost recovery

The low level of cost recovery in Australian courts can be contextualised by comparisons with similar jurisdictions overseas. Cost recovery through fee revenue is much higher in English and Welsh courts than Australian courts (table 16.3). The Ministry of Justice in the United Kingdom has also flagged its intention to move to full cost recovery by the end of 2014-15 (UK National Audit Office 2011).

Recently, courts in New Zealand have also increased their levels of cost recovery. New Zealand courts previously had lower cost recovery than many Australian courts, with rates around 20 to 25 per cent in the lower courts, and almost zero cost recovery in its superior and specialist courts in 2010-11 (New Zealand Ministry of Justice 2012). However, the recent changes are estimated to increase cost recovery in lower courts to around 35 per cent, similar to current levels in some Australian courts.

Table 16.3 Cost recovery in civil courts of England and Wales

2010-11 pounds (sterling)

<i>Court type</i>	<i>Expenditure</i>	<i>Net fee revenue</i>	<i>Foregone revenue from fee relief</i>	<i>Cost recovery excl. fee relief</i>	<i>Cost recovery incl. fee relief ^a</i>
	£m	£m	£m	%	%
Family Courts	235.9	101.0	16.6	43	50
Magistrates'	20.0	18.7	0.1	94	94
Higher courts	342.1	327.6	11.0	96	99
Probate	14.5	16.7	0.01	115	115
Total	612.5	464	27.7	76	80

^a Foregone revenue from fees waived is included.

Source: Calculated from figure 4 in UK National Audit Office (2011, p. 28).

Higher cost recovery can rebalance the public and private costs of court services

The current relatively low level of cost recovery in Australian courts means that litigants do not internalise the cost to society of resolving their private disputes. Unlike the courts, the providers of alternatives to litigation — such as private mediators and arbitrators — charge the full cost of their services, including a commercial rate of return. As such, some parties may not face adequate incentives to try private alternatives before litigating through the courts at the taxpayers' expense.

In the draft report, the Commission suggested that an increase in court fees would strengthen the pricing mechanism and ensure that parties take into account the cost of court services when deciding to litigate. At higher levels, court fees may no longer be a small share of legal costs for many parties, and thus would divert people to lower-cost dispute settlement arrangements and discourage unnecessary, or unnecessarily drawn-out, litigation.

In response, a number of stakeholders have argued that court fees do not function as a price signal:

The rationale that 'The current low level of cost recovery in Australian Courts means that litigants do not internalise the cost to society of resolving their disputes' is flawed in that ... If the cost of legal representation is not a sufficient incentive to resolve matters the added burden of Court fees is not likely to be decisive. (Law Society of South Australia, sub. DR219, Attachment, p. 77–78)

Many parties have no choice but to bring their legal problems to a court or tribunal. ... 'Price signals' simply do not work where applicants have no choice. It simply exacerbates the hardship of both parties ... The Productivity Commission's conclusions in this Chapter are unsupported by reference to any evidence that so-called 'price signals' have any impact ... (Law Council of Australia, sub. DR266, p. 73)

As already discussed throughout this chapter, at their current low levels many fees are unlikely to be a decisive factor in the decisions of parties. However, these arguments misconstrue the underlying purpose of a price signal in the context of cost recovery. Price signals are designed to align the private costs of a service with the public cost of providing it. This helps ensure that a service is only accessed where the benefits outweigh the costs.

If an increase in fees does not change demand for the service — whether that is because court fees are not a sufficient incentive or because parties have no other option — the price signal has not failed in its function. Rather, it simply suggests that the parties still derive greater benefit from accessing the courts than the cost of the fee, and thus are willing to pay it. The suggestion that fees exacerbate the hardship of these parties is an argument for fees (and fee waivers) that are effectively targeted to ensure equity, rather than an argument against any increases in cost recovery in most cases.

Court resourcing can be improved by increasing cost recovery

Low rates of cost recovery increase the extent to which governments must rely on other sources of funding, such as general taxation, to fund the courts. As governments face growing fiscal pressures, several courts have expressed concern at the impact of tightening budgets on service delivery:

... the Court, like all public institutions is feeling the impact of reduced public spending. ... budget constraints will make it more difficult for the Court to meet such performance targets. (Federal Circuit Court, sub. DR258, p. 1)

Like many other courts, we have been under considerable financial pressure over recent years. ... the reality is that there are very limited reductions to be made without having a serious impact on service delivery ... (Family Court of Australia 2013a, p. 2)

The Court's budget position continues to be affected by the government's tight fiscal position. (FCA 2013a, p. 17)

Inadequate resources can lead to rationing of court services, which increases non-financial barriers to justice, such as delay:

In recent years, courts have been subject to reductions in staff in a number of registries, which have led to significant delays in processing. ... The Law Council [of Australia] submits that funding to Federal, State and Territory courts has failed to keep pace with demand and the growing cost of service provision. (sub. 96, p. 46)

These fiscal pressures are likely to increase given the growing and competing demands for other government-funded services — particularly in age-related expenditure — and given existing policies to not raise taxes significantly (PC 2013a). To ensure the adequate provision of court services under these fiscal pressures, courts will need to reduce their reliance on general taxation for funding. In the Commission's view, an increase in the amount of revenue sourced from court users is the most obvious, efficient and equitable alternative, and could be used, at least in part, to improve resourcing of the courts.

Under higher levels of cost recovery, including fees that recover the full cost of services in many cases, the incentive for governments to cut court resources — such as registry staff — are reduced. Charging higher fees to a wide group of clients therefore has the potential to ensure sufficiently resourced courts and reduce the rationing of court services in the face of fiscal pressures.

In response to the draft report, the Supreme Court of Victoria argued that increased cost recovery through fees will not improve court resourcing:

The Commission asserts that increases in court fees may ultimately enhance access to justice by providing greater resources to reduce non-financial barriers to justice, such as delay. Such an assertion assumes that increased fee revenues would be applied to fund the courts and that there would not be a corresponding withdrawal of ordinary government funding. This is a direct contradiction of the logic of full cost recovery, which postulates that fee revenue will replace government funding, rather than adding to it. (Supreme Court of Victoria, sub DR324, p. 10)

However, this argument is based on the assumption that the overall quantum of court expenditure would not change under higher rates of cost recovery. This only holds if the existing level of court funding matches demand for court services, which is not the case if rationing is currently occurring. Irrespective of whether fees are set at full or partial cost levels, higher rates of cost recovery would ensure that a greater share of the courts' funding base is driven by demand for court services.

Increases in cost recovery should depend on dispute type

While the evidence suggests that fees should be broadly increased, it would not be advisable to simply impose large uniform increases in the quantum of fees for all dispute and party types in order to reach an overall cost recovery target. Rather, the characteristics of the parties and the dispute should be taken into account.

There are some disputes where there is a clear case either for minimal cost recovery (for example, cases concerning vulnerable parties) or full cost recovery (such as substantial commercial disputes). These are discussed further below.

Arriving at the appropriate level of cost recovery is more complicated for cases that fall outside these two extremes. For these disputes, a low level cost recovery would misallocate limited government resources, while full cost recovery may unreasonably impede access to the courts, as explained by Chief Justice Martin:

Between the top end and the bottom end there's a big gap in the middle and I think that is most of our cases. If we were to go to full cost recovery for that big gap in the middle in the case of our court ... that would be a substantial disincentive. (trans., p. 588)

The framework outlined by the Commission for setting court fees earlier in this chapter suggests that court fees should depend on the amount that is in dispute and the type of parties involved. This suggests that fee increases should be targeted to achieve rates of cost recovery that reflect the amounts at stake and the parties involved.

Full cost recovery should apply in cases of substantial value

It thus follows that in cases of substantial private value, the appropriate court fee level may approach the full cost of the court's proceedings. In these cases, court fees are unlikely to deter parties from coming to court, as they are likely to be negligible amounts in comparison to both the amount in dispute and the parties' other legal expenses, even at full cost levels.

Where well-resourced parties are pursuing a substantial private interest and thus have sufficient incentives to pay a higher share of court costs, there is little reason for the taxpayer to subsidise the litigation:

There are other cases in our court between very substantial — sometimes corporate enterprises, big mining companies, fighting each other, big families who have substantial incomes. You can probably guess the people I'm talking about. I struggle to see why the taxpayer of Western Australia should subsidise litigation of that kind at all. So I think there's a lot to be said for a regime in which there is a capacity to full cost recover from those sorts of litigants ... (Wayne Martin CJ, trans., p. 587)

A similar view was also offered by the Law Society of Tasmania:

When looking at significant commercial matters of some complexity – for example the Bell Group litigation in Western Australia and the C7 litigation in New South Wales – it is not unreasonable to argue that the cost to those users should reflect the significant cost to the taxpayer of these disputes. Where disputes drag on for months or even years and result in judgement pages numbering in the hundreds, if not thousands, it is not unreasonable to accept a far more significant contribution to the cost that comes from the public purse. (sub. DR227, p. 23)

One suggestion put forth by some participants was that disputants in substantial commercial disputes could be charged court fees at a rate that they otherwise would be required to pay for private arbitration (Law Society of Tasmania, trans., pp. 933–934; Law Society of Northern Territory, trans., p. 1023). While the price of private arbitration may provide policymakers with an indication of the minimum price that a commercial litigant would be willing to pay for their dispute to be resolved, the cost of the court's services should still be the primary factor in determining the court fees for commercial litigants.

The Australian Bar Association instead suggested that the primary expense that parties should fund is additional expenses such as technological support, while the public should fund the judge and court infrastructure (trans., p. 780). However, given that judges, court staff and infrastructure comprise the vast bulk of the courts' expenses (appendix G), this would not be an equitable allocation of costs between commercial litigants (as the primary beneficiaries of the service) and the taxpayer.

Tribunals can also deal with large commercial disputes

The Commission believes that fees which reflect a tribunal's costs of service should be pursued in larger, more complex matters dealt with by tribunals — especially those that are commercial in nature. Examples of such cases may include planning matters, commercial building disputes or competition matters. Cost recovery in these cases may be increased by adopting the same principles for differentiated fees that the Commission has recommended for courts. As noted previously, a number of tribunals have already adopted differential pricing to increase cost recovery in some case types (see table 16.1).

The Law Institute of Victoria has expressed support for charging higher fees to larger entities that may be involved in tribunal-based disputes:

The [Law Institute of Victoria] is supportive of this Draft Recommendation in so far as heavy court users will be required to pay more. In this context, a 'heavy user' is defined as a public company or statutory company. In addition, this could take into consideration the number of days of trial ... (Law Institute of Victoria, sub. DR221, p. 46)

The Consumer Action Law Centre and Consumer Credit Legal Centre NSW objected to full cost recovery in commercial cases in tribunals, arguing that accessibility should be the primary consideration when setting tribunal fees (sub. DR202, p. 28). While broadly agreeing that accessibility should be a priority for many tribunal-based disputes, given the nature of parties involved in large commercial disputes the Commission is not convinced that tribunal fees are likely to significantly hinder accessibility for these parties, and thus higher cost recovery is appropriate in these cases.

Cost recovery should be minimal in some types of matters

As noted previously, there are a number of types of matters where there is a clear public interest in ensuring that vulnerable parties can readily access formal processes where necessary. This may include matters involving family violence, child protection, deprivation of liberty, guardianship, mental health, and claims to seek asylum. In these cases, a higher level of cost recovery may not correctly reflect the balance of public and private costs and benefits, and may lead to prohibitively high fee amounts that place vulnerable parties at risk. The Commission believes that increases in cost recovery are not justified in these cases.

