

## NATIONAL LEGAL AID

### SUGGESTED ISSUES FOR CONSIDERATION BY THE PRODUCTIVITY COMMISSION

- 1. An assessment of the real costs of legal representation and trends over time.**
  - 1.1 To what extent do legal aid commissions exert market influence over the prices paid for legal services and in particular whether and to what extent has the rationing of legal assistance funding placed an artificial ceiling on these prices?
  - 1.2 Based on the potential impact of an artificial ceiling on prices, to what extent does this limit the supply of legal assistance services.
  - 1.3 Examine the benefits of Australia's "mixed model" of legal aid assistance, which sees service delivery provided by in-house public sector practitioners as well as private practitioners. Does it create an implicit level of competition which serves as an appropriate mechanism to achieve price equilibrium in the legal services market? The difficulties of other jurisdictions, such as New Zealand and the United Kingdom, which did not have such a model for managing legal aid expenditure may be instructive in this regard.
  - 1.4 Do changes to the law, including those driven by law reform initiatives, drive "legal inflation", such that these changes create a demand for additional services or a higher level of intensity of service?
- 2. An assessment of the level of demand for legal services**
  - 2.1 What is the definition of "demand" in the context of legal services – does it include those services which are overtly manifested by a tangible service delivery, or does it also include "unmet" need, where persons resolve a problem themselves or leave a problem unresolved? This concept was considered by the *Legal Australia-Wide Survey: Legal Need in Australia* (2012) by the Law and Justice Foundation of New South Wales.
  - 2a. The number of persons who cannot afford to secure legal services but who do not qualify for legal assistance services**
    - 2a.1 To what extent has the proportion of people eligible for a grant of legal aid changed over time?
    - 2a.2 To what extent does "self-rationing" occur, such that people do not apply for a grant of legal aid because of an assumption that they would not fulfill the eligibility criteria?
    - 2a.3 Based on the answer in 2a.2, to what extent does any self-rationing mask the real demand for legal assistance services?

2a.4 To what extent can the unfulfilled demand for grants of legal aid be assisted through other non-litigation type services provided by legal aid commissions, such as duty lawyer; telephone and face to face information and advice services; minor assistance services, and community legal education?

**2b. The number of pro-bono hours provided by legal professionals**

2b.1 Is there realistic capacity for the legal profession to make a material difference to filling unmet need through pro-bono services?

2b.2 Do some practitioners providing legal services under a grant of legal aid consider that they are providing a pro-bono service on the basis of the difference between the legally aided rate of remuneration and prevailing market rates?

**3b. Information asymmetry**

3b.1 The Productivity Commission's attention is drawn to the research on this issue undertaken by the Law and Justice Foundation of New South Wales and published in the Legal Australia-Wide Survey: Legal Need in Australia (2012) report.

**3c. Other issues of market failure**

3c.1 To what extent does geography, including being a resident in regional, rural and remote areas, impact upon the availability of legal practitioners and general access to legal services?

3c.2 Is there a correlation between locality, availability of lawyers, population socio-economic status and demand/unmet demand for legal services?

**3d. The structure of the legal profession in State and Territory jurisdictions**

3d.1 Does the structure of the legal profession drive costs of services within individual jurisdictions?

3d.2 Does the structure of the legal profession in some jurisdictions create barriers to the accessibility of services by individuals?

3d.3 Does the structure of the legal profession in some jurisdictions dilute the level of utility of legally aided representation?

**3e. Legal professional rules and practices**

3e.1 Do professional conduct rules concerning conflict of interest create an unreasonable limitation on a practitioner's capacity to provide services to multiple parties with related issues?

3e.2 What is the impact of professional conduct rules concerning conflict of interest for people seeking legal services in regional and remote locations where the supply of legal practitioners may be limited?

**3f. Court practices and procedures**

3f.1 Can court listing practices be improved to reduce the amount of time and expense associated with waiting for a matter to be considered by the court, or associated with matters needing to be re-listed due to unforeseen delays?

3f.2 Do the courts have a sufficient capacity to reduce vexatious litigants from presenting claims?

3f.2 Should the courts be offering a more welcoming and less procedurally rigid approach to encourage self-represented litigants who are unable to afford legal representation?

**4. Whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issue in dispute?**

4.1 To the extent that many family law matters involving the dissolution of marriages and de-facto marriage arrangements are an economic and social transaction, is the cost of the associated litigation and other professional services proportionate to the income earning capacity and private asset base of the parties?

4.2 What is the social and economic impact of high family law transaction costs on families over the short, medium and long term?

**6. The economic and social impact of the costs of accessing justice services and securing legal representation?**

6.1 How many people have no capacity to access legal assistance for genuine legal problems as a result of the cost of legal services?

6.2 What is the social and economic impact arising from the escalation of legal problems through a lack of access to professional legal assistance?

6.3 Is there a link between criminal sanctions and the lack of a person's capacity to adequately resolve a problem in the civil jurisdiction (such as social security problems or driver's licence problems)?

6.4 What is the role of legal aid commissions and allied organisations in providing high volume legal services for matters affecting large numbers of people in special circumstances (such as representation of parties seeking the resolution of insurance claims following natural disasters)?

**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?**

- 7.1 To what extent do early intervention and prevention initiatives result in a positive outcome for parties and promote a more efficient approach for the resolution of legal problems?
- 7.2 To what extent do pre-trial disbursements, such as expert reports, discourage or prevent a party from commencing an action and, as a consequence, suffering an enduring economic loss?
- 8. Alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, in both metropolitan areas and regional remote communities and the costs and benefits of these.**
- 8.1 To what extent do the heavily paper driven requirements of civil courts, including the Family Court, create a barrier to entry to system and inflate the costs of engaging with the system?
- 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.**
- 9.1 Has the Australian approach to legal aid assistance been more sustainable and cost-effective than those in other jurisdictions, such as New Zealand and the United Kingdom? (A detailed investigation into the New Zealand approach to legal aid assistance is provided in the *Bazley Report (2010)*).
- 9.2 What improvements might be made to Australian legal aid commissions to enable them to increase their capacity to provide access to legal assistance services?
- 9.3 Is the existing level and structure of funding for legal aid commissions sufficient to enable an acceptable level of access to justice for individuals over the medium to long term?
- 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.**
- 10.1 National Legal Aid and the Commonwealth Attorney-General's Department have an agreed set of data collection principles which can be provided separately for the information of the Productivity Commission.