Date 4 November 2013

Legal Aid Commission (ACT)

Dr Warren Mundy
Access to Justice
Productivity Commission
GPO Box 1428
CANBERRA ACT 2601

Attention: Ms Pragya Giri

Dear Dr Mundy,

SUBMISSION FROM LEGAL AID ACT TO ACCESS TO JUSITCE INQUIRY

We refer to the invitation to provide a submission for the Inquiry into Access to Justice. Legal Aid ACT is an independent statutory authority established under the *Legal Aid Act 1977*. It is funded by the Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

Legal Aid ACT appreciates the opportunity to make a submission. The terms of reference for the Inquiry are wide ranging, and as such we will focus our submission on some key aspects of policy reform to the justice system.

We trust the submission will be of assistance to the Inquiry, and confirm our availability to attend any hearings. Please let me know if you wish us to clarify any points in the submission. We appreciate the essential link that needs to be established between government policy, the practical operation of the justice system and law reform.

Yours sincerely

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Legal Aid ACT

Submission to Productivity Commission

October 2013

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Introduction

Legal Aid ACT is an independent statutory body established under the *Legal Aid Act 1977* (ACT) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid ACT provides information, community legal education, advice, minor assistance and representation, through in-house and private practitioners. The work of Legal Aid ACT broadly addresses issues relating to criminal law, family law and civil disputes. We also operate a free Helpline which allows anyone in the ACT, no matter their economic or social circumstances, to obtain information, referrals and advice over the telephone.

This submission was prepared on behalf of Legal Aid ACT through consultation with its internal staff to specifically address the issues in the request made by Assistant Treasurer David Bradbury under the *Productivity Commission Act 1998* and the Productivity Commission's Access to Justice Arrangements Issues Paper of September 2013.

What is Legal Aid ACT?

The purpose of Legal Aid ACT is to promote a just society in the Australian Capital Territory by:

- ensuring that vulnerable and disadvantaged people receive the legal services they need to protect their rights and interests;
- developing an improved community understanding of the law; and
- seeking reform of laws that adversely affect those we assist.

We achieve this purpose by delivering a range of high quality legal services through our staff and professional partners in a caring manner, that respects diversity and promotes confidence in the legal system.

- We are committed to helping disadvantaged people achieve justice;
- We respect people and their diversity;
- We value integrity and ethical conduct;
- We are accountable and committed to using learning and innovation to improve the quality of our services and the efficient use of resources;
- We work collaboratively with others to meet people's needs;
- We value and protect our statutory independence.

Legal Aid ACT provides legal assistance through its:

- Legal Practice comprising criminal, family and civil law practices and the Youth Law Centre ACT;
- Client Services including the Legal Aid Helpdesk and the Dispute Resolution Program; and
- Community Education and Information Services.

The roles of these areas are elaborated as necessary later in this document.

Definitions

This section provides an explanation of specific terms used throughout the document, particularly where they may have different meaning in different organisations.

Advocacy

An Advocacy service is a legal service not requiring a grant of legal assistance which is provided to advance or support the needs and issues of a client, before the legal issue escalates further. It involves communication with a third party on behalf of the client and/or a scheduled representation event at a court or tribunal. Advocacy does not include a duty lawyer service.

Community Legal Education

Community legal education means services or strategies designed to meet the needs of a group of people in the community in relation to legal issues or legal problem recognition and includes:

- information hub, network activity, presentation, outreach or public events;
- development of resources and materials to support a range of client services;
- community development and liaison;
- publication of materials that further understanding of a legal issue or access to legal problem resolution, including material and information kits published on the website.

Dispute Resolution

Dispute resolution is referred to in section 35A of the *Legal Aid Act 1977* as 'approved negotiation' and defined as a program for dispute resolution that:

(a) is approved by Legal Aid ACT; and

(b) consists of a structured negotiation process; and

(c) uses a convenor to assist parties to a dispute to settle the dispute.

Duty lawyer

Duty Lawyer services are defined in the *Legal Aid Act 1977* as 'legal services provided by a legal practitioner attending at a proceeding of a court or tribunal, being legal services consisting of appearing on behalf of a person at, or giving legal advice to a person in connection with, the proceeding, otherwise than by prior arrangement with the person'.

Independent Children's Lawyer

Refers to an appointment made in the Childrens Court, the Family Court or the Federal Circuit Court. A solicitor is appointed to represent the children's interests in the Court proceedings. The guidelines for Independent Children's Lawyers vary depending on which jurisdiction the appointment is made.

Information Service

Information services are services that provide information to people that is of *general application* about such matters as:

1. general information about legal rights and responsibilities which does not refer to the facts of a specific case;
2. court, tribunal and alternative dispute resolution processes; and
3. legal aid eligibility, application and review processes.

Legal Advice

Legal Advice is usually provided in face to face interviews at the office (including the Youth Law Centre and Legal Aid Clinic) or at outreach services such as the Prisoners Legal Service. Legal Advice may also be provided by telephone.

Minor Assistance

Minor Assistance is the provision of self-help assistance greater than Information and Legal Advice but short of direct representation that is designed to enable people to progress resolution of identified legal problems.

Referral

A Referral service is a referral of someone to another service or agency for the purpose of assisting the person. The other service could be another legal service, such as a community legal centre, or a non-legal service such as a counseling service.

Addressing Legal Need in the ACT

The *Legal Australia-Wide Survey: Legal Need in Australia* (2012) by the Law and Justice Foundation of New South Wales (LAW Survey) is the first comprehensive quantitative assessment across Australia of legal needs. It analysed legal need within each state and territory as well as at a national level. The LAW Survey results for the ACT are largely consistent with those in other jurisdictions and with international findings.

The LAW Survey's major findings Australia wide were:

- Legal problems are widespread and often have adverse impact on life circumstances.
- Some people, most notably the disadvantaged, are particularly vulnerable to legal problems, including substantial and multiple legal problems.
- A sizeable proportion of people take no action to resolve their legal problems and consequently achieve poor outcomes.
- Most people who seek advice do not consult legal advisors and resolve their problems outside of the formal justice system.

In the ACT the most commonly reported problems were:-

- Consumer law issues 22%;
- Criminal law issues 16%;
- Housing issues 11%;
- Accidents 9%; and
- Government law issue 8%

The LAW Survey found that in the ACT, as in all jurisdictions, the experience of multiple legal problems was common and those problems tended to cluster in particular combinations. In the ACT (like other jurisdictions) people with disability had significantly higher prevalence of legal problems overall, more substantial legal problems, and multiple legal problems. Also unemployed people; people living in disadvantaged housing; and people whose income was a government payment had significantly higher prevalence according to several measures. These findings are consistent with our experience.

The role of Legal Aid ACT

Legal Aid is a proven and cost-effective method of addressing legal need.[1] The number of people assisted by Legal Aid ACT in each year tells a significant story. Over the last two financial years Legal Aid ACT dealt with the following matters:-

Service	2011- 2012 Financial Year	2012-2013 Financial Year
Information Services	7,675	9,149
Legal Aid Helpline	8,021	9,668
Advice, Minor Assistance & Advocacy	4,212	4,460
Duty Lawyer Services	2,961	3,031
Applications Received	3,365	3,263
Approved Grants in house	1,063	1,007
Approved Grants Referred	1,213	1,207
Family Dispute Resolution Conferences Conducted	118	156
Community Legal Education Session Attendees	1,894	1,650
TOTAL	30,522	33,591

Legal Aid ACT addresses a wide range of legal needs through its in-house Legal Practice and the Legal Aid Helpdesk. One of the major issues we encounter is that clients seldom experience legal issues that fit exactly within a single area of law. Clients' legal needs have become increasingly complex and are more likely to transcend the boundaries of specific legal areas.