Low levels of cost recovery may also be appropriate for minor disputes dealt with by tribunals, for example small claims, consumer, residential or tenancy matters. In these cases, cost-reflective fees may often exceed the amount in dispute. Given that most tribunals also do not award costs in their proceedings, this would reduce the incentive for many individuals to pursue small claims matters. The Commission considers low-cost and informal avenues for redress in these types of matters to be necessary for strengthening the shadow of the civil justice system.

Further, there are some tribunals that deal primarily with disputes between government and those experiencing disadvantage. Some of these tribunals — such as the Social Security Appeals Tribunal — currently do not charge fees to disputants. In others, such as the Refugee Review Tribunal, a fee is only payable if a party is unsuccessful (though data suggests that the actual rate of payment by unsuccessful parties is rather low). Given the characteristics of those using these fora, and the nature of the issues in dispute, in the Commission’s view it is appropriate that these tribunals continue to be provided free of charge. This view was also supported by some stakeholders, such as the National Welfare Rights Network:

We consider that the social security jurisdiction should continue to be fee free due to the disadvantage of the people using it. (sub. DR201, p. 9)

In addition to these types of matters, minimal levels of cost recovery should also be applied to certain types of disputants through the use of fee relief. This is discussed further in section 16.4.

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.

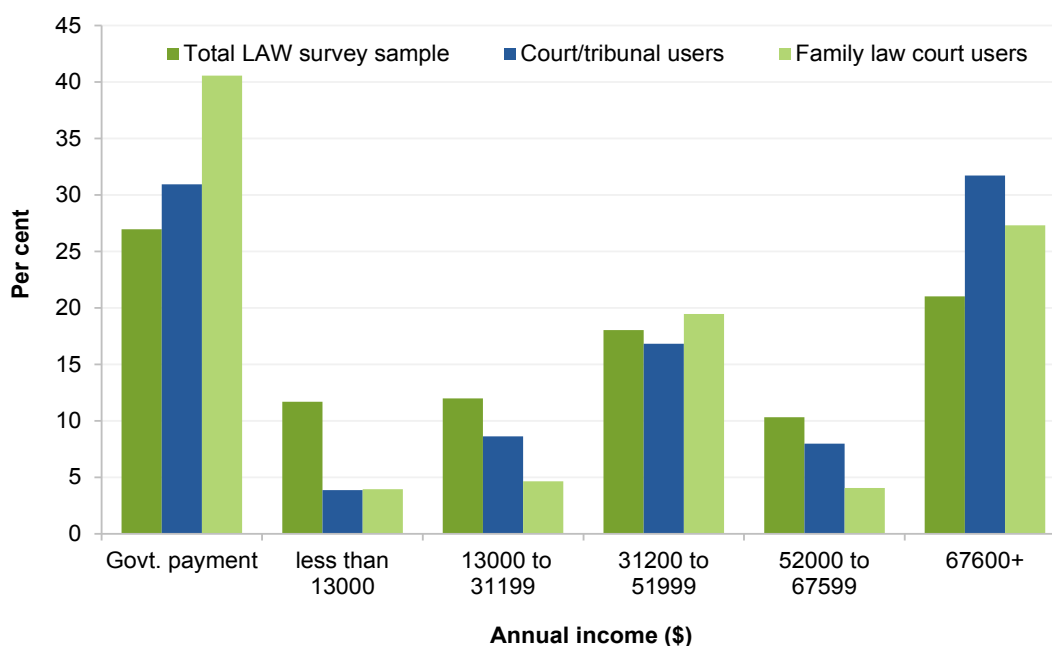
16.4 Fee relief arrangements

A large share of court and tribunal users either receive a means-tested government payment or are on relatively low incomes (figure 16.4).⁷⁹ In family law and human rights disputes, the share of individuals living on low incomes or government payments is

⁷⁹ For comparison, average weekly earnings among full-time adult employees were about \$60 000 in November 2008 (ABS 2008).

particularly high according to the Commission’s estimates using unpublished data from the *Legal Australia-Wide (LAW) Survey*.

Figure 16.4 Annual incomes of *LAW Survey* respondents who used civil courts and tribunals^{a, b, c}
2008 dollars, from the *LAW Survey* sample



^a Individuals receiving a means-tested government payment were counted as a separate income category, regardless of their actual income bracket. ^b Court/tribunal users were survey respondents who had a legal problem which led to court or tribunal proceedings. ^c Family law court users were survey respondents who had a family law problem that led to court (or tribunal) proceedings.

Source: Commission estimates based on unpublished *LAW Survey* data. A detailed analysis of factors associated with court usage and different legal problem types is provided in Coumarelos et. al. (2012).

The effect of court fees on access to justice may be particularly acute for financially disadvantaged individuals. The Queensland Public Interest Law Clearing House (QPILCH) argued that:

While in the scheme of litigation fees, court fees may appear minimal, these fees can represent a large amount of a low income earner’s salary. (sub. 58, p. 55)

This has implications for the equity of the system when fees are imposed on users, and thus creates the need for safeguards to ensure accessibility.

Most courts and tribunals can waive, reduce or postpone court fees to ameliorate their effect they can have on financially disadvantaged parties. For example, financial hardship was the reason for roughly half of fee relief applications in the Melbourne registries of the

Federal Court (53 per cent) and the Federal Circuit Court (43 per cent) in 2011 (AGD 2012a).

Fee waivers in federal courts are targeted towards individuals with very low incomes, the majority of whom are unemployed. In the federal courts in 2011, the estimated average income of those granted a waiver on the basis of financial hardship was between \$17 500 and \$19 000 a year (AGD 2012a). This does not include those granted waivers for other reasons, such as receipt of legal aid, possession of a concession card, detention in prison, or being under 18 years of age.

While fee relief plays an important role in safeguarding access to justice, in the Commission's view these arrangements require reform by:

- establishing formal criteria for determining financial hardship
- postponing fees where appropriate, rather than waiving them
- using automatic exemptions to simplify fee relief applications
- introducing partial waivers for individuals on lower incomes.

These reforms are examined below.

Establishing formal criteria for financial hardship

In many Australian courts, assessments of financial hardship are not based on any specified income or asset criteria. Rather, hardship is determined at the discretion of registrars or court officers, with consideration given to factors such as the individual's income, living expenses, assets and liabilities.

In the draft report, the Commission recommended that the fee relief process should be made more certain and transparent by governments establishing formal criteria to determine eligibility on the basis of financial hardship. For example, in the Supreme and District Courts of Queensland, eligibility for a fee reduction is dictated by an equation to calculate a party's available funds relative to a fee (Queensland Courts 2013). These criteria should be designed so that courts need only use their discretion to offer fee relief for financial hardship where a party faces exceptional circumstances that clearly fall outside those foreseen by the criteria. This recommendation was broadly supported by stakeholders (Legal Aid NSW, sub. DR189, p. 32; Maurice Blackburn, sub. DR197, p. 16; Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202, p. 28; Law Institute of Victoria, sub. DR221, p. 47; QPILCH, sub. DR247, pp. 37–38; Law Council of Australia, sub. DR266, p. 77).

In response to this recommendation, the Law Society of South Australia suggested that these arrangements were already in place:

Such mechanisms already exist, and work well. ... Victoria and South Australia (and probably other jurisdictions) already have fee waiver guides. (sub. DR219, Attachment, p. 82)

However, while fee waiver guides are published in these jurisdictions, the eligibility criteria within these guides are not transparent or objective. In South Australia and Victoria — among other jurisdictions — eligibility for a waiver due to financial hardship is based entirely on the discretion of the relevant court officer. For example, in Victoria a party is only eligible for a fee waiver ‘if in the [relevant court officer’s] opinion, the payment of the fee would cause financial hardship’, with no further clarification of what constitutes ‘financial hardship’ in the eyes of a court officer. Similar ambiguity exists in the South Australian courts. This highlights the need for more consistent and transparent criteria.

The Insurance Council of Australia opposed this recommendation, noting:

... court fee relief is a matter for Courts and Tribunals to determine. (DR193, p. 12)

While the Commission recognises the need for some discretion for courts and tribunals to grant or refuse fee relief in exceptional circumstances, its use should be the exception rather than the general rule. Granting waivers and reductions primarily on a discretionary basis provides little guidance to potential disputants as to whether they will be eligible. Moreover, some stakeholders have suggested that there is an increasing reluctance by courts and tribunals to use their discretion to grant waivers. For example, the Australian Lawyers Alliance (ALA) said:

Whilst there may be a theoretical relief available to a person seeking a waiving of the fee, ALA members report an increasing tendency towards denial by the various Courts and Tribunals. (sub. 107, p. 11)

Further, it is important to recognise that the granting of a fee waiver or reduction represents a taxpayer-funded subsidy to individuals. As such, the process by which fee relief is granted should be as transparent as possible, both to those applying for relief as well as the wider public that is funding them.

Waivers for public interest cases

In addition to those suffering financial hardship, it may also be in the interests of the community to waive fees for cases that may be deemed in the public interest. This is consistent with the framework outlined earlier in the chapter, which suggests that minimal cost recovery should apply if the matter produces substantial public benefits and there are insufficient private benefits at stake.

In response to the draft report, QPILCH suggested that further clarification of ‘public interest’ was needed, and proposed that cases could be defined as being in the public interest if they:

- affect a significant number of people;
- raise matters of broad public concern;
- require legal intervention to avoid a significant avoidable injustice; or
- particularly impact disadvantaged or marginalised groups. (sub. DR247, p. 36)

In the Commission's view, courts may be best placed to use their discretion in determining whether or not a case is likely to raise substantial matters of public interest, in line with similar considerations regarding costs orders (chapter 13).

Postpone fees where an eligible party can obtain an award for costs

There may be some cases where the cost of paying a court fee is only a temporary barrier for a poorly resourced party. This is most clearly demonstrated in cases where a poorly resourced party is subsequently awarded costs following judgment. In these cases, the party could afford to pay court fees if successful, despite short-term liquidity constraints.

Rather than waiving fees entirely, it may be more appropriate in these cases to postpone the charging of court fees until after judgment. This practice has already been adopted in some jurisdictions. For example, fee guidelines in New South Wales currently stipulate that it is usually preferable to postpone fee payment until finalisation, rather than waive the fee altogether (NSW DAGJ 2014).

While numerous stakeholders supported the increased use of fee postponements (NSW Bar Association, sub. DR206; Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202; Law Institute of Victoria, sub. DR221), some warned of the need for provisions to waive a postponed fee if sufficient costs could not be recovered from the opposing party (Flemington and Kensington CLC, sub. DR225).

Using automatic exemptions to simplify fee relief applications

Several stakeholders to this inquiry have expressed concern at the lack of ease, efficiency and flexibility in the existing processes used to grant fee relief to disadvantaged litigants. Burdensome application processes can raise the financial barriers to justice and increase the complexity of the system, by forcing disadvantaged individuals to navigate a complicated and time-consuming system to obtain financial relief. Unnecessary means testing for waivers can also consume the time and resources of court staff and legal assistance providers.

Submissions have provided examples of complex and burdensome fee waiver processes. For example, the Consumer Action Law Centre said:

We have recently raised concerns with VCAT that its current fee waiver process may be excluding low income individuals from accessing the Tribunal as well as wasting resources of [community legal centres] and Tribunal staff. ... In our view this process creates unnecessary duplication ... (sub. 49, p. 19)

The complexity involved in applying for a fee waiver can also be a barrier for disputants with limited language or literacy skills. This may be particularly problematic in the Federal Court and Federal Circuit Court, where migration matters are the most common type of

case where waivers are sought (AGD 2012a). The National Pro Bono Resource Centre has previously described the process facing such a disputant as:

... lengthy and, for people already experiencing disadvantage, a difficult process with uncertain prospects of success. It requires completion of a four-page Statement of Financial Position and attesting in an affidavit about the veracity of the information provided. (sub. 73, p. 39)

One way of reducing administrative and compliance burdens is to identify particular groups that have already met means tests to be considered financially disadvantaged, and grant them fee relief with no need for further information or means testing.

The federal courts currently provide an example of how categories for fee exemptions can be formally set out (box 16.5). Similar exemption categories are used in Queensland, Western Australia and Tasmania. The use of formal criteria and categories for fee exemptions in the federal courts has received support from some stakeholders, including the Public Interest Advocacy Centre (PIAC):

PIAC notes that currently federal courts have fixed categories of non-discretionary exemptions of fees. ... As well as these categories, the federal courts and tribunals have the discretion to waive fees in circumstances of financial hardship. PIAC believes that the current system of fixed exemptions is clear and predictable and generally enables those with limited financial capacity to access the legal system. (sub. 45, p. 33)

Box 16.5 Fee exemptions in federal courts and tribunals

In federal courts and the Administrative Appeals Tribunal, a party is generally exempt from paying court fees in a proceeding if the person (or body):

- has been granted legal aid for that proceeding from a state or territory legal aid commission or an approved legal aid scheme or service
- has a health care card, a pensioner concession card, a Commonwealth Seniors Health Card or any other entitlement to Commonwealth health concessions
- is serving a sentence of imprisonment or is otherwise detained
- is under 18 years of age
- receives Youth Allowance, Austudy payments or ABSTUDY benefits
- has been granted particular assistance to bring proceedings under the *Native Title Act 1993* (Cth).

If a general exemption is established, it remains until the proceeding is finalised, provided that there is no relevant change in circumstances.

Individuals can also be exempt from paying court fees if, in the opinion of the court, paying the fee would cause financial hardship. An individual's income, day-to-day living expenses, liabilities and assets are taken into account for this decision.

Sources: Federal Court of Australia (2013b); Family Court of Australia (2013b).

In particular, there may be avenues to reduce the cost and complexity of applications for fee relief to individuals that are:

- receiving particular means-tested government benefits
- represented by legal aid commissions or under a grant of legal aid
- represented by a community legal centre or pro bono professional.

These categories are discussed in further detail below.

Individuals receiving means-tested government benefits

As discussed in section 16.1, the accessibility of the system may be best ensured by targeting subsidies at those with fewer resources. In 2008, roughly one third of civil court and tribunal users received means-tested government payments (figure 16.4).

Several participants in this inquiry suggested that there is little reason to require such individuals to undergo further means testing to qualify for a fee waiver:

... a recipient of Centrelink payment has already been means tested and found to be of low income. It appears wasteful for the Tribunal to then conduct its own assessment rather than accept the assessment of Centrelink. (Consumer Action Law Centre, sub. 49, p. 19)

A person in receipt of Centrelink benefits is clearly in a relatively poor financial position. This has been proven to the satisfaction of Centrelink. The ALA is of the view that receipt of such benefits should automatically entitle the person to the waiving of any fees. (Australian Lawyers Alliance, sub. 107, p. 11)

... all people in receipt of a social security benefit or who hold any evidence of having met certain means tests, should be automatically exempt from paying fees. (Law Council of Australia, sub. DR266, p. 77)

In the draft report, the Commission sought feedback on a number of criteria that could be used to identify those on government benefits for automatic fee exemptions, including:

- the possession of a Commonwealth concession or health card, with the exception of a Commonwealth Seniors Health Card (as this is available to individuals not receiving an income support payment)
- passing an asset test in addition to possessing a concession or health card
- the receipt of a full rate government pension or allowance.

The first of these options, which is already used in a number of courts and tribunals, was supported by many stakeholders (Flemington and Kensington CLC, sub. DR225; Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202; Kingsford Legal Centre, sub. DR242).

The Commission sees merit in this as a simple and low-cost approach to identifying those receiving government benefits. While many of these concession cards do not impose any

form of asset test — meaning that some individuals with the means to pay fees may receive a waiver — the associated compliance and administrative costs would likely undermine any benefits of an additional asset test.

Legal aid commission clients

Individuals represented by state and territory legal aid commissions generally receive automatic exemptions from paying court fees. However, some stakeholders have argued that despite being generally granted automatic fee waivers by their corresponding state and territory courts, clients of legal aid commissions (LACs) are still required to submit an application for fee waivers in Commonwealth jurisdictions. This is likely to create needless complexity for disputants, as suggested by Legal Aid NSW:

Currently legal aid clients are eligible for exemption but required to complete a form to receive the fee exemption. As legal aid clients are eligible for the fee exemption and generally receive the exemption, the application process appears to be unnecessary red tape and costly. (sub. 68, p. 76)

Indeed, given that individuals must already meet financial hardship criteria to receive LAC services, requiring them to apply for a fee waiver on the basis of financial hardship is duplicative and inefficient. As such, the Commission believes that all courts and tribunals in Australia should offer automatic fee relief to parties represented (directly or indirectly) by a LAC. This recommendation was broadly supported by a number of stakeholders (Legal Aid NSW, sub. DR189; Flemington and Kensington CLC, sub. DR225).

Pro bono and community legal centre clients

Numerous submissions to this inquiry have called for automatic fee waivers for individuals represented by community legal centres (CLCs), Aboriginal legal services and pro bono lawyers (Allens, Ashurst and Clayton Utz, sub. DR224; Hunter Community Legal Centre, sub. 26; National Pro Bono Resource Centre, sub. 73; PIAC, sub. 45). With respect to the latter, some stakeholders have suggested that court fees can pose a barrier to provision of pro bono legal assistance:

While firms make available many hours providing pro bono legal assistance, budgets to pay external disbursements are limited. Court fees are a cash cost to firms. (Allens, Ashurst and Clayton Utz, sub. DR224, p. 21)

Moreover, it was suggested that fee exemptions for pro bono clients would:

... save time by avoiding the need to complete and assess lengthy applications submitted for fee waiver or deferral, and bring pro bono matters into line with the current treatment of matters where there is a grant of Legal Aid. (National Pro Bono Resource Centre, sub. 73, p. 39)

However, it would appear that these barriers are not significant.

With respect to CLCs, there are almost 200 approved CLCs whose clients are eligible for automatic fee exemptions in the federal courts, as listed in the *Legal Aid Schemes and Services Approval 2013*. As noted in chapter 20, there are around 200 CLCs operating across Australia (NACLC 2013a). Of these, around 140 receive Commonwealth government legal assistance program funding. This suggests that clients of CLCs appearing in the federal jurisdictions face little, if any, barriers. A similar exemption for clients of approved legal assistance providers is also used in Western Australia and Tasmania. And in New South Wales, courts are required to postpone fees for parties receiving legal assistance representation until a judgment is given (NSW DAGJ 2014).

While the National Pro Bono Resource Centre previously identified filing fees as a significant barrier to pro bono legal work, it also acknowledged that pro bono clients are likely to receive fee relief:

Anecdotal evidence from pro bono clearing houses around Australia, and from law firm pro bono programs indicates that most low-income Australians that are acted for on a pro bono basis are exempt from the payment of fees. (sub. 73, p. 39)

As is the case for clients of legal assistance providers, fee guidelines in New South Wales courts require courts to postpone fees for parties receiving pro bono assistance (NSW DAGJ 2014). In other jurisdictions, such as Victoria, while there is no automatic exemption, pro bono applications for fee waivers are generally viewed favourably.

In assessing the extent of any barriers that exist in jurisdictions where provisions do not already apply, it is important to note that not all clients of CLCs or recipients of pro bono services experience financial hardship.

Unlike LACs — which enforce financial hardship requirements on their clients — there do not appear to be consistent requirements ensuring that CLCs or pro bono lawyers exclusively service disadvantaged clients. Using unit record data provided by the Attorney-General's Department, the Commission has estimated that 17 per cent of CLC clients were earning incomes defined as medium (greater than \$500 per week) or high (greater than \$1000 per week) in 2011-12. Further, a large proportion of clients did not have their income or income source recorded at all. And as noted in chapter 23, the bulk of pro bono work is undertaken for not-for-profit organisations (who operate in areas such as health, social services, sports, arts and culture, the environment and animal welfare). Thus it would not seem appropriate to grant automatic fee relief solely on the basis of being the client of a CLC or pro bono representative.

However, the Commission supports granting automatic fee relief to the clients of CLCs or pro bono providers that adopt eligibility criteria for their clients commensurate with the financial hardship criteria used to grant fee relief.

Expanding fee relief using partial fee waivers

Eligibility for waivers is currently narrow

Some submissions to this inquiry have argued that fee waivers in Australian courts are excessively targeted at those experiencing severe financial hardship:

In our experience, the exemptions for divorce court fees for health care card holders and for reduced income women do not address the lack of affordability for many other women. (Women's Legal Service, sub. 117, p. 3)

At present, fee waivers are only applied in very limited circumstances for litigants receiving social security payments ... (NSW Bar Association, sub. DR206, p. 8)

It is possible that some people who do not qualify for a waiver (such as those whose income is only marginally higher than those on a government payment) may face a degree of financial hardship and so may still struggle to pay court fees. As shown in figure 16.4, there is a sizable group of court users with incomes that are below average, but higher than the income of the average waiver recipient. This 'missing middle' can be faced with the same court fees as other individuals on higher incomes, while paying much more than those eligible for full waivers, but whose incomes may be only slightly lower.

Women's Legal Service Victoria provided an example of the barriers faced by low income individuals who were not eligible for fee waivers in family law matters:

... individuals on low incomes, who may not necessarily satisfy the test for financial hardship applied by the court, are unfairly disadvantaged by the current structure of fees in the family law jurisdiction. ... For those who fall outside of the financial hardship test, full fees apply. ... This is prohibitively expensive for a woman on a low income who may not satisfy the financial hardship test because she works and has a small amount of savings in the bank. (sub. 33, p. 23)

Partial fee waivers could assist those on lower incomes

One option to improve accessibility for these individuals would be to grant them a partial waiver of fees, essentially charging a reduced court fee. This approach may help reduce cost barriers faced by lower income individuals, while preserving some of the price signalling and cost recovery benefits associated with court fees. A system of partial fee waivers is currently used in English and Welsh courts (box 16.6).

Numerous stakeholders strongly supported an expanded system of partial fee relief for low to medium income earners — often referred to as a 'sliding scale' of fees — based on capacity to pay (NSW Legal Aid, sub. DR189 and trans., p. 181; Kingsford Legal Centre, sub. DR242; Women's Legal Service Victoria, sub. 33; Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202; NSW Bar Association, sub. DR206).

Box 16.6 **Fee waivers in England and Wales**

In English and Welsh courts, fee relief is granted by setting a maximum contribution that a party may be required to pay towards a fee. In some cases, the individual may be set a maximum contribution of zero, granting them a full waiver of any fees. Where the maximum contribution is greater than zero, it is essentially a partial waiver.

The maximum fee contribution for an individual is determined by three factors – income (including any partner's income), number of children and couple status. Singles, those with fewer children, and those on higher incomes face higher maximum contributions.

Eligibility for a maximum contribution also depends on passing a disposable capital (asset) test, the threshold for which increases with the size of the court fee to be paid. Disposable capital includes savings, stocks or shares, and second homes. Some assets are excluded from the test, including first homes; home contents; vehicles; medical negligence or personal injury payments; and self-employed businesses.

For example, a single person with no children earning monthly wages in England of £2077 would be set a maximum contribution of £495. If this person was charged a fee of £600, and was under the disposable capital threshold of £3000, they would pay a maximum contribution of £495, with the remaining £105 waived. By comparison, the maximum contribution for a couple with two children on a combined monthly income of £2077 would be £170.