For example, it is not uncommon to be faced with a situation where we will need to assist a client both in relation to civil law and family law matters as illustrated in the following case study:-

[1] See generally Dr Liz Curran *'I Can Now See There's Light at the End of the Tunnel'*, Report March 2012

Case Study[1]

Magda is a 38 year old woman who contacted the Family Practice of Legal Aid ACT seeking advice in relation to property matters. Magda did not particularly want a property settlement as she did not want to be seen as being 'greedy' but she had 5 and 7 year old children to care for and there was a loan over the family car. Instructions were taken and proceedings were initiated for property settlement. Magda was referred to the Civil Practice who assisted her in obtaining a stay on loan payments until the matter was resolved. Magda was then the subject of some harassment from her former partner during the property proceedings. The Family Practice again assisted Magda with a referral to the Civil Practice who assisted Magda to obtain a Domestic Violence Order. The civil law and family law solicitors then collaborated closely to ensure that the evidence from the Domestic Violence proceedings was provided to the family law section ensuring valuable forensic material was available for the client's case.

Experiences such as those in Magda's case have lead Legal Aid ACT to develop a particular focus on addressing all the legal issues that may arise in a client's case through a 'wrap around' approach. Legal Aid ACT emphasises that assisting a client means addressing their legal issues to the best of our ability and organising internal or external referrals to address areas of specific need (including issues of a non-legal nature). The aim of this approach is that the client's numerous legal problems are addressed holistically and they are provided with 'assistance' rather than a narrow solution to what may be one among many legal problems.

The integrated approach to addressing legal need is well illustrated in the Legal Aid Helpdesk which was created in 2012. The Legal Aid Helpdesk is staffed by paralegals under the supervision of a lawyer. The Helpdesk staff 'triage' callers on the Legal Aid Helpline and people attending Legal Aid ACT reception. Having established the nature and urgency of the person's legal issues the Helpdesk staff ensure that referrals are made to the appropriate areas of the Legal Practice so that multiple legal needs can be efficiently addressed. In this manner in-house and 'referred'[2] lawyers are informed of the client's different legal needs and those needs are addressed. Referrals are also made to other legal service providers in the ACT, including Community Legal Centres, the Law Society of the ACT and social services. We provide more information about the Legal Aid Helpdesk further below.

Criminal Practice

The totals above show that there continues to be a significant number of people assisted by Legal Aid ACT. This table does not include the number of people that received assistance in criminal law. For completeness, and to illustrate the holistic approach of Legal Aid ACT, a snapshot of our services provided in relation to Criminal law is below:-

Criminal Practice	2012-2013	2011-2012

[2] Referred lawyers are private lawyers who provide legal aid services to people on behalf of Legal Aid ACT.

Grants of assistance	519	601
Legal Advice, minor assistance and advocacy	722	692
Duty Lawyer	1691	1480

Legal Aid ACT is particularly focused on challenging preconceptions that our role is to only assist people who are guilty of criminal offences. While Legal Aid ACT assists those charged with criminal offences, the majority of our clients have never and will never have an encounter with the criminal justice system. There is a far wider range of matters dealt with than those involving criminal law and a broad section of the community is assisted by the work of Legal Aid ACT.

Civil Practice

The Civil Practice assists clients with a wide range of civil law matters (not including family law or care and protection).

The following table shows the 10 most common types of civil legal matters in which legal advice, minor assistance and advocacy services were provided during 2012-2013. These statistics accord with the LAW Survey results about the most common legal issues experienced are civil law matters.

	Type of legal matter	Services provided	Percentage
1	Domestic Violence & Personal Protection Orders	1,141	25.58%
2	Mental Health	565	12.67%
3	Traffic /driving offence	251	5.63%
4	Motor vehicle accident	211	4.73%
5	Employment	197	4.42%
6	Tenant	177	3.97%
7	Assault	163	3.65%
8	Contact	132	2.96%
9	Breach of order type offences	126	2.83%
10	Criminal – other	122	2.74%
	Total	**4,460**	

Meeting the Multiple Legal Needs of Clients with Mental Illness

In the experience of Legal Aid ACT's Civil Practice people living with mental illness are particularly vulnerable to having complex and multiple legal and non-legal needs. People who suffer from mental illness are also those who most struggle to resolve their needs. Often, but not exclusively, the needs of clients with a mental illness relate to legal proceedings involving their mental illness. This can include proceedings under the *Mental Health (Treatment and Care) Act 1994* and the *Guardianship and Financial Management Act 1991.* Other matters such as debt, domestic violence, tenancy, employment, neighbourhood disputes and consumer law issues are also often experienced by people with mental illness.

Legal Aid ACT is the leading legal service provider for people with mental illness in the ACT. Civil Practice lawyers provide advice and advocacy services to clients at the Adult Mental Health Unit (AMHU), the Older Persons Mental Health Inpatient Unit (OPMHIU) and the private Mental Health Ward 2N. Priority is given to representing people involuntarily detained for treatment before the mental health division of the ACT Civil and Administrative Tribunal (ACAT). Our lawyers take a holistic and practical approach, working with other legal and non legal service providers to ensure the client receives the support and assistance they require.

We have found that, when first admitted to hospital, clients are often too unwell to deal with anything other than their current mental health proceedings. Connections made at this stage are important as, hopefully when the client is ready to address their other legal problems they will consult Legal Aid ACT. We make an effort to follow-up on our mental-health clients when their other legal issues are brought to our attention, and offer assistance after their discharge. Our mental health lawyers also conduct a weekly community legal education session at the AMHU to raise awareness of the serviced provided by our Office.

The following case study demonstrates the way in which the Civil Practice caters for the diverse legal problems that may be experienced by its clients.

Case Study

A client sought assistance for a psychiatric treatment order hearing before ACT Civil and Administrative Tribunal (ACAT). While taking instructions and providing advice about the application, it became apparent to the Civil Practice lawyer that the client had a number of other legal and social issues, including: a substantial credit card debt; being the respondent in personal protection order proceedings; having pending criminal matters and having no appropriate accommodation.

The lawyer represented the person in the mental health proceedings before ACAT, and subsequently negotiated a waiver of the client's debt with their financial institution, helped the client apply for grants of legal assistance for their criminal and personal protection order matters, and made an effective referral to the hospital's social worker in relation to securing suitable accommodation.

Employment Law

During 2012-2013 enquiries relating to matters involving employment ranked as the fifth most common enquiry to the Helpline and the fourth most common legal matter in which legal advice, minor assistance and advocacy services were provided by the Civil Practice.

Employment law problems have serious potential adverse consequences for members of the community including loss of income and financial strain. The Civil Practice provides assistance, primarily by way of early intervention services, by providing initial advice; assistance with complaints or applications to the Fairwork Ombudsman. The Civil Practice also represents people, where appropriate, at conciliation conferences at Fairwork Australia.

Legal Aid ACT's services assist not only the individual to assert their rights, but they also serve a broader social purpose of:-

- promoting employer compliance with their obligations under employment and discrimination law;
- addressing power imbalances in employment disputes; and
- promoting the efficiency of the judicial and complaint process.

Consumer Law

Consumer law, defined as problems with goods and service providers, insurance and credit providers is one of the most common legal problems encountered by Legal Aid ACT. Legal Aid ACT's Civil Practice has noticed that many of our most vulnerable clients, particularly those with mental health issues, experience consumer problems along with other legal and non legal problems. The Civil Practice assists client's experiencing consumer law problems with advice, minor assistance, advocacy, negotiations with other parties such as service providers, traders/salesmen, creditors, financial service providers such as banks and credit unions, debt collectors, etc. and complaints to bodies such as Financial Ombudsman's Service Limited and the Credit Ombudsman Service Limited, and on a systemic scale, to ASIC, ACCC and ORS.

Family Practice

The Family Practice of Legal Aid ACT provides services in family law and child care and protection matters. These services have impacts throughout the community, through impacts on parents, children and other family members.

The Family Practice conducts cases and provides advice in relation to the following:

1. children's matters, including urgent recovery orders and Airport Watch List applications;
2. child support

3. property matters;
4. spousal maintenance;
5. child support; and
6. child care and protection.

Family Law and Care & Protection Casework

The Family Practice maintains a significant number of ongoing files, with 327 new grants of legal assistance assigned to the practice in the 2012-2013 financial year. These grants were additional to those continuing from the previous financial year. Family law cases often take longer to resolve than other types of cases due to the intensity and volatility of the personal and emotional issues they involve.

The Family Practice provided Independent Children's Lawyer services in 32 matters in the Family Court and Federal Circuit Court as well as providing Child Representatives in care and protection proceedings.