While the array of factors above may appear to be complex, this fee remission system appears to be straightforward for users in its application. A maximum contribution calculator is available online, into which users can enter relevant details, and identify their maximum contribution.

Sources: HM Courts and Tribunals Service (2013); Office for National Statistics (2014).

... but administrative costs must be taken into account

When considering the use of partial fee relief, policymakers need to be mindful of the possibility that the cost of administering and collecting the partial payment can exceed the revenue collected. The federal courts introduced reduced fees in 2010, but abandoned them in 2013, with some arguing that the costs of pursuing payment of reduced fees exceeded revenues (Law Council of Australia 2013b). However, these reduced fees were very low, and were charged to disadvantaged parties that had previously received a full fee waiver.

The rationale for a partial fee relief system is strengthened if many court fees were to be increased as recommended previously in this chapter. The current level of cost recovery is so low that it does not make sense to introduce another layer of differentiated fees beneath that ceiling, especially if the appropriate partial fee may actually be higher than the current full fee. A shift towards greater cost recovery allows scope for a broader range of fee levels beneath full cost.

The Commission sees merit in using partial fee relief, similar to the maximum contribution system used in England and Wales, to offset the burden of suggested court fee increases on disputants with limited and moderate means. However, the Commission has some reservations about the potential administrative costs and burdens from processing a large

number of partial fee waivers. Determining the income and asset levels at which parties should be eligible for partial fee relief, and the levels of partial fees to be collected, will depend largely on the level of cost recovery adopted and the costs of administering partial waivers.

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.

17 Courts — technology, specialisation and governance

Key points

- Australian governments have made significant investments in court technologies to make interactions between courts and their users more efficient and to support efficient and effective case flow management.
- However, investment has been uneven across jurisdictions and the availability, quality and use of technology varies widely. Greater investment in technology, based on the needs of individual jurisdictions, would promote efficiencies in the delivery of court services and improve outcomes for users.
- Areas where investment in information technology can yield longer term savings and improve access to justice include case management software, e-lodgment facilities, electronic trial technologies and technologies to assist self-represented litigants.
 - Case management software allows better management and measurement of court workflow, and facilitates data collection and reporting critical to evaluating the effectiveness of procedural and other reforms.
- Courts should extend their use of telephone conferences and online technologies for the purpose of procedural or uncontentious hearings.
- The use of specialist courts, divisions and lists is common as a way to improve efficiency, although the extent and form of this specialisation varies across jurisdictions.
 - Courts should continue to facilitate civil matters being allocated to judges with relevant expertise for case management and hearing through use of specialist lists and panel arrangements.
- As with any institutions, the performance of courts is affected by their governance and funding arrangements. Most courts in Australia operate under the traditional ‘executive’ model of court governance with others adopting more innovative approaches, which more closely align responsibility with authority.
 - Australian governments, in relevant jurisdictions, should examine the funding and costs and benefits of establishing a single courts agency under the collective governance of the relevant presiding judicial officers.
 - Irrespective of the governance model chosen, all jurisdictions should undertake and publish periodic reviews of the adequacy of court funding every three years.

Courts are fundamental to the civil justice system. As discussed in chapter 11, there are a range of ‘supply’ and ‘demand’ factors that affect the performance of the courts (table 17.1). This chapter examines a number of these factors.

The efficiency of the litigation process is influenced by courts' use of information technology and the degree of task specialisation. These issues are discussed in sections 17.1 and 17.2 respectively. The governance structure of courts is also a key determinant of court performance, and current models and options for reform are examined in section 17.3. The capacity of courts to perform their role is also affected by available resources. Section 17.4 looks at court and judicial resourcing trends over time and explores options for alternative funding arrangements.

Table 17.1 Factors impacting the 'market for litigation'^a

Where the number of disputes in the community is given

<i>Supply side factors</i>	<i>Demand side factors</i>
<ul style="list-style-type: none"> • Court resourcing • The efficiency of the litigation process as influenced by: <ul style="list-style-type: none"> - the degree of task specialisation - case flow management - use of information and communication technology - conduct of parties - court process and procedures • Court governance 	<ul style="list-style-type: none"> • Cultural traits and general economic conditions • The costs of accessing the service and cost shifting rules • The incentives that apply to lawyers as shaped by the joint effect of the fee regulation and the organisation of the supply of legal services • The availability of alternative dispute resolution (ADR) • Court processes and procedures

^a The number of disputes in the community is itself affected by a number of factors such as the structural, social and economic characteristics of the economy, the business cycle, and the quality and quantity of legislation.

Source: Adapted from Palumbo et al. (2013).

17.1 Technology

Significant investments have been made in court technology

Use of technology can improve the efficiency of court-based dispute resolution and court operations. In 1999, a report by the Victorian Parliamentary Law Reform Committee on the prospective impact of information and communications technology on the justice system predicted that:

... developments in technology offer the opportunity to transform the civil justice system into an accessible, inexpensive, transparent and efficient system, which is responsive to the needs of the community. The effective use of IT in the justice system can entirely change the relationship between courts, governments and the public ... technology can ensure that everyday legal issues are processed without the need for expensive legal advice or long court processes. (1999, p. 23)

Similarly, in his final report on the civil justice system in England, Lord Justice Woolf expressed the view that:

IT will be the foundation of the court system in the near future and now is the time that it should be seen to be receiving attention at the highest levels. (Woolf 1996, ch. 21, para. 26)

In the last two decades, many Australian courts and governments have recognised the importance of technology and implemented significant reforms aimed at improving case management systems and making court processes and operations more efficient and accessible (AGD 2012e). Key ways in which Australian courts are utilising technology include:

- providing online information to court users including via court websites and publishing court decisions online
- providing online resources specifically targeted to the needs of self-represented litigants, including web-based guides and You Tube videos on court procedures
- allowing court documents to be filed and court fees to be paid electronically
- providing online access to court documents
- enabling litigants and parties to communicate with the court about pre-trial issues using emails or other secure online environments
- conducting procedural hearings through tele- and video-conferencing or tailored ‘virtual court’ applications
- facilitating and providing technologies which make the running of a trial and giving of evidence more efficient (audio, video, transcript and evidence presentation systems)
- introducing sophisticated integrated case management systems, which better support efficient case management, work flow and performance measurement.

But there is scope for greater use of technological solutions

While there has been significant technological uptake, investment in information technology has been uneven across jurisdictions, with the availability, quality and use of technology varying widely between and within jurisdictions. Even relatively basic uses of information technology, such as conducting less complex directions hearings by telephone, do not appear to be utilised as fully as they might be. Variability in the quality and use of technology was raised by a number of participants in this inquiry.

Notwithstanding the general enthusiasm attending discussions around use of technology as a means of improving access to justice, the Law Council is advised that many court systems remain antiquated. (Law Council of Australia, sub. 96, p. 101)

... e-filing is largely unavailable in [South Australian] courts and tribunals. When it is available it is sporadic and not uniform. In other words, whereas e-filing is available in some registries in others it is not. In one example where e-filing is not available in the registry it is available for

interlocutory processes. There is no seemingly consistent approach even to that very basic subject ... Whereas one would expect information technology would be utilised effectively to assist in streamlining litigation, our court rooms largely do not extend to provide those facilities. (Law Society of South Australia, sub. 61, p. 18)

The availability, quality and use of technology [to improve the efficiency and scope of service delivery] already exists but it varies widely amongst Courts, Tribunals, ADR providers and legal practitioners in each jurisdiction. (Australia's Lawyers Alliance, sub. 107, p. 12)

Many submissions supported greater and more consistent use of technology to streamline the litigation process and overcome geographic isolation. For example:

[G]reater use of [technology] should be made ... If we are to improve access to justice, all Courts and Tribunals and their ADR offshoots and lawyers must embrace up to date technology. A minimum standard should be established in each jurisdiction and rolled out in stages as far as Courts, Tribunals and their ADR offshoots are concerned. The front end cost will likely be substantial but the time and cost savings in reduced Court, Tribunal and ADR attendances could ultimately be even more substantial. (Australia Lawyers Alliance, sub. 107, p. 12)

The Law Council strongly supports the greater use of technology in proceedings to improve access to justice and efficiency of court processes ... Increased reliance on technology could reduce litigation costs, eliminate unnecessary (and expensive) formal correspondence and save time through the electronic lodgement of various case material. Other telecommunications vehicles such as greater use of the telephone, video and email for direct communication between parties and the courts, will simplify procedures in routine applications, which can be dealt with without the need for parties to attend the court. (Law Council of Australia, sub. 96, pp. 9, 54)

However, some submissions also cautioned that technology is not a complete solution to access problems:

While the use of technology, such as the Commonwealth Law Portal can streamline people's experience of the justice system, there are many clients who don't use technology for literacy and cost reasons. (Women's Legal Service Inc (Brisbane), sub. 117, p. 4)

... increased reliance on technology to administer and deliver court services may have a disproportionately adverse impact on applicants who do not have ready access to online service, such as applicants in [rural, regional and remote] areas (including, for example, Indigenous communities) or in other disadvantaged circumstances. Accordingly, equitable access should be ensured by continuing to provide ordinary access through court registries. (Law Council of Australia, sub. 96, p 101)

Participants also emphasised that maintaining technology can be very labour intensive and it cannot be a one-size-fits-all approach. The wider role of technology in the justice system is further discussed in chapters 5 and 10.

Low-cost technology options could be better exploited

Some technologies, such as telephone conferences, can be utilised by courts at relatively low cost and obviate the need for litigants or their legal representatives to attend court premises. As noted by the Commonwealth Attorney-General's Department, this has obvious implications for efficiency and accessibility:

[Reducing the need to attend court premises] significantly reduces the cost of conducting court proceedings and enhances the ability of people in regional areas to access court services. (sub. 137, p. 36)

Despite the clear benefits that arise from more fully exploiting low cost technologies, only some courts have rules and procedures in place to facilitate their use. For example, the Supreme Court of NSW has a dedicated conference call facility used principally for common law directions hearings before a Registrar. The practice of the Land and Environment Court is that if parties are in non-metropolitan areas, the court automatically lists the first directions hearing via teleconference while other parties may request a teleconference by contacting the court.

By comparison, in the United Kingdom, there is a broad based presumption that certain types of cases (largely procedural hearings and interim applications with a time estimate of less than one hour) be conducted by telephone unless the court orders otherwise.

In considering the impact of such reforms it is important to look at the community-wide costs and benefits. As Lord Justice Jackson noted with respect to experience in the United Kingdom, while telephone hearings may be a less effective use of judicial time, this must be balanced against savings for parties (by eliminating travelling time) and savings in other court resources (such as reducing the need for court rooms or staff). Overall, the service has been well received (Jackson 2009b).

The Commission sees merit in the possibility of a similar presumption applying in Australian courts. This could be extended to the use of online court facilities where available. This proposal received significant support in post-draft submissions (for example, Law Society of South Australia, sub. DR219; Maurice Blackburn, sub. DR197). Some participants were supportive, with reservations:

The National FVPLS [Family Violence Prevention Legal Services] Forum agrees with this recommendation with reservations. If the legal matter is simple and straightforward there can be benefits from utilising the convenience afforded by technology. ... Telephone and internet facilities would need to be upgraded both in remote communities and regional courts. ... Where technologies are used it is even more critical that clients are appropriately represented as using the telephone can create an additional communication barrier, re-traumatise clients and impose more barriers to accessing services due to limited telephone and internet facilities. Generally it would not be appropriate in family violence/child protection matters for there to be a presumption of telephone/online hearings. (sub. DR194, p. 6)

RECOMMENDATION 17.1

Courts should extend their use of telephone conferences and online technologies for the purpose of procedural or uncontested 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.