An example of the case work undertaken by the Family Practice is provided by the following case study.

Case Study
In July 2013, a woman applied for a grant of legal assistance for a domestic violence matter and a family law matter which arose as a direct result of her applying for a Domestic Violence Order (DVO). She had two children aged nine and five years old. She had been separated from her former husband for two years. The husband's rough treatment of the nine year old caused her to apply for a DVO, which included the children. The former husband responded by making an urgent application to the Federal Circuit Court for orders for him to spend five nights a fortnight with the children. Our client's story was complex and troubled. A long affidavit was prepared detailing her concerns for herself and the children, which included the former husband's unpredictable temper and his lack of insight into how others may feel in response to his conduct. The child in question was demonstrating serious psychological responses to his father's treatment of him. Our client was particularly anxious about the father spending time with the children and preferred that this was limited to a maximum of three days at a time. There was a contested interim hearing before a judge in the Federal Circuit Court. The judge found in favour of our client and limited the children's time with the father to three days a fortnight until other investigations were made.

'Wrap Around' Practice in Family Law

The nature of family law work means that it is closely aligned with other areas of law, most notably domestic violence and property law issues. The Family Practice liaises closely with the other areas of the practice to ensure that client's diverse needs are met.

The sensitivities of family law mean that the Family Practice is attuned to the reality that some client's require assistance with more than legal problems. This is particularly so given the inherent psychological stresses of family law matters. In appropriate cases the Family Practice refers clients to support groups such as women's refuges and counseling services, ensuring that client's feel supported and have the appropriate assistance to address their legal and non-legal needs.

Family Law Duty Lawyer Service

In addition to casework services, the Family Practice operates a daily duty lawyer service in the family law courts. The duty lawyer service is often the initial 'port of call' for people arriving at the courts for the first time or for self-represented litigants. The duty lawyer service provides legal and procedural advice to clients on a 'drop in' basis at the courts and can, where appropriate, appear on behalf of a unrepresented parties in an attempt to narrow the issues and clarify matters for the court. This is a valuable resource for judges who can refer self-represented parties who are confused about the court process to the duty lawyer for help.

During 2012-2013, the duty lawyers assisted 702 clients with a range of family law advice and minor assistance. Over 144 people were referred to private practitioners for assistance in cases where in-house lawyers had a conflict of interest.

Case Study
The duty lawyer was approached by a client who said the judge had asked them to see the duty lawyer. The duty lawyer was able to take instructions from the client and speak to the judge's associate. It transpired that the client had been very confused and taken up approximately 20 minutes of the court's time as the judge attempted to determine exactly what the person was seeking. The client was confused about the exact legal meaning of the term 'parental responsibility'. Once the meaning had been explained by the duty lawyer the client realised that they were in agreement with the proposal being put by the other party. The duty lawyer was then able to negotiate a settlement, appear in court and hand up consent orders. This saved the court significant time as otherwise an Interim hearing would have needed to be conducted.

Legal Aid Helpdesk

The Legal Aid ACT Helpdesk provides precise and well-directed legal information and procedural advice to scores of clients each day. The information provided is sourced from approved resources and is often sufficient to alleviate the need for legal advice. In providing this quick, concise service, the Helpdesk is able to assist a large number of clients that would otherwise 'fall through the cracks'. That is, prospective clients who are ineligible for a grant of legal assistance, yet unable to afford advice or representation from a private solicitor. This is achieved in a number of ways, namely:-

- referrals to the Legal Aid Clinic program run in conjunction with the Australian National University's College of Law;
- referrals to Legal Aid ACT's in-house Legal Practice and the Youth Law Centre; and
- referrals to external agencies, including community legal centres, private law firms and non-legal services.

This requires effective communication and relationships with all of these programs and agencies, as well as other areas of Legal Aid ACT. The Helpdesk paralegals have a thorough knowledge of other services in the ACT,

specifically through the use of the Free Law Directory developed by the ACT Legal Assistance Forum (ACTLAF).[3] The staff also have strong referral relationships with other ACTLAF members and in appropriate cases make 'warm' referrals to services like the Women's Legal Centre and the Consumer Law Centre (ACT).

The following table shows the number of calls taken by the Legal Aid Helpline which increased 21% during the last financial year.

2012-2013	2011-2012
9,668	8,021

The following table shows the number of calls to the Legal Aid Helpline by law type.

Criminal	Family	Civil	Not recorded	Total
616	1,947	2,970	4,135	9,668

The next table gives a further breakdown of the types of legal matters addressed.

Matter	No. of Inquiries	% of Total Calls	2011-2012 Ranking
Family - Parenting	914	9.45%	1
Landlord / Tenant	446	4.61%	2
Family - Property	339	3.51%	3
Family - Dissolution Marriage	335	3.47%	5
Employment	290	3.00%	4
Traffic Offences	255	2.64%	6
Domestic Violence & Personal Protection Orders	246	2.54%	9
Family - Other	166	1.72%	8
Criminal - Other	162	1.68%	-
Motor Vehicle Accident	110	1.14%	10

Youth Law Centre ACT

Background and Services

The Youth Law Centre ACT (the Centre) provides free and confidential legal advice, information, referral and minor assistance to young people aged between 12 and 25. The Centre offers one-off and ongoing services in person, over the phone and by email. The centre assists clients with a wide range of legal issues including:

- criminal law;

[3] http://www.legalaidact.org.au/pdf/free_law_directory.pdf

- employment;
- discrimination;
- contracts;
- tenancy;
- motor vehicle accidents;
- family law; and
- debt.

In the event the Centre is unable to assist, referrals are made to other services and youth organisations in the ACT. The Centre has a strong presence in the local Canberra youth worker community, and has close ties to the Youth Coalition of the ACT. The staff of the Centre regularly attend youth worker meetings and forums.

The Centre strongly engages with the ACT's young people through an outreach program. This includes attending high schools, colleges, universities and youth centres throughout the Australian Capital Territory. These attendances often involve presentations of legal information and referrals for young people, as well as conducting stalls at orientation days, youth festivals and exhibitions.

In the last financial year, the Centre provided the following services.

Youth Law Centre	2012-13
Clients	239
Contacts with Clients for Advice and Information	1230

Top 5 Matter Types	2012-13
Motor Vehicle Accident	207
Tenant	127
MVA - Property Damage	80
Traffic / Driving Offence	80
Personal	78

The Centre also participates in law reform initiatives. The Centre recently made a submission to the Senate Select Committee on Cyber Safety addressing the issue of sexting by minors.

The Centre works to promote social justice for young people in the ACT by:

- ensuring that more and more vulnerable and disadvantaged young people have awareness and access to our services;
- educating students and community organisations in order to improve community legal education, to inform young people about the law and to notify them about the services we can offer; and
- participating in law reform initiatives that will benefit our existing and prospective clients

What are the Benefits of the Youth Law Centre?

The Centre is focused on early intervention for young people who face legal challenges and dedicated to maximising access to justice for young people in the ACT. This means taking an active role in encouraging young people to ask legal questions and seek legal advice long before a matter reaches a court or tribunal. The Centre uses social media to be readily accessible to young people and this approach is often able to stop simple matters from escalating into more complex problems that spiral out of control. For example, when a client contacts the Centre for advice on a motor vehicle debt, we can negotiate with insurance or debt-collection companies to arrange payment plans, or consolidate debts where a client owes specific amounts to multiple parties. This early intervention prevents a situation where the client will be pursued by debt collectors and will be fearful about a damaged credit rating, or be in a position where they must declare bankruptcy.

Through its outreach program, the Centre aims to raise widespread community awareness about young people and the law as it applies to them. Through our engagement with schools, teachers, students and youth workers, we increase their ability to understand and critically assess the impact of the law. Outreach also allows a bridging of the gap between community members and the legal system, encouraging them to take the next step and to contact us for their legal questions.

Value for money provided by Legal Aid ACT

Legal Aid ACT provides value both in terms of benefits to the ACT community but also to the wider Australian community. In a report prepared by Dr Liz Curran in 2012[4] on research into the quality and outcome of services provided by Legal Aid ACT, Dr Curran stated:-

> In the author's view, any attempt to measure legal aid services' impact, outcomes and/or results must take into account the challenges of working with disadvantaged and vulnerable clients. Human services such as legal aid services involve individual lives and impact on these lives in ways that can be beneficial or detrimental. Rather than assuming that the impact of legal aid services is simple, easy to measure and/or predictable in advance, the approach to measurement used in these circumstances must acknowledge the difficult and unpredictable nature of service delivery when complex work is undertaken for disadvantaged and vulnerable clients. This involves listening to, informing, conducting analysis with, responding to, interacting and communicating with a range of people engaged in this complicated work.
>
> Any expectations or funding contingent on criteria beyond the actual role and responsibility, control and power of Legal Aid practitioners needs to be carefully scrutinised so that the staff, clients and service are not 'set up to fail'. Mowles, Stacey and Griffin[5] make a salutary warning to funders and agencies trying to report and comply with measurement of outcomes and results. They note that managerial methods have been adopted largely uncritically from the private sector and are now ubiquitous across a range of organisations and in expectations from funding bodies. They observe that, when applied to processes of social interaction like human development (or services), such methods have severe shortcomings. These methods overlook or 'fail to understand unanticipated contextual and contingent circumstances unforeseen in the more abstract and de-contextualised planning processes to be such "noise" which needs to be managed away.[6]

It is for this reason that the following matters have been identified as clear indicators of the value for money of services provided by Legal Aid ACT.

a) Contributes to an easing of the financial costs of accessing civil justice.
b) Contributes to an increased timeliness and a reduction in delay in courts by limiting the number self-represented litigants that appear before the court.
c) Early intervention programs reduce the number of matters requiring judicial determination.
d) Provides effective services to Aboriginal and Torres Strait Islander people.
e) Collaborates with other service providers in the ACT.

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[4] L Curran, 'We can see there's a light at the end of the tunnel now: Demonstrating and ensuring quality service to clients', Curran Consulting and Legal Aid ACT, 2012.
[5] C Mowles, R Stacey and D Griffin, 'What Contribution Can Insights From the Complexity Sciences Make to the Theory and Practice of Development Management?', *Journal of International Development*, vol. 20 (2008), 804-820.
[6] Ibid., 808.

Contributes to the financial costs of accessing justice

One of the realities of the civil justice system is that the majority of legal service providers are private businesses and must maintain profitability, and the cost of legal services is to some extent driven by market demand. Cuts in legal aid funding in the mid-1990s and the fact that increases in funding since then have not kept pace with increases in the cost of providing legal assistance, has meant that the number of grants of assistance Legal Aid ACT has been able to make has fallen to its lowest level since 1990. As a consequence, an increasing proportion of the ACT population in need of legal assistance is unable to obtain it.[7]

More than 50% of legally assisted cases are handled by private lawyers, including cases in which in-house Legal Practice has a conflict of interest. Private lawyers are paid at Legal Aid rates which are significantly below market rates. For example, an hourly rate of $160.00 is paid in family law matters[8] whereas market rates range upwards from $200 to $500 an hour or more.[9]

Contributions to an increased timeliness and a reduction in delay by Courts

Self-represented litigants lead to inefficiencies both for court and the wider legal system. Legal professionals spend a significant amount of time training and gaining experience allowing them navigate the legal system. Lawyers also have professional duties such as the duty to the court, which facilitate the efficient and expeditious delivery of justice. Self-represented litigants cannot be expected to navigate these waters without difficulty, despite what assistance might be provided from the bench or by court staff.

Self-represented litigants place further strain on already stretched court resources, as they are often unable to present their cases as efficiently and effectively as they would if they were legally represented. The time taken to hear cases involving unrepresented parties is increased by having to address errors in court documents or submissions, explain court procedures, resulting in more frequent appearances and greater delays. A further cost may be incurred where a represented party is

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[7] See generally the Legal Aid Commission (ACT) Annual Report 2012-2013, http://www.legalaidact.org.au/aboutus/whoweare/corporateinformation/ Annual Reports.
[8] Legal Aid ACT Scale of Costs, http://www.legalaidact.org.au/aboutus/whoweare/corporateinformation/ Guidelines.
[9] http://www.legallawyers.com.au/legal-topics/law-firm-sydney/solicitor-prices/

unable to recover legal costs from a self-represented party.[10] The delays caused by these cases has a wider impact on the justice system by increasing the time other litigants have to wait to have their cases heard.[11] While some courts, such as the Family Court of Australia, have developed specific guidelines for self-represented litigants, the additional procedures involved incur additional costs.

This is not just a problem in the family law jurisdiction, but is increasingly so in the Magistrates Court. Most self-represented people fall into a 'justice gap' between those who can afford private legal representation and those who are ineligible for a grant of legal assistance. Legal aid commissions address this gap to some extent by providing duty lawyer services, but these services are limited to advice and representation in straightforward applications on a particular day. They do not extend to representation in contested matters or ongoing representation if the matter is not concluded on that day.

Early Intervention programs limiting the volume of matters that require judicial determination

Early intervention is critical to the resolution of many legal problems. One area in which it is gaining increasing prominence is the Dispute Resolution (DR) Program provided by Legal Aid ACT. The DR Program is an in-house conferencing program which involves parties, lawyers and (in certain circumstances) experts such as child psychologists.

The main benefit of DR is that it places decision making power in the hands of the parties. In family disputes this means enabling parents, carers and extended family members to determine care arrangements for children as opposed having the matter resolved by court adjudication.

The DR Program provides models of alternative dispute resolution to assist clients to resolve disputes across the family law, child protection and other civil law jurisdictions. The purpose of DR is to avoid the stress, financial strain and delay of litigation. When litigation is necessary in complex matters, DR can still be utilised to narrow the issues in dispute.

Provide effective services to Aboriginal and Torres Strait Islander people

Legal Aid ACT is committed to improving access to justice to Aboriginal and Torres Strait Islander communities in the ACT and surrounding regions. This commitment incorporates a whole of

[10] Dewar, J., Smith, B., Banks, C. (2000), Litigants in Person in the Family Court of Australia, Research Report No. 20, Family Court of Australia.

[11] The Honourable Justice Pierre Slicer – Supreme Court of Tasmania 'Self Represented Litigants: paper presented to the Magistrates Conference' Monday 14 June 2004.

organisation approach to targeting the unmet legal needs of Aboriginal and Torres Strait Islander people who, as a group, have been historically reluctant to use legal aid services. It is useful to again illustrate our approach through the work of the Dispute Resolution (DR) Program.

A culturally appropriate model of dispute resolution

Legal Aid ACT is developing a culturally appropriate and sensitive lawyer-assisted model of DR. The initiative is a first of its kind in the ACT and has built on Legal Aid ACT's existing DR program to extend the service to Aboriginal and Torres Strait Islander families.

Dispute resolution is just one of a suite of early intervention legal and support services that Legal Aid ACT aims to deliver to Aboriginal and Torres Strait Islander communities in the Canberra region. The goal to develop a culturally sensitive model of DR and to increase the usage of DR by Aboriginal and Torres Strait Islander families is supported by a long term strategy to target and resource the delivery of legal services to Aboriginal and Torres Strait Islander communities. It is proposed that a key outcome of this approach will be that increased numbers of Aboriginal and Torres Strait Islander families will access Legal Aid ACT's DR program.

To support this long term strategy, the DR Program employs a solicitor, a senior support administrative officer, an Aboriginal and Torres Strait Islander client support officer and an Aboriginal and Torres Strait Islander dispute resolution support officer in the delivery of early intervention and legal and support services.

Working collaboratively

The DR program works in co-operation with the legal practice areas of Legal Aid ACT and other program areas such as the Helpdesk and the Community Education and Information Services Coordinator. The DR program also works collaboratively with the ACT and Region Family Law Pathways Network (Pathways) on special project initiatives. An example is the current initiative in partnership with Legal Aid ACT, Pathways, Winnunga Nimmityjah Aboriginal Health Service and Aboriginal and Torres Strait Islander consultants/trainers Sharon Payne and Tracey Wetnal - to deliver a cultural competency training workshop to lawyers, care and protection case workers and other professionals working in the care and protection and family law jurisdictions. This project also aims to address inadequacies in the flow of information between government, legal and other agencies involved in the care and protection of Aboriginal and Torres Strait Islander children.