Investment in technology is required to generate longer term savings and improved access to justice

In some cases, greater reliance on information technology would require an upfront investment by the courts. However, as noted in a number of submissions, the cost savings which result from greater use of up-to-date technology would offset the costs of those investments in the longer term.

This is consistent with the view of the Organisation for Economic Co-operation and Development (OECD), which has found that justice systems devoting a larger share of the justice budget to information technologies display, on average, shorter trial lengths, as well as higher productivity of judges (where the productivity of judges is measured as the number of cases disposed of by each judge) (OECD 2013). As a senior court administrator in Australia commented:

... there are readily available technologies in areas such as customer relationship management, appointment and queue management, voice recognition, paperless workflows and digital signatures that could streamline file management. Courts may struggle to deliver what is required within the resources available over the long term if they do not begin to embrace some of the new technologies. (Foster 2012, p. 13)

The Commission has identified at least four areas where there is potential for investment in information technology to yield longer term savings and improved access to justice — e-lodgment and electronic court file technology, technologies to improve access to justice for self-represented litigants, electronic trial technology and case-flow management systems.

E-lodgment and electronic court file technologies

E-lodgment and electronic court file technologies provide a more efficient and convenient way for litigants and representatives to interact with the courts and can assist in facilitating self-representation. A number of courts in Australia already facilitate some degree of e-lodgment and electronic access to court files. Some systems are open to all litigants. Others restrict access to lawyers, corporate litigants and government departments. For example, the eLodgment service in Western Australia allows registration by legal practitioners, major private organisations and government departments.

As is the case in other areas of information technology, availability and technological take-up vary across jurisdictions.

- The Federal Court and Federal Circuit Court utilise an e-lodgment system which is open to all court users. In 2012-13, 41 per cent of all documents filed in the Federal Court and Federal Circuit Court (general federal law matters) were filed electronically (FCA 2013a). The Federal Court is currently enhancing the system to completely replace the use of paper files.
- E-filing is available to family law litigants and parties through the Commonwealth Courts Portal for a range of family law documents. The Federal Circuit Court reported that e-filing for divorce proceedings has continually increased since it was introduced in 2009, with an average of 156 divorce applications e-filed each week in 2012-13, representing around 19 per cent of all divorce applications in that year (FCC 2013).
- E-filing has been available for civil documents in the County Court and Supreme Court of Victoria (Trial Division) since 2003 and 2007 respectively. The Supreme Court of Victoria has also recently developed an advanced online case management system, RedCrest, which, among other functions, facilitates e-filing. Since 1993, the Magistrates Court of Victoria has utilised a Civil Electronic Data Interchange Program, which allows solicitors to electronically lodge civil complaints and other applications.
- The range of documents available for filing online in the Supreme, District and Local Courts of NSW through Online Registry was expanded significantly in 2013, with 42 civil forms available for online filing. The NSW Land and Environment Court utilises e-court for this purpose.
- E-filing has been operational in the Queensland Magistrates court since 2003, but is not yet available in the District and Supreme Courts. A system called ‘eFiles’ is currently being trialled in the Planning and Environment Court in Brisbane which, once more widely implemented, will make District and Supreme Court documents available to all court users online 24 hours a day, 7 days a week.
- In Western Australia, two systems are in operation — ‘on-line forms’ and ‘eLodgment’. The ‘online forms’ system is operational in the Magistrates Court and the Probate Office of the Supreme Court and is designed to assist non-regular court users to lodge forms electronically. ‘eLodgment’ is operational in the Supreme Court, District Court and Magistrates Court and is described as a ‘work in progress’, which will be expanded as resources become available (District Court of Western Australia nd). It is designed for law firms and government agencies or municipalities who have knowledge of court processes.
- In South Australia, e-filing is available for civil claims in the Magistrates Court.
- In Tasmania, an electronic lodgments pilot project was established by the Supreme Court of Tasmania in September 2013.

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- No e-filing appears to be available in the Northern Territory or the ACT.

Technologies to improve access to justice for self-represented litigants

Courts — like tribunals, legal assistance providers and other organisations — use the internet extensively to provide information on legal rights, responsibilities and enforcement options, which can be useful for intervening before matters escalate. However, while internet-based information is an efficient way of getting information to self-represented litigants (SRLs), it suffers from the general limitations of online information — it is mainly useful for confident consumers with the skills to find it, understand it, and apply it to their personal circumstances.

More could be done to make information accessible to SRLs. As Chief Justice Martin said:

... I think the courts can do much better about making ourselves accessible to self-represented litigants. Also, the Internet can of course provide information about the substantive legal issues. It can be provided in a simplified form, there's an awful lot of information on the Internet now about the law and legal subjects. It's written usually in a form that's intended for digestion by lawyers. I think we can do better about providing that in a way in which it's more readily understood by ordinary members of the public. (trans., p. 585)

A number of inquiry participants agreed that while technology plays an important role in assisting self-representation, it could be exploited to a greater degree. While technology has the potential to deliver more personalised, targeted information to SRLs, it should also be used as more than a medium for disseminating information. Staudt and Hannaford's (2002) interdisciplinary investigation on how to improve access to justice for SRLs in the United States mainly put forward technological solutions, such as Archetype Finder, a system of web-delivered questions designed to help SRLs identify the legal choices and options available for selected types of cases, and can also be used to generate legal documents to be filed with the court.

Grainger (sub. 66) noted that Australian courts and tribunals lag overseas courts in the adoption of technology, and recommended that they focus on:

- access to the internet
- text message technology
- smartphone technology
- interactive 'do-it-yourself' forms
- interactive web-based question and answer forums (based on Law Help — New York's Live Help program)
- video conferencing technology.

In Australia, the Administrative Appeals Tribunal (AAT) already uses SMS technology to send reminder messages to SRLs about approaching case events. Allens, Ashurst and

Clayton Utz (sub. DR224) commended the CourtNav program, an online tool developed by the Royal Courts of Justice Bureau in London, as an example of an effective tool to help SRLs understand procedural requirements of that jurisdiction. CourtNav is an online tool that asks users to answer a number of questions to complete court forms for the user, with final forms checked by a solicitor (Royal Courts of Justice Advice Bureau 2014).

Technological developments are also generating more options for SRLs in the private market for unbundled legal assistance. For example, a number of firms in the United States are using ‘do-it-yourself’ technologies that allow people to create and file documents on their own electronically, while building into the product an ability to consult with a lawyer (Zuckerman 2014).

Electronic trial technology

Technologies that support electronic trials and the use of video conferencing for the giving of evidence can also be more efficient for the court and parties. Over the past decade, electronic trials have been conducted in a range of Australian jurisdictions, typically for large and complex litigation.

Initially, these trials were run with the assistance of commercial service providers, with parties bringing to the courtroom all of the technology they required to support their case — computers, flat screen monitors, digital projectors, a visual display system, and file servers containing databases with images of the documentary and other evidence to be presented at trial. The associated costs were borne by the parties.

Over the last decade, jurisdictions have increasingly moved toward developing their own court-provided technology, with some jurisdictions significantly further advanced than others. New court buildings are incorporating many of the features found in electronic courtrooms as part of standard infrastructure. The use of modern information communication technology (ICT) facilities in courtrooms is no longer restricted to complex or longer trials. Use of ICT has also become more selective, with parties drawing on technology that suits the needs of their particular case rather than having to use a whole system (Wallace 2009).

There is international evidence to suggest that total cost and time savings from the use of electronic trial technology are in the vicinity of 25-30 per cent in larger matters (Jackson 2008). The benefits of electronic trial technology have also been shown to be particularly significant in the context of large and complex litigation in Australia (box 17.1).

Savings are not restricted to large and complex cases — a United States report suggests minimum savings from the use of evidence presentation technologies of about 10 per cent, even in a short, one hour case with only a few documents (Lederer 2003).

Participants in this inquiry also considered that the use of electronic trial technology has been beneficial. For example, Allens submitted that:

The cost of electronic court systems has decreased significantly in the past 5 years ... We believe there is significant benefit to litigants' access to justice when courts have invested in the necessary infrastructure. (sub. 111, p. 12)

Box 17.1 Great Southern proceedings — Supreme Court of Victoria

The Great Southern proceedings, which commenced in the Commercial and Equity Division of the Supreme Court of Victoria in October 2012 and concluded in October 2013, was the largest set of group proceedings commenced to date in the Division — comprising in excess of 22 000 group members and individual plaintiffs.

The proceedings raised important issues involving the Corporations Act 2001 (Cth) in regard to managed investment schemes and other matters.

Various claims against the Great Southern entities and their directors included whether certain product disclosure statements complied with this legislation and whether the Great Southern entities breached their statutory duties as a responsible entity of managed investment schemes. There were also issues relating to whether there was misleading and deceptive conduct on the part of various parties in the context of the relevant product disclosure statements.

A special 'referee' was appointed to manage the discovery process, in which there were over 10 million potentially discoverable electronic documents.

An analysis of the benefits of running the trial utilising e-trial services looked at three areas of savings — time reduction, hard copy court book cost and hard copy court book management. The trial judge estimated that the trial time required would have increased by 25 to 30 per cent without the benefit of the technology utilised. The net benefit of utilising e-trial services was estimated at \$2.4 million.

Source: Supreme Court of Victoria (pers. comm., 27 February 2014).

Information technology can support efficient case-flow management

In addition to creating efficiencies in the pre-trial and trial stages of litigation, information technology also critically supports efficient and effective case-flow management. Case management software enables courts to more efficiently allocate their resources in terms of scheduling judicial workloads, listing matters and allocating hearing rooms.

Perhaps most importantly, case management software allows better measurement and management of court workflow and facilitates data collection and reporting that are critical to evaluating the effectiveness of procedural and other reforms. The OECD has found:

An important condition for the implementation of case flow management techniques is the systematic collection of detailed statistics on case flows, trial length, judges' workload and other operational dimensions. With some exceptions ... trial length appears to be shorter in systems with a higher production of statistics. (OECD 2013, p. 6)

The International Framework for Court Excellence makes the point this way:

Without reliable measurement systems courts will be unable to adequately assess how they are performing or whether any of their strategies or initiatives is actually effective. What may appear to be a sensible solution of requiring greater pre-hearing issues disclosure could well impose unacceptable costs upon parties or add further delay to case finalization. Measurement is vital to effective assessment of performance and progress. (International Consortium for Court Excellence 2013, p. 30)

Not all jurisdictions appear to have adequate technology for this purpose. For example, as noted in a 2011 review of case management and listing procedures in the ACT Supreme Court:

Consultation with other jurisdictions, reviews of case management in other jurisdictions, and the Auditor-General's reports of 2005 and 2010 all emphasised the need for reliable and routine statistics on Court performance in order to implement and maintain an effective case management system ... The current practice in the Supreme Court Registry is to manually collect and analyse information on cases. (Penfold and Leigh 2011, p. 42)

Subsequent to this 2011 review, in 2012-13 the ACT Government provided \$8.2 million over three years for a new case management system to be rolled out across all ACT Law Courts and Tribunal jurisdictions by 2015 (Justice and Community Safety Directorate 2013).