In January 2013 Legal Aid ACT, in collaboration with the Winnunga Nimmityjah Aboriginal Health Service, commenced a free legal advice service at the Winnunga Nimmityjah Health Clinic each Monday morning. The service provides legal advice in relation to issues of domestic violence, family separation and child protection.

Legal Aid ACT is also connecting with many Aboriginal and Torres Strait Islander professionals working in the legal sector and in various government and non-government sectors managing Aboriginal and Torres Strait

Islander programs (e.g. Women's Legal Centre, Aboriginal Legal Services, Marymead, Relationships Australia, ACT Department of Community Services, CanFaCS, Bimberi Youth Justice Centre, ACT Probation and Parole, Medicare Local and the CIT Yurauna Centre).

Working collaboratively is crucial to the achievement of key outcomes in Legal Aid ACT's delivery of legal services to local Aboriginal and Torres Strait Islander communities.

The role of Aboriginal and Torres Strait Islander support officers

The Aboriginal and Torres Strait Islander Client Support Officer (CSO) and Dispute Resolution Project Support Officer (DRPSO) have pivotal roles in supporting Aboriginal and Torres Strait Islander people in need of legal assistance and developing effective working relationships with the community.

The role of the CSO is to assist Legal Aid ACT to identify and deliver its services to meet the special needs of Aboriginal and Torres Strait Islander people and to assist people to access services provided by Legal Aid ACT and other legal assistance providers. The CSO works closely with solicitors to ensure that clients are well informed and aware of their legal rights and obligations.

The role of the DRPSO is to assist in the work of the DR Program and its development of a culturally appropriate lawyer-assisted model of dispute resolution. The DRPSO works collaboratively with organisations that have established relationships with local Aboriginal and Torres Strait Islander families. This helps to ensure the development of important referral pathways between services to better assist families who sometimes have multiple legal and social needs.

The DR Program initiative and the work of the Aboriginal and Torres Strait Islander support officers have been instrumental in enabling Legal Aid ACT to double the number of services provided to Aboriginal and Torres Strait Islander people in 2012-13.

Collaboration with other legal service providers in the ACT

Legal Aid ACT prioritises collaboration with other service providers in an effort to make the most of resources and meet the needs of a greater number of people. In times of limited resources across the legal aid sector it is essential that service providers work together, share resources where possible and avoid unnecessary duplication.

Our Community Education and Information Services section has close ties to community organisations and attends regular networking and interagency meetings to promote the services of Legal Aid ACT and to upskill

community sector workers to enable them to recognise when their client's are experiencing legal issues and, how to make appropriate referrals.

This collaboration is also undertaken through our membership of the ACT Legal Assistance Forum (ACTLAF). ACTLAF was established in May 2008 to improve coordination between legal assistance services in the ACT and to encourage collaborative service delivery.

ACTLAF comprises all legal assistance providers in the ACT, namely the five community legal centres, the Aboriginal Legal Service, Legal Aid ACT and the ACT Law Society, as well as the ACT Bar Association, the Aboriginal Justice Centre and the Justice and Community Safety Directorate (ACT).

ACTLAF improves the coordination of legal assistance services, importantly resulting in less duplication of services or programs in circumstances where funding is an issue for all legal service providers. ACTLAF members collaborate on projects to improve the targeting of services to vulnerable members of the community, improve the exchange of information between services, and improve the referral processes between services.

Legal Aid ACT staff are members of ACTLAF working groups whose role is to identify opportunities for improving service delivery in priority areas of need and develop effective service strategies. The ACTLAF working groups during 2012-13 were:

- Community Legal Education (CLE) Working Group
- Legal Advice and Referral Working Group
- Care and Protection Working Group
- Emergency Legal Assistance Response Group
- Prisoners Legal Service Working Group

Collaborative projects undertaken by ACTLAF during the year included the development of:

- the Free Law Directory of free and reduced cost legal services in the Territory which was launched by the ACT Attorney-General, Simon Corbell MLA on 4 December 2012;
- training for community sector workers in relation to identifying legal issues and making appropriate referrals to legal services;
- fact sheets on 17 common legal problems that will accessible on the ACTLAF website; and
- public information sessions on popular legal topics such as arrangements on separation and self-representation on drink driving charges.

Another major initiative of ACTLAF during the year was the organisation of a one-day symposium on legal need held at the National Library of Australia on 28 August 2013. The purpose of symposium which was called

'Targeting Need . . . Making Connections: Improving Legal Services for Vulnerable People', was to review the LAW Survey findings, examine the legal needs of groups identified in the research as having increased susceptibility to serious legal problems, and discuss how the needs of these group could be better met by collaboration between legal and non-legal services. Members of Legal Aid ACT's staff have volunteered to be part of ongoing working groups whose role will be to implement the findings and recommendations from the Symposium in conjunction with other community and government agencies.

Proposed reforms to promote access to justice

In the first part of this submission the current services provided by Legal Aid ACT and initiatives being undertaken to improve access to justice in the Territory were outlined. In the next part of the submission Legal Aid ACT suggests how access to justice might be improved through the following justice system reforms.

1. Exploring alternatives to the adversarial system.
2. Reducing restrictions on who can provide legal services.
3. Clarifying the focus of pro-bono services.
4. Reducing the reporting burden imposed on legal assistance services.
5. Changes to the *Family Law Act* regarding property settlement.
6. Tax concessions for legal assistance providers.

Each of these suggestions is explored in detail below.

Alternatives to an Adversarial System

An adversarial justice system is considered to effectively adhere to due process and to deliver justice through the determination of facts by an unbiased fact-finder (the jury, or in some limited cases, the judge). However, the system can fail when litigants are prevented through disadvantage such as financial difficulty, disability, race, or ill health from having their case competently argued because they cannot obtain legal representation.

The system, despite some safeguards, generally favors parties who are legally represented. Further, litigation is expensive, stressful and time consuming and so the justice system by its very nature is often closed to those in our society whose legal rights and interests are most at risk.

It is for this reason that alternative justice models should be considered by the Productivity Commission – including the utilisation of inquisitorial models of justice such as those employed in civil law jurisdictions.

In such systems, the onus of bringing one's case to court and successfully arguing it and presenting relevant evidence and facts does not fall upon the contesting parties, but rather upon the Court and the judge. This shift in focus away from each party bringing their case to court with the objective of winning at the expense of the other has the potential to confer many advantages when considering questions of equitable access to justice, both procedural and substantive. Such advantages are in terms of greater practical access of parties to be heard

in Court and procedural fairness when there, in addition to potentially greater equity and fairness in outcome arising from a 'best outcome' inquisitorial, rather than a 'most compelling argument' adversarial, approach.

Recommendations in a 1996 UK report into Access to Justice suggest a shift away from adversarial systems.[12] They involve the adjustment of the current adversarial system to avoid litigation where possible and where litigation is necessary, to limit the adversarial nature. Courts would be more interventionist and structures more strictly regulated to keep time and money costs down. These recommendations were implemented successfully.[13]

From a Legal Aid perspective, reform in the direction of reducing the adversarial nature of trials is desirable for two reasons. Firstly, the Court controls fact-finding (and, consequently, ultimate fairness in ruling), rather than relying upon the flawed assumption that each party has the capacity to formulate their best arguments, supported by all relevant evidence, and will present that case clearly and persuasively to the Court.[14] This promotes fairness for disadvantaged parties who, for example, cannot afford to retain legal counsel. Secondly, it is possible that an inquisitorial style framework could limit the financial and time cost of bringing an action to court, further enabling disadvantaged would-be litigants to access the justice system.

Primary differences between Adversarial and Inquisitorial Systems

Attributes	Adversarial Systems	Inquisitorial Systems
Binding force of case law	Previous decisions by higher courts are binding on lower courts.	Traditionally, there is little use of judicial precedent (case law). Judges are free to decide each case independently of previous decisions, by applying the relevant statutes.
Investigation	The responsibility for gathering evidence rests with the parties (the Police and the defence).	The typical criminal proceeding is divided into 3 phases: the investigate phase, the examining phase, and the trial. In the investigative phase, a government official (generally the public prosecutor) collects evidence and decides whether to press charges. Prosecutors carry out investigations themselves or request Police to do so. The prosecution can give general instructions to the Police regarding how particular cases are to be handled and can set areas of priority for investigations. In some inquisitorial systems, a Judge may carry out or oversee the investigative phase.
Examining phase	There is no examination phase, so an independent evaluation of the evidence collected during investigation is left to the	The examining phase is usually conducted in writing. An examining Judge completes and reviews the written record

[12] Lord Woolf, *Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales* (1996).
[13] Stephen O'Ryan, *A Significantly Less Adversarial Approach: The Family Court of Australia's Children's Cases Program* (2004) 32.
[14] William van Caenegem, 'Advantages and disadvantages of the adversarial system in criminal proceedings' (1999) *ePublications@bond* 69, 69 < http://epublications.bond.edu.au/law_pubs/224>. While the inquisitorial systems' investigative process shifts responsibility to the judge, parties are still able to make submissions to advance their cases.

	trial.	and decides whether the case should proceed to trial. The examining Judge plays an active role in the collection of evidence and interrogation of witnesses. In some inquisitorial systems, the "legality principle" dictates that prosecution must take place in all cases in which sufficient evidence exists (ie, the prosecutor or Judge has limited discretion as to whether or not charges will be brought).
The trial	An adversarial system requires the prosecutor, acting on behalf of the State, and the defence lawyer, acting on behalf of the accused, to offer their version of events and argue their case before an impartial adjudicator (a Judge and/or jury). Each witness gives their evidence-in-chief (orally) and may be cross-examined by opposing counsel and re-examined.	As a result of the thoroughness of the examining phase, a record of evidence has already been made and is equally available to the prosecution and defence well in advance of the trial. The main function of a trial is to present the case to the trial Judge and, in some cases, the jury, and to allow the lawyers to present oral argument in public. While there is no cross- and re-examination of witnesses, witnesses are still questioned and challenged. In Germany there is a preference for narrative testimony, in which the witness gives their version of events without shaping by questions from the prosecution or defence. Traditionally there is no ability for the defendant to plead guilty.
Role of the trial Judge and counsel	The Judge is a referee at the hearing. It is the Judge's function to ensure that the court case is conducted in a manner that observes due process. The Judge decides whether the defendant is guilty beyond reasonable doubt (except in jury trials where the jury performs that role), and determines the sentence. Lawyers are primarily responsible for introducing evidence and questioning witnesses.	Judges are required to direct the courtroom debate and to come to a final decision. The Judge assumes the role of principal interrogator of witnesses and the defendant, and is under an obligation to take evidence until he or she ascertains the truth. It is the Judge that carries out most of the examination of witnesses, arising from their obligation to inquire into the charges and to evaluate all relevant evidence in reaching their decision. However, it is now accepted that the defence should have the right to confront each witness during at least one stage in the proceedings.
Use of juries	Juries are used in many cases. In New Zealand, if the maximum sentence of the charge is more than three months, the defendant has the right to elect trial by jury. [78]	Juries are generally only used for the most serious cases.
Rules of evidence	Evidence which is prejudicial or of little probative value, is more likely to be withheld from juries (who don't have training on the weight that should be given to certain evidence). However, hearsay evidence is more readily allowable if it is reliable. A significant category of inadmissible evidence is 'hearsay' evidence (with numerous exceptions). In New Zealand, a 'hearsay statement' is defined in the Evidence Act 2006	The rules around admissibility of evidence are significantly more lenient. The absence of juries in many cases alleviates the need for many formal rules of evidence. More evidence is likely to be admitted, regardless of its reliability or prejudicial effect. Evidence is admitted if the Judge decides it is relevant. In many inquisitorial systems, there is no hearsay rule (eg, France, Belgium and Germany). It is up to the Judge to decide the value of such testimony.

	as "a statement that was made by a person other than a witness and is offered in evidence at the proceedings to prove the truth of its contents". At the heart of the hearsay rule is the idea that, if the court is to discover the truth, it is essential that parties have the opportunity to verify the information provided by the witnesses, which is difficult to do if the court receives evidence in writing or via a third party (and are therefore unable to cross-examine the person).	
Rights of the defendant	In both systems the accused is protected from self-incrimination and guaranteed the right to a fair trial. However, some commentators view adversarial systems as offering stronger protections for defendants due to their interpretation of the right to silence.	In both systems the accused is protected from self-incrimination and guaranteed the right to a fair trial.
Role of the victim	Victims are not a party to proceedings. Prosecutors act on behalf of the State and do not represent the victim. In New Zealand, victims can provide a victim impact statement to the court at sentencing, which the Judge must take into account when determining the offender's sentence.	The victim generally has a more recognised role in inquisitorial systems – they usually have the status of a party to proceedings. In some jurisdictions, victims have a formal role in the pre-trial investigative stage, including a recognised right to request particular lines of inquiry or to participate in interviews by the investigating authority. At the trial, they generally have independent standing and some jurisdictions allow victims to be represented by their own lawyer.
Organisation of the courts	Adversarial systems have courts of general jurisdiction available to adjudicate a wide range of cases.	Civil law systems tend to have specialist courts (and specialist appeal courts) to deal with constitutional law, criminal law, administrative law, commercial law, and civil or private law.

Inquisitorial Justice and the Australian System

Tribunals

Australia already allows judges to exercise an inquisitorial role in several jurisdictions. In particular, the High Court has affirmed that cases arising from the Migration Tribunal are inquisitorial proceedings, noting that under the *Migration Act 1958* (Cth) neither the Minister nor the applicant bears any burden, but rather the Tribunal engages in merits review and conducts its own investigations into the pertinent facts.[15]

There has been some controversy over whether the tribunal system is truly inquisitorial, as the tribunal is not a 'truth-identifier', and only the Administrative Decisions Tribunal of NSW has a legislatively imposed requirement of judicial inquiry.[16] However, for our purposes this seems largely academic because ultimately the court/tribunal has an inquiry function and the capacity to exercise investigatory powers, at least to some degree, which are the characteristics that are most relevant.

The Family Court of Australia

It has been suggested curially that the judicial role in family court cases should be more inquisitorial,[17] and there is reasonably widespread support from higher Australian courts for this proposition.[18] A project instigated as a result of the child protection case *M v M*,[19] entitled the Magellan Project, demonstrated that active judicial involvement meant that outcomes were more likely to be effective, enabled early identification of the relevant issues and preparation of the most useful evidence in an efficient manner, and limited the number of cases that proceeded to trial.[20]

Already it has been identified that family law systems seem to have a blend of inquisitorial and adversarial features and that features of each system can coexist.[21] For example, there are some practices, such as that where a child psychologist is called to give evidence they do not owe any duty to either of the adult parties to the case, that seem to fit with the inquisitorial system of responsibility falling upon the Court.[22] The use of Family Consultants and other experts, as well as the large emphasis placed on their evidence exemplifies this.

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[15] See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, [40]; *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486, [4].
[16] Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (2006, Australian Institute of Judicial Administration).
[17] See, eg, *U v U* (2002) 211 CLR 238.
[18] John Caldwell, 'Common law judges and judicial interviewing' (2011) 23 *Child and Family Law Quarterly* 41, 53-55.
[19] (1988) 166 CLR 69.
[20] Family report 22-23.
[21] Stephen O'Ryan, *A Significantly Less Adversarial Approach: The Family Court of Australia's Children's Cases Program* (2004) 12-15.
[22] John Caldwell, 'Common law judges and judicial interviewing' (2011) 23 *Child and Family Law Quarterly* 41, 44-49.