However, there still remain jurisdictions that are relying on out-dated technology. In particular, the Chief Justice of South Australia has commented on the urgent need to upgrade the information technology systems supporting South Australian courts:

The provision of modern technology infrastructure for the courts is as urgent as the need for a new courts building. The courts in many other Australian jurisdictions have installed, and are extending the use of, information technology which enables electronic filing and file management and allows internet access to the parties. Our technology is primitive in comparison. (Judges of the Supreme Court of South Australia 2012, p. 6)

Overcoming barriers to the uptake of technology

Currently, governments have a central role in funding technology in courts and tribunals. For self-administering courts, the government does not usually provide a specific budget allocation to IT — courts and tribunals make their own allocations from their budget. While arrangements for courts that are not self-administering do vary, judicial officers have less control and input into the process (Alford, Gustavson and Williams 2004, p. 39).

In 2012, the National Centre for State Courts in the United States developed a set of principles for judicial administration. According to principle 23, the court system should be 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. The Commission considers that this principle is relevant to Australian courts.

Funding is not the only constraint faced by courts seeking to improve their use of technology. A number of participants, both courts and court users, made the point that technological initiatives are currently siloed and individual courts and other justice bodies are reinventing the same wheel. There may be merit in consolidating and/or better disseminating efforts across the justice system, perhaps through partnerships between courts, tribunals, legal service providers and governments. The Chief Judge of the Supreme Court of South Australia has commented:

In preparing the business case for a new electronic case management system in this State, the [State Courts Administration Council of South Australia] has surveyed the systems available interstate. There continue to be marked differences in the systems adopted in the States. A national program to facilitate and coordinate the technology that is used would be of benefit. If the State and Federal Courts were to adopt systems that were compatible, the collection of data and the comparison of that data would also be facilitated. (sub. DR330, p. 1)

Along similar lines, the Law Society of Tasmania commented:

It would be useful if there was some communication and uniformity across jurisdictions including Federal and State, as to which particular systems are used or implemented. Surely such uniformity [must] be able to result in cost savings for the various jurisdictions and an ability for users to more easily familiarise themselves with different systems. (sub. DR227, p. 24)

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.

17.2 Specialisation

Task specialisation is often advocated as a way to enhance the performance of the courts (Palumbo et al. 2013). As Australia's formal civil justice system has developed, there has been a trend towards greater task specialisation.

Two factors have contributed to the increase in task specialisation:

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- greater legal complexity, especially with growth in legislation
 - increased specialisation of the legal profession — which means that newly appointed judges and magistrates may not have the same breadth of experience as in the past, and that practitioners appearing in the courts expect a level of expertise on the bench (Mack et al. 2012).

Task specialisation has taken a number of forms including the creation of:

- separate stand-alone courts that deal only with a particular or related set of subject matter — for example, the Family Court of Australia, which specialises in matters under the *Family Law Act 1975* (Cth), and the Land and Environment Court of NSW, which deals with a range of environment, planning and related legislation
- divisions or special programs embedded within existing court structures that deal with particular subject matters — for example, drug courts or family violence courts
- specialised court lists in which certain categories of cases are heard, often by dedicated judges — for example, commercial lists, building lists and intellectual property lists.

All of the above forms of task specialisation are, at times, referred to as ‘specialist courts’ (ALRC and NSWLRC 2010).

Specialisation varies across jurisdictions ...

Australian courts differ with respect to the extent and form of specialisation in civil matters (and between criminal and civil matters). As discussed in chapter 10, jurisdictions also differ in their use of courts and tribunals for this purpose. Further, some courts have tribunal like functions within them – for example, the Land and Environment Court of NSW has both judges and commissioners who make decisions in different types of proceedings.

Some specialist ‘courts’ are expressly established by legislation. Others operate as a matter of practice, and their structures are established through administrative mechanisms. It has been noted that an advantage of the latter approach is that it enables the court to more easily adjust the structure (independent of the legislature) if, for example, the specialisation is later perceived as unnecessary or there is a desire to change its focus. It also enables the court to deploy its judicial workforce more flexibly, across the whole range of the court’s work (Mack et al. 2012).

Most magistrates’ courts have, within their structure, a range of specialist ‘courts’, divisions or programs. For example, the Local Court of NSW has a Children’s Court, Coroner’s Court and a Chief Industrial Magistrate’s Court. In Tasmania, statutory provision is made for the Magistrates Court to sit in six divisions — Civil, Coronial, Youth Justice, Children’s, Administrative Appeals and Mining.

The advent of many specialist courts at this level, such as drug courts, family violence courts and Koori courts, reflect developments in ‘therapeutic jurisprudence’ and primarily deal with preventing criminal behaviour and reducing imprisonment related to mental health, drug and other issues. These specialist courts have been said to be characterised by ‘legislative reform, specialist staff and judiciary, multi-disciplinary teams, tailor-made processes and additional resources’ (Spencer 2012, p. 4).

Courts higher up the hierarchy also utilise specialist ‘courts’, divisions or lists, which can be managed and heard by judges with specialist expertise. The number and subject matters of these lists vary according to the jurisdiction and workload of individual courts. Most superior courts and some intermediate courts have specialist commercial ‘courts’ or court lists, with larger jurisdictions having a larger number of specialist lists.

The Federal Court has established panels of judges in some registries to hear and determine particular types of matters such as competition, corporations, industrial and patents matters. Similarly, the Federal Circuit Court has established specialist panels in some registries for commercial, admiralty, migration, human rights, industrial and national security matters.

Some jurisdictions also utilise specialist courts for environmental, land, planning and industrial matters, for example, the NSW Land and Environment Court and the NSW Industrial Court.

... and the costs and benefits are context specific

The main arguments in favour of specialisation are that it enhances court efficiency and improves the accuracy, timeliness and quality of decision making because judicial officers have more detailed knowledge of the relevant area of law and familiarity with the relevant processes, and that it is likely to guarantee better consistency of decisions.

But these benefits need to be weighed against the risk that specialisation may introduce rigidity (and potential inefficiencies) in the use of resources, limiting the flexibility to reallocate judges from one area to another. Specialisation is also thought to impact on skills and job satisfaction, including limiting the ability of judicial officers to benefit from ‘knowledge spillovers’ (OECD 2013), and contributing to the narrowing of their expertise and ‘de-skilling’ (Mack et al. 2012) — all of which can, in turn, negatively affect job satisfaction levels. Concerns have also been raised that specialisation can lead to judicial officers becoming fixed in their viewpoints (Sage, Wright and Morris 2002).

It has been noted that, despite the increasing popularity of judicial specialisation and specialist courts across the common law world, there have been few assessments that weigh up the benefits and costs of specialisation (Baum 2009).

The Law Council of Australia’s submission to this inquiry indicates, in general terms, that specialist courts have a positive impact on the efficiency of dispute resolution:

The Law Council is advised that specialist courts are effective and efficient due to the capacity to specialise and appoint judges or members with extensive practising experience in the relevant areas of law. (sub. 96, p. 82)

However, whether the benefits of specialisation outweigh the costs in a particular context will depend on a wide range of factors. These include:

- how the specialisation is structured (ie. in stand-alone court or embedded in an existing court)
- the rigidity and formality of the specialisation structure (whether it is administrative or legislatively imposed)
- the nature of subject matter in question
- the size of the court
- the volume of matters it deals with
- whether the specialisation is full or part-time, short-term or permanent
- how clearly the standards or requirements for skills and expertise for particular types of work are defined.

For this reason, no conclusion on the costs and benefits of specialisation can be reached in the abstract. This is reflected in the discussion below in respect of two forms of specialisation raised in submissions — the use of specialist court lists and specialisation in environmental matters.

Specialist court lists

Although many courts are increasingly utilising specialist lists, often staffed by panels of judicial officers with relevant expertise, there is little empirical research on the impacts of this form of specialisation.

In its submission to this inquiry, the Law Council of Australia was supportive of existing specialist court lists, noting:

Specialisation within courts is common. For example, most supreme courts have separate lists, commercial lists and property lists. Equity courts and other lists have been established in most jurisdictions to enable judicial specialisation, which in turn enables the Court to deal with complex matters efficiently. (sub 96, p. 82)

This is consistent with the findings of research into the New South Wales court system in which solicitors interviewed expressed a desire for more judicial specialisation (Marfording and Eyland 2010).

A similar picture emerges from overseas experience. In the course of his review of civil litigation costs in England and Wales, Lord Justice Jackson received the clear message from court users and practitioners that specialisation by judges was welcomed and leads to reduced cost. He recommended that, as far as possible, cases should be assigned to judges

who specialise in that type of case for both case management purposes and for hearing (Jackson 2009a). There is also OECD data which suggests that specialisation in commercial matters is associated with shorter trial length (OECD 2013).

However, specialisation can potentially result in inefficiencies if it means that a matter in a high volume court has to wait for a judicial officer who has expertise in a particular subject matter to become available. Principles of fair work allocation and transparency also come into play.

Based on the submissions made to this inquiry, the Commission does not see a need for more legislatively prescribed specialisation within courts. However, the Commission sees merit in courts continuing to facilitate the allocation of cases to judicial officers with relevant expertise to the extent possible — while remaining sensitive to the need to balance the efficiencies to be gained from specialisation with the potential disadvantages.

The Commission notes that, while not mutually dependant, greater specialisation can enhance the benefits brought about by docketing, such as savings in preparation time for judicial officers (chapter 11) (Taylor and Fitzpatrick 2012). The Commission supports courts continuing to facilitate civil matters being allocated to judges with relevant expertise for case management and hearing through use of specialist lists and panel arrangements.

Specialist environmental courts

Two submissions to this inquiry called for the creation of specialist environmental courts in those jurisdictions lacking such a court. It is suggested that these courts be modelled on the NSW Land and Environment Court.

The Australian Network of Environmental Defender's Offices (ANEDO) submitted that specialist environmental courts are 'particularly well-placed to manage the complexities of environmental litigation with maximum efficiency' (sub. 94, p. 17), with the expertise of the decision-maker being identified as an important factor. This proposition was supported by the Conservation Councils of Australia (sub. 124).

The NSW Land and Environment Court is a superior stand-alone court. South Australia and Queensland each have specialist environmental courts at the District Court level — the South Australian Environment, Resources and Development Court and the Queensland Planning and Environment Court. While there are no specialist environmental courts in Victoria, Western Australia, Tasmania, the Northern Territory and the ACT, tribunals are used to differing degrees. These include the Victorian Civil and Administrative Tribunal, the Western Australian State Administrative Tribunal, the Tasmanian Resource Management and Planning Appeal Tribunal, the Northern Territory Lands Planning and Mining Tribunal and the ACT Civil and Administrative Tribunal.

While the NSW Land and Environment Court is highly regarded, the Commission notes that moves to create stand-alone superior environmental courts in other jurisdictions would

be a major structural change. The Commission further notes that whether specialisation in environmental matters takes the form of a specialist court or a specialist tribunal or list in a tribunal is not determinative of their effectiveness and accessibility:

... the status and authority of successful [environment courts and tribunals] located throughout the world does not necessarily correlate with the ECT [environment court or tribunal] being a court rather than a tribunal or a court at a higher level in the hierarchy of courts. Some of these successful fora have been established as a superior court of record whereas others have been established as inferior courts of record or tribunals with one or more environmental divisions or streams. (Preston 2013, p. 2)

The Commission received limited feedback on this issue in response to a request for further information. The ANEDO expressed the view that ‘establishing specialist courts improves the level of understanding about environmental issues being considered, the rigour of the assessment and consistency of decision making’ (sub. DR293, p. 3). The ANEDO also noted that:

Anecdotally, EDO lawyers practicing in jurisdictions without a specialist court (but with a dedicated environmental list within an existing court or Tribunal, such as VCAT or the SAT of WA (Development and Resources Stream)) have found that a dedicated registry is important for the environmental list, procedures lack consistency and, particularly for unrepresented litigants, this can be overwhelming. (sub. DR329, p. 13)

The Commission accepts that specialisation in the area of environmental law can improve justice outcomes by promoting the expertise of decisions makers and the consistency of decision making. Internationally, there has been considerable growth of specialist environmental courts and tribunals. However, the Commission is not convinced that the only way of achieving improved outcomes in this area is the creation of stand-alone specialist superior courts of record. Independent specialist tribunals (such as in Tasmania) and specialist lists or panels of judges within existing courts or tribunals (such as in VCAT) are other ways that the benefits of specialisation can be achieved while making use of existing infrastructure (EDO (ACT), trans., p. 63). Improved procedures and assistance for self-represented litigants are possible within existing structures.