The Family Court of Australia currently maintains a Less Adversarial Trial (LAT) process for certain child-related cases that are deemed to be appropriate.[23] The LAT process is a move towards inquisitorial processes, implementing procedures that were found to be successful in other jurisidictions (notably Germany),[24] aiming to reap some of the benefits identified by studies such as the Magellan Project and manage cases to settlement, rather than trial.[25] LAT is now used widely in more complex family law cases. The process involves the judge exercising discretion, actively clarifying contentious issues requiring decision in consultation with the parties and family consultants who play an advisory and mediatory role, making orders to prescribe trial conduct, directing parties to obtain and present evidence and make inquiries on issues determined relevant, and determine how the trial should be conducted in all minutiae.[26] The parties and judge may address each other directly, regardless of whether they are represented.[27]

While little data on the pecuniary advantages of LAT exists, it is generally assumed that LAT-based family court trials are less financially draining on the parties. This is partially because the process is conducted with minimal formality and does not require adherence to more traditional legal technicalities and procedures in the interests of flexibility and speed.[28] Rather, research on the trial structure has focused more on the experiences of parents who have gone through the procedure, particularly in a qualitative study of the pilot project preceding the implementation of LAT, the Children's Cases Project.[29] The results of this study indicated that the outcomes measuring the wellbeing, stress, satisfaction with court procedures of both parents and children undergoing the process were significantly improved in LAT, and suggested that the protection of the interests of the child and perceptions of the fairness of outcomes reached were significantly augmented by the system.[30]

The less adversarial, more inquisitive process with regard to children's cases has been approved in the United Kingdom,[31] New Zealand,[32] and has had significant approval in the commentary in the United States.[33]

The successes of the LAT process demonstrate that there are some inquisitorial functions that are not beyond the role of Australian Courts to undertake and there is some possibility that these processes could be extended into alternate areas of law. A prime example is the care and protection jurisdiction, where people are often unrepresented, and the majority of parties come from a low socio-economic background.

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[23] *Family Law Act 1975* (Cth) pt VII div 12A.
[24] Family Court of Australia, *Finding a Better Way* (2007) 39-40.
[25] Jennifer McIntosh, *The Children's Cases Pilot Project*, Final Report to the Family Court of Australia (2006).
[26] Family Court of Australia, *Less Adversarial Trial Handbook* (2009) 17.
[27] Ibid 19.
[28] Ibid 18.
[29] Jennifer McIntosh, *The Children's Cases Pilot Project*, Final Report to the Family Court of Australia (2006).
[30] Rosemary Hunter, *Presentation of the Children's Cases Pilot Program* (2006).
[31] See, eg, *Oxfordshire County Council v M* [1994] 1 FLR 175, 278; Re L (a minor) (police investigation: privilege) [1996] 2 All ER 78; Re P-B (a minor) (child cases: hearings in open court) [1997] 1 All ER 58.
[32] Pauline Tapp, 'Family Law' (1999) 4 *New Zealand Law Review* 443.
[33] Stephen O'Ryan, *A Significantly Less Adversarial Approach: The Family Court of Australia's Children's Cases Program* (2004) 36.

It should be noted, however, that while some of the reforms inherent in LAT appear to minimize the need for legal representation, the role of the lawyer continues to be recognized as pivotal, and the Family Court has emphasized the continuing need for adequate legal assistance for representation of disadvantaged parties,[34] noting that while LAT substantially improves outcomes for self-represented litigants and is thus preferable to traditional structures in that sense, represented litigants are still at an advantage (albeit a more diminished one).[35]

Arguments for an inquisitorial system

Financial and Temporal Efficiency

In 1999 the Law Reform Commission of Western Australia undertook an extensive enquiry into the value of an inquisitorial system of justice. It identified advantages and disadvantages of the adversarial system and ultimately recommended that the adversarial system should be completely abolished in favour of the inquisitorial system.[36]

Adversarial systems impose a significant financial burden upon parties involved in litigation. Litigation is largely a protracted affair involving engagement of costly lawyers and provision of evidence can also be expensive (particularly where experts are involved). From a Legal Aid funding perspective, the adversarial system is one in which to adequately meet the needs of clients in litigation relative to those who have deep pockets, more funding is needed. An inquisitorial system where the burden is shifted to the Court would alleviate some of these financial stressors, and movement to a quasi-inquisitorial approach would have a similar effect, although possibly to a lesser extent.

A move to an inquisitorial justice system is not necessarily a cheaper option overall. Court processes and the acquisition of evidence among other necessities are expensive, regardless of the internal processes of the Court.[37] The cost of litigation is shifted from the litigant to the judicial system. Inquisitorial bodies necessarily have a duty to inquire as fully into the facts of a particularly case as necessary to be satisfied that natural justice is achieved (or such other standard as deemed appropriate). Any failure by the parties to sufficiently comply with judicial requests for information such that standards of certainty or justice were not met would lead to the drawing-out of inquiries, increasing the cost of litigation and delaying outcomes. This has occurred on several

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[34] Family Court of Australia, *Finding a Better Way* (2007).
[35] Ibid.
[36] Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia: Submissions Summary* (1999) Project 92, 19-22.
[37] Andrew Daughety and Jennifer Reinganum, 'On the Economics of Trials: Adversarial Process, Evidence, and Equilibrium Bias' (2000) 16 *Journal of Law, Economics, and Organisation* 365, 366.

occasions in the Australian tribunal system.[38] However, economic analysis of costs associated with evidence-gathering suggests that while both systems are necessarily expensive, adversarial systems impose greater costs in this arena and thus end up screening more unmeritorious cases than the inquisitorial alternative.[39] The optimum solution to minimize this problem was considered to be more centralized information gathering; that is, a procedure similar to that of LAT processes, where in adversarial contexts an inquisitorial style court-determined, independent acquisition of evidence would enable the relevant evidence to be gathered with minimal irrelevant canvassing.[40] Indeed, interim reviews of the CCP system (pilot program to LAT) showed that there was a reduction in the delay in cases reaching Court, a shortened time course of trial and consideration of only relevant evidence, features which significantly reduced the cost to the parties.[41]

Research undertaken in the United States to elucidate the 'fact-finding efficiency' of each system found that wildly different outcomes in efficiency were produced by each system dependent on informational structure. Where pertinent information is private, the inquisitorial system was found to be more efficient at discovering the relevant facts to the proceedings.[42] The results suggested that if the adversarial system is to function effectively, the associated procedure of discovery is critical in ensuring its success and efficiency – if discovery is not sufficiently comprehensive, the system cannot work as effectively as it should. However, in the context of law reform, given that discovery has been identified as potentially problematic with regard to the financial cost and time delay it imposes,[43] movement to an inquisitorial/quasi-inquisitorial system may be beneficial. In a legal context where a lack of discovery processes means that pertinent information is primarily available to only one of the two parties, a judge-as-referee system will be more efficient and prevent the necessity of expensive and time-consuming discovery processes (indeed, the inclusion of the discovery process was found to be a hindrance to efficient functionality of proceedings). It is also possible that this would decrease disadvantage faced by those litigants who are self-represented or whose representation is less well-resourced than the adversary party.

However, beyond this difference in the necessity of the 'discovery' process, both systems face issues in delay, which are primarily a result of the high volume of litigants requiring access to justice. Ultimately, there is a limit

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[38] Se, eg, *Re Ross and Repatriation Commission* [2002] AATA 497; *Re Bessey and Australian Postal Corporation* [2003] AATA 12; *Re Heard and Repatriation Commission* (2004) 84 ALD 484.
[39] Andrew Daughety and Jennifer Reinganum, 'On the Economics of Trials: Adversarial Process, Evidence, and Equilibrium Bias' (2000) 16 *Journal of Law, Economics, and Organisation* 365, 384-6.
[40] Ibid.
[41] Stephen O'Ryan, *A Significantly Less Adversarial Approach: The Family Court of Australia's Children's Cases Program* (2004) 41.
[42] Michael Block, Jeffrey Palmer and Olga Vyborna, 'An experimental comparison of adversarial versus inquisitorial procedural regimes' (2000) 2 *American Law and Economics Review* 170, 186.
[43] Issues Paper, 20.

to which these issues can be dealt with summarily, and neither system has yet found a satisfactory solution to the problem of delay.[44]

Self-Represented Litigants

One of the primary objections to the inquisitorial system is that any changes that may assist self-represented litigants, including but not limited to alteration of the judicial role, will encourage self-representation.[45]

Self represented litigants are already often assisted by judges in the course of litigation, usually in relation to adherence to court procedures. While the represented party often contests this as unfair, generally the Court will continue to provide this limited assistance.[46] Court orders may allow further questioning by the judge, and this is particularly considered appropriate in relation to cases involving custody disputes, juveniles and the disabled in the interest of protecting those vulnerable parties. Given that self represented litigants are generally vulnerable in a variety of other ways, it is arguable that such protections should also be extended to them.[47] Law reform could transform a practice that seems to offer far more advantages than drawbacks and is already happening in an *ad hoc* manner into one that is formalized, regulated and sanctioned.[48] This sort of judicial inquiry would be possible without moving to a full inquisitorial system, which would likely require far more radical reform than is currently contemplated in the terms of reference of this inquiry.