The ANEDO notes that as part of the review of the planning and development system in South Australia, consideration is being given to rolling the functions of the Environmental Resource and Development Court into a specialist list within the Civil and Administrative Tribunal.

17.3 Court governance and administration arrangements

The OECD has identified the governance structure of courts as a key determinant of court performance, noting that an important dimension in this respect is the allocation of responsibilities over jurisdictional and managerial tasks. OECD research has found that systems in which the chief judge has broader managerial responsibilities — over areas

such as the organisation and supervision of judges, the supervision and appointment of administrative staff, and the administration of the budget — also display shorter trial lengths (OECD 2013).

Courts in Australia operate under different court governance arrangements. In New South Wales, Queensland, Western Australia, Tasmania, the ACT and the Northern Territory, the courts follow the traditional ‘executive’ model. Under this model, the executive branch of government provides funding for the courts (and to a significant extent regulates the use of those funds), owns and manages the courts buildings and facilities and employs and supervises court administration staff (Sallman and Smith 2013). For example, in New South Wales, the Courts and Tribunal Services Division of the Department of Justice administers the court system, employing registrars who manage the courts and tribunals, and a network of registry staff, reporting services, Sheriff’s Officers, library services and an alternative dispute resolution directorate.

In contrast, the federal courts are self-administering with shared administration of some functions. In 2009, the Family Court and the Federal Circuit Court amalgamated administration activities (including corporate functions), eliminating duplication of functions such as human resources, payroll, property services and finance systems. The single administration was formalised in 2013.⁸⁰ The Federal Court of Australia also provides General Federal Law registry services for the Federal Circuit Court.

In South Australia the courts follow a ‘judicial autonomous’ model in which a judicial council — consisting of the Chief Justice, the Chief Judge and the Chief Magistrate — and a separate Courts Administration Authority together provide administrative facilities and services to the courts.

In Victoria the courts have recently moved to a model similar to that operating in South Australia. A new independent body, ‘Court Services Victoria’, will provide, or arrange for the provision of, the administrative facilities and services necessary for the performance of the judicial and administrative functions of the Victorian courts and the Victorian Civil and Administrative Tribunal (Court Services Victoria Bill 2013). Courts Services Victoria is to be governed by the Victorian heads of jurisdiction.

In introducing the legislation the Victorian Attorney-General commented:

... while the Crown needs to provide the administrative support for the courts, it is bad in principle and bad in practice for that support to be provided via a government department. It is bad in principle, because it opens the potential for executive government to interfere in the operations of the courts, and bad in practice because it has meant that much of the operational functioning of the courts has been outside of the courts’ control. Court administrations have, for example, been heavily dependent for facilities construction, IT and personnel services on other parts of the Department of Justice, parts which also have responsibilities for supporting diverse other functions of the Department. (Clark 2013, p. 230)

⁸⁰ *Courts and Tribunals Legislation Amendment (Administration) Act 2012* (Cth).

Problems with the Executive model

Each model of court administration presents its own governance challenges. However, there has been a long running debate as to whether there is a structural deficiency or ‘fundamental flaw’ in the organisational design of the executive model of court administration. Some argue that the executive model represents a significant obstacle to the strategic long-term planning of the courts’ activities and is not optimal for judicial independence, efficiency and quality (Alford, Gustavson and Williams 2004; Barr et al. 2006). It has been suggested that both judicial independence and better management results are likely to be achieved by the judiciary having more, rather than less, involvement in court policy and administration (Church and Sallmann 1991).

Some of the shortcomings attributed to the executive model include:

- courts lack stable funding and discretion over expenditures, which create obstacles to strategic and long-term planning
- there is a lack of a single source of clear leadership and accountability
- court administrators often have divided loyalties to executive and judicial officers, which can undermine the effectiveness of court administration
- there exists a likelihood that the courts’ interests may become subsumed by the policy priorities of the government of the day (Barr et al. 2006).

According to the Australasian Institute of Judicial Administration (AIJA) report into court governance arrangements in Australia:

... the traditional model is clearly problematic in terms of the efficiency and effectiveness of the courts. It sets up a misalignment of authority and responsibility, in which those who have the core operational responsibility (judges) lack clear authority over the necessary resources to carry out that responsibility. (Alford, Gustavson and Williams 2004, p. 86)

In respect of lack of control over funding, the report stated:

The net result is that the courts lack an adequate say at two stages of the budgetary process. Firstly, they have no direct input at the point where government as a whole determines the budget for each of its agencies and programs. And secondly, they lack authority over the management of finances within programs once they have been allocated, and indeed sometimes find out after the fact that monies have been reallocated without consultation. (Alford, Gustavson and Williams 2004, p. 86)

The report recommended that the most suitable governance arrangements are ones in which, among other things:

- the authority of the Executive is confined to employing judges and providing a global budget for a specified set of outputs, while the judiciary has clear control over the remainder of the functions of court administration: staff, infrastructure, operations and outputs

-
- court staffing and infrastructure and some operations are controlled jointly by all of the courts in the smaller jurisdictions, and by some of the courts in the larger jurisdictions.

Where to from here?

Models of court administration have important implications for the efficient operation of courts. However, while reports of various bodies identify a number of problems with the executive model which may lead to inefficiencies in the operation of courts, there does not appear to be empirical analysis which would allow the conclusion that one model of court administration makes for a more efficient and effective court system than another. In particular, it is not clear whether improvements in efficiency and effectiveness to be gained from aligning responsibility with authority, are greater than the obvious economies of scale to be achieved under the executive model whereby government departments administer the courts.

Much may depend on the degree of collaboration that exists between the judiciary and the relevant government department in those jurisdictions utilising the executive model, and the clarity of governance arrangements that exist with respect to court administration (Alford, Gustavson and Williams 2004). In 2005, the Auditor-General of the ACT recognised this in his findings in respect of ACT court administration, concluding:

- The current governance arrangements for the ACT Courts system indicate a lack of alignment between responsibilities and accountability.
- Clear accountability is difficult to achieve. The Courts Administrator has conflicting accountabilities to the Attorney-General, the Chief Executive of [the Justice and Community Safety Directorate], the Chief Justice, and the Chief Magistrate. Some financial accountability issues are also unclear. For example, judicial officers effectively make some expenditure decisions, but legally they are a departmental decision.
- There are opportunities to clarify accountability through a review of overall governance structures, and through better budgeting and reporting.
- Significant administrative efficiency can be achieved with greater cooperation between the judiciary and the Department in court management. (ACT Auditor-General 2005, pp. 3 – 4)

The Commission received a range of feedback on the issue of whether changes to current court administration arrangements are desirable to facilitate more efficient and effective court operations. The Supreme Court of Victoria indicated that stronger connections between the judiciary and administration of the courts have assisted in improving the efficient handling of cases and that there will be increased scope for this to occur under the new arrangements:

A combination of a judiciary committed to innovation and improvement and an administration focused on supporting the judiciary has brought about successful outcomes for court users and the community at large. With the establishment of Court Services Victoria, the opportunities for courts to change processes and put in place the administrative support they require will provide even greater scope for reform and innovation. (sub. DR234, p. 12)

Another participant expressed similar support for courts having ‘local control over the budget’ (Transformation Management, trans., p. 622).

However, Chief Justice Kourakis cautioned that an independent administration authority does little to promote judicial independence unless it is adequately funded (Supreme Court of South Australia, sub. DR330). It was suggested that in some jurisdictions a higher level of judicial control over administrative resourcing has been achieved without the existence of an independent court administration authority.

The Commission considers that, at least for larger jurisdictions, the Victorian model offers scope for improved efficiency and effectiveness by giving greater control to the judiciary to manage their own administration, while still benefiting from integrated governance and shared service arrangements. That said, greater control (and resulting efficiencies) may be able to be achieved in ways requiring less significant structural change than the creation of a separate authority. The judiciary and governments in individual jurisdictions are best placed to make this assessment.

While the executive model does not operate at the Commonwealth level, there appears to be scope for efficiencies through greater administrative integration of the Federal Court with the Family Court and the Federal Circuit Court. As noted above, currently the Family Court and the Federal Circuit Court have a shared administration. The option of legislatively merging all administration of the Federal Court, Family Court and Federal Circuit Court was canvassed by the Skehill Review into small and medium agencies in the Attorney-General’s portfolio (Department of Finance and Deregulation 2012). However, the review recommended that the Commonwealth Government should first seek to administratively foster greater cooperation between the courts and only consider legislative merger of administration as a future possibility if efficiencies and effectiveness are not adequately achieved through cooperation. It noted that a legislative merger of administration would ‘significantly change the nature of each Court and its relationship with each other Court’ (Department of Finance and Deregulation 2012, p. 52). The review recommended the establishment of a heads of jurisdiction consultative committee to focus on the achievement of increased efficiency and effectiveness in the management of the courts. The Committee was to report on its work program biannually and on an annual basis in each court’s annual report. Such a Committee was established in late 2011.

The most recent public reports indicate that the Committee’s main focus has been on overseeing the resolution of accommodation issues for the Federal Circuit Court in Sydney, reviewing the courts’ library services and case management systems and developing a strategic plan for the ongoing occupancy of Commonwealth Law Courts buildings. In August 2012, the Committee approved an amalgamation of the courts’ library services (FCA 2013a).

Given that the Heads of Consultation Committee has now been in place for over two years, the Commission considers that it is timely for the Australian Government to assess whether it is achieving its aim and to examine the costs and benefits of a shared administration between the three courts.

17.4 Is there a case for greater financial autonomy?

Currently, the Australian and state and territory governments are responsible for allocating funding to courts in their respective jurisdictions with their annual expenditure funded by budget appropriations out of consolidated revenue. Generally, the Attorney-General or Minister for Justice in the respective jurisdiction will prepare a budget proposal, with input from the judiciary. Any revenue from the collection of court fees is returned to consolidated revenue, although some jurisdictions, such as Victoria and Western Australia, allow courts to retain either all or part of court fees generated to offset their operating costs. As noted above, courts have differing levels of control over how this funding is spent due to different court governance arrangements.

Some stakeholders have criticised the existing arrangement of court fees being directed towards consolidated revenue. For example, the Law Council of Australia argued:

The Law Council strongly opposes the emerging practice of effectively taxing federal court and tribunal users to fund other essential government services. (Senate Legal and Constitutional Affairs Committee 2013b, p. 20)

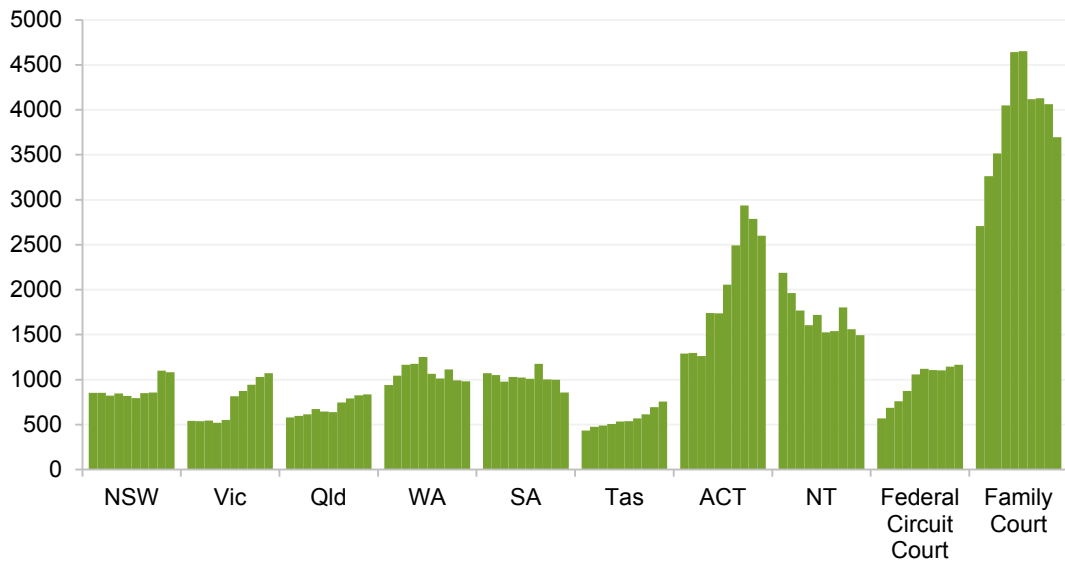
This argument is rather disingenuous, given that cost recovery is currently well below 100 per cent in every Australian court. As such, any fee revenue returned to the government currently only serves to reduce the fiscal impact of providing court services, rather than cross-subsidising any other government activities.

However, the current funding system does have some limitations, such as exposing courts to cuts to their resources during periods of fiscal tightening. A cut to court funding, while decreasing outlays, is likely to leave fee revenue largely unchanged. While this may improve a government's fiscal position (noting that court expenditures are not a major budget item), the result can be an under-provision of court services, increased rationing of services and greater backlogs, ultimately reducing access to justice.

The available data suggest that these concerns have generally not yet been realised. Despite growing fiscal pressure, and contrary to popular belief, overall levels of civil court funding in real terms have remained relatively stable in most jurisdictions. At the same time, civil court lodgments have declined — from 794 190 in 2004-05 to 605 123 in 2012-13 — resulting in slight increases in real recurrent expenditure and judicial officers per civil lodgments in most courts over the past 10 years (figure 17.1 and 17.2 respectively).

Figure 17.1 Real recurrent expenditure per lodgment in civil courts, 2003-04 to 2012-13

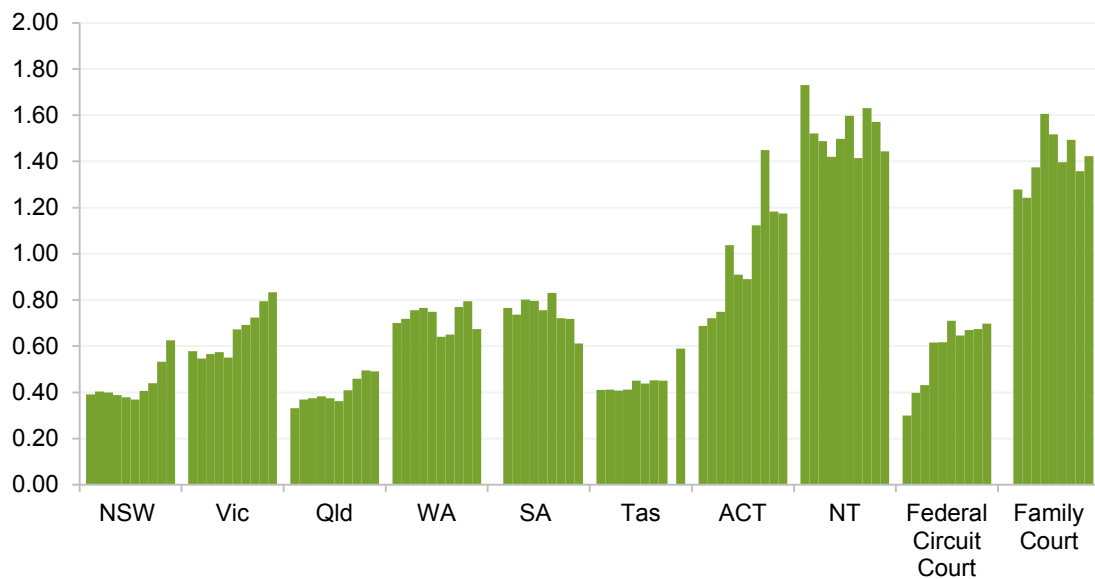
All civil courts, excluding the Federal Court, by jurisdiction, in 2012-13 dollars



Data source: SCRGSP (2009c, 2014).

Figure 17.2 Judicial officers per 1000 lodgments in civil courts, 2003-04 to 2012-13

All civil courts, excluding the Federal Court, by jurisdiction



Data source: SCRGSP (2014).

Decreases in lodgements could reflect increased use of non-court resolution avenues such as mediation, especially in the family law courts where family dispute resolution is generally required prior to taking a parenting matter to court (chapter 24). This is generally desirable if disputes are being dealt with in more appropriate settings, freeing up public funds to deal with more complex or intractable disputes.

However, if the cases remaining in the workloads of the courts are increasingly complex, trends in funding on a per lodgment basis may not accurately reflect changes in court funding relative to its resource requirements. It is important that decisions regarding court resourcing also consider changes in the complexity of a court's workload, as well as the total number of cases.

There is some, albeit limited, data available supporting such an increase in the complexity of cases in the courts. For example, over the past 10 years there has been a steady increase in the proportion of cases in the Family Court in which a notice of child abuse or risk of family violence was filed — though such increases can also be at least partly attributed to increases in reporting and expansions to the definitions of abuse and family violence (chapter 24) (Family Court of Australia 2013a).

However, any increases in case complexity in the family law courts do not yet appear to have impacted the amount of time required by the family courts to resolve cases. For example, the average number of court attendances per case in the Family Court have declined over the past 10 years, and the Court's backlogs also have not worsened over the same period (SCRGSP 2009c, 2014).

What are alternative funding options?

While court resourcing levels for civil matters have remained relatively stable, a number of options for better ensuring the adequacy of court funding exist. These include the creation of separate appropriations for judicial salaries, multi-year funding and the hypothecation of fee revenue.

Separate appropriations for judicial salaries

Separating the funding for judicial salaries from the funding for court services more generally was recently recommended by the Skehill Review into small and medium agencies in the Attorney-General's portfolio (Department of Finance and Deregulation 2012). This recommendation applied to the Federal Court, Family Court and Federal Circuit Court.

The argument for a separation along these lines is that when judicial salaries and funding for court services are included in a single appropriation, reductions in this appropriation must be borne entirely by cuts to court services. This is due to the constitutional protections that apply to judicial salaries. The impact of this is most noticeable in the

context of efficiency dividends — the base for the dividend is the entire appropriation amount, but reductions in expenditure must be absorbed by the non-judicial share of the court’s budget, increasing the ‘effective’ efficiency dividend.

The Commission considers that funding of judicial salaries should be exempted from the application of efficiency dividends, whether through special appropriations or other exemptions.

Multi-year funding

Courts are generally funded on a year-to-year basis as part of the broader budget process. This reduces the certainty of the courts’ funding and restricts their ability to undertake long-term resource planning.

In the Commission’s view, it may be more appropriate for the courts to be funded on a multi-year basis, for periods of three years. Funding for each three-year period would be determined following a review of their service costs, the demand for their services, the needs of their users, and any upgrades to infrastructure required. Such a review should also be tied to a periodic review of court fee levels (recommendation 16.1).

Funding courts on a multi-year basis would allow them to invest with greater certainty in longer-term programs — for example, funding improvements in their information technology systems. This would also allow the courts to ‘smooth’ their expenditure in response to fluctuations in demand — for example, by offsetting higher costs in years with a high number of lodgements against savings in years of lower workload. Multi-year funding could also improve the independence of the courts as an institution, by reducing the frequency of government’s involvement in decisions regarding their resourcing.

Hypothecation of fee revenue

The Commission’s recommendation to increase cost recovery in the courts (chapter 16) opens up a further option whereby the courts are funded (at least in part) directly through fee revenue. Under such a system, fee revenue would be hypothecated to the courts and constitute a significant part of court funding. Fee amounts and the level of court expenditure would continue to be determined by the government, along with policies for waiver eligibility.

Under this model, revenue from fees would still fall short of the required level of funding for court expenditure, due to foregone revenue from fee waivers, as well as a lack of full cost recovery in many dispute types. Any shortfalls in fee revenue would then be met through contributions from consolidated revenue.

This approach is currently used for funding courts in England and Wales, where 82 per cent of expenditure is funded through court fees. The remaining 18 per cent comprises fee income lost through waivers and those fees set below full cost pricing. This share is covered

out of general revenue as part of the United Kingdom Ministry of Justice budget (HMCTS 2011).

The Commission received limited feedback on the issue of the most appropriate mechanism for funding courts and allocating fee revenue. A number of submissions that canvassed the issue considered that courts should continue to be funded out of general revenue:

... courts should essentially be seen as a core aspect of government, and thus funded out of general revenue. (Judicial Conference of Australia, sub. DR195, p. 5)

A model predicated on fee revenue would seriously undermine access to justice (Law Council of Australia, sub. DR266, p. 79).

Courts and Tribunals should be funded out of general revenue with provisions to ensure the adequacy of funding ... (Law Society of South Australia, sub. DR219, Attachment, p. 86)

Some suggested that where court fees are charged they should be retained by the court as a ‘supplement to their budget’ (Law Society of South Australia, sub. DR219, Attachment, p. 86).

Allowing courts to retain some, or all of fee revenue may have the benefit of reducing courts’ reliance on general appropriations (and therefore also the base to which any efficiency dividend would need to be applied) and providing some ‘automatic cover’ for growth in demand. However, this would not be without risk — courts would also be exposed to the possibility of fluctuations in fee revenue without corresponding changes in costs. This may compromise the stability of court resourcing, as noted by the Supreme Court of Victoria:

... the revenue base would become unpredictable and unstable which will impact negatively on courts’ ability to function and plan for the future. (sub. DR324, p. 11)

Further, as noted above, the courts would still ultimately be dependent on an appropriation from government, to make up the difference between fee revenue and their total expenditure. Therefore governments may still decide to reduce this appropriation in periods of fiscal tightening.

Hypothecation also does not change the overall cost to government of resourcing the courts at a particular level, given that any fee revenue retained by the courts is money that would otherwise have gone into consolidated revenue — the ‘net’ amount of funding from government remains the same.

Ultimately, the Commission does not consider direct hypothecation of fee revenue to the courts as an appropriate funding arrangement. Any consideration of the adequacy of funding affecting access to justice depends on the aggregate funding available, not whether that funding source is a hypothecated stream of fee revenue, or an appropriation from consolidated revenue. However, as noted in chapter 16, additional revenue collected through court fees should be used, at least in part, to offset the cost of improvements to technology in the courts outlined earlier in this chapter (recommendation 17.2).

Where to from here?

The Commission considers that changes to both current governance and court funding arrangements could improve the efficient and effective operation of Australian courts. While available data suggests that court resourcing levels for civil matters have remained relatively stable, the adequacy of court funding was raised as an issue by a number of stakeholders to this inquiry (for example, the Law Council, subs. 96, DR167). The Commission sees merit in all jurisdictions undertaking public periodic reviews into the adequacy of court funding, in addition to relevant jurisdictions examining the costs and benefits of moving to a single courts administration model funded on a multi-year basis.

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.