Achievement of Practical Justice

It is clear that expert advocacy is a highly influential factor in whether litigation is ultimately successful in the adversarial system;[49] in effect distributing justice through the market system and rendering access to it a commodity that can be bought and sold.[50] This is a function of the fact that the adversarial system focuses on the achievement of proper process, while the inquisitorial system has a more outcomes-based focus that is theoretically more likely to end in the achievement of justice.[51] A rational extension of the argument is that an inquisitorial (or quasi-inquisitorial) system in which the Court and the judge are allowed, and expected, to play a more active role in seeking the most just and fair outcome is a good way of ensuring equity for parties in the

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[44] William van Caenegem, 'Advantages and disadvantages of the adversarial system in criminal proceedings' (1999) *ePublications@bond* 69, 86 < http://epublications.bond.edu.au/law_pubs/224>.

[45] Jonah Goldschmidt, Barry Mahoney, Harvey Solomon and Joan Green, *Meeting the Challenge of* Pro Se *Litigation: A report and guidebook for judges and court managers* (1998).

[46] Richard Zorza, 'The Disconnect Between the Requirements of Judicial Neutrality and Those of Appearance of Neutrality when Parties Appear Pro Se : Causes, Solutions, Recommendations and Implications' (2004) 17 *Georgetown Journal of Legal Ethics* 423.

[47] Russell Pearce, 'Redressing inequality in the market for justice: Why access to lawyers will never solve the problem and why rethinking the role of judges will help' (2005) 73 *Fordham Law Review* 969, 974-5

[48] Ibid, 978.

[49] Orley Ashenfelter and David Bloom, 'Lawyers as agents of the devil in a prisoner's dilemma game' (Working Paper No 650, Princeton University Department of Economics, September 1990).

[50] Russell Pearce, 'Redressing inequality in the market for justice: Why access to lawyers will never solve the problem and why rethinking the role of judges will help' (2005) 73 *Fordham Law Review* 969, 970.

[51] William van Caenegem, 'Advantages and disadvantages of the adversarial system in criminal proceedings' (1999) *ePublications@bond* 69, 79 < http://epublications.bond.edu.au/law_pubs/224>.

justice system who are in some way disadvantaged or vulnerable.[52] Law reform enabling judges to engage in questioning, call witnesses and undertake limited independent investigation within the context of cases where there are specified classes of vulnerable parties (including, for example, children, the disabled, unrepresented parties etc) might be a highly effective way of creating greater equity and access to just outcomes in the justice system.

However, the achievement of this practical justice requires the theoretical requirements of the inquisitorial system to be met: notably, the truly unbiased judicial officer.

Effective and responsive legal service - restrictive right of practice

Rationale for restricting the right of legal practice

The *Legal Profession Act 2006* (ACT) (LPA) states the rationale for reserving legal work to duly qualified legal practitioners as follows (Part 2.2 Reservation of legal work and titles):

> 15 (2) The purposes of this part are as follows:
>
> (a) to protect the public interest in the proper administration of justice by ensuring that legal work is carried out only by people who are properly qualified to do so;
>
> (b) to protect consumers by ensuring that people carrying out legal work are entitled to do so.

Section 15 encapsulates the public protection test referred to below. It is an offence for a person who is not an Australian legal practitioner as defined in the LPA to engage in legal practice in the ACT for fee, gain or reward.[53]

The legal practice statutes in other jurisdictions have similar provisions.

Examples of legal practice given in the LPA include:

- preparing a will or other testamentary instrument;
- preparing an instrument creating or regulating rights between people;
- preparing an instrument relating to property or a legal proceeding;
- acting as advocate for someone in a proceeding before a court or tribunal; and

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[52] Russell Pearce, 'Redressing inequality in the market for justice: Why access to lawyers will never solve the problem and why rethinking the role of judges will help' (2005) 73 *Fordham Law Review* 969.

[53] Section 15(2) provides that is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant did not engage in the legal practice for fee, gain or reward.

- preparing papers to be used in support of, or opposition to, an application for the grant of probate or letters of administration

The LPA contains no definition of 'engage in legal practice' other than it includes 'practise law'. Neither 'practise law' nor 'legal practice' are defined.

The Explanatory Statements that accompanied the *Legal Profession Bill 2006* throws no further light on the extent of activities that might be caught within the phrase 'engage in legal practice'. The Explanatory Memorandum to the equivalent bill in Victoria [54] stated that the concept of engaging in legal practice was 'intended to invoke the common law learning on what defines the practice of a lawyer'. The apparent intention was to avoid perpetuating by statutory prescription the profession's monopoly of the types of work defined in the bill, instead leaving it to the common law, particularly 'the protection of the public test', to determine what work should only be done by legal practitioners.

The public protection test

In *Cornall v Nagle* [1995] 2 VR 188 Phillips J formulated a test of whether someone was engaging in legal practice. He said that one of the ways in which an unqualified person may act or practise as a solicitor included doing something which, in order for the public to be adequately protected, should only be done by those with legal training and expertise. This is the public protection test.

In *Felman v Law Institute of Victoria* [1998] 4 VR 324 Kenny JA delivering the judgment of the Court of Appeal, said that the expression to 'engage in legal practice' means to engage in legal practice as a legal practitioner. It followed that the provision of advice about the law relating to a particular area would not amount to engaging in legal practice if done by a member of an occupation with expertise in that area in the course of carrying out their occupation, provided it is not done in a way that may lead to a reasonable inference that they are a legal practitioner. In this case it would infringe the prohibition.

The degree to which the protection of the public requires someone to be legally trained must depend on the breadth and legal complexity of the work to be carried out. In relation to advocacy on behalf of a person in a specific type of legal matter such as a tenancy dispute, the public protection test might be satisfied by someone undertaking a course in tenancy law, advocacy and the rules and procedure of the relevant tribunal.

Once it is accepted that it is possible to satisfy the public protection test in relation to work of specific kinds by ensuring that those undertaking the work are adequately trained and experienced, then there should be no impediment to extending the range of legal work that can be undertaken by non-legal practitioners. The caveat we would attach to this is that the public interest should be further protected by requiring that non-

[54] *Legal Practice Bill 1996* (Vic).

practitioners performing this work should be supervised by a legal practitioner. This would ensure that if any difficulty arose in relation to the work or other legal issues were intertwined, there would be appropriate supervision to ensure that the out-of-scope legal work was identified and referred to an appropriately qualified person.

This further condition would be satisfied in the case of paralegals employed by legal aid commissions, other legal assistance services and private law firms.

In 1995, following its study of the legal profession, the Trade Practices Commission (the forerunner of the Australian Competition and Consumer Commission) concluded that the profession had many restrictive practices which prevented rigorous competition. Legal Aid ACT recommended opening up to non-lawyers areas such as conveyancing, tax, wills and probate, simple incorporations, uncontested divorce, simple civil claims and welfare advocacy. Apart from conveyancing these recommendation have since gained little traction.

The types of work that appropriately trained and supervised paralegal staff could carry out would have to be carefully selected, and the availability of suitable training and mentoring programs would be a prerequisite. Areas in which paralegals could be authorized to provide legal advice and representation before courts or tribunals might include:

- pleas of guilty in traffic matters;
- Magistrates Court bail applications;
- mental health matters;
- tenancy disputes.

What are the benefits of using paralegals?

Using the services of paralegals offers significant advantages. From a resource perspective, paralegals offer a way of providing legal information, limited legal advice and representation services at a significantly lower cost than legal practitioners whose charge out rates can range from $200 an hour for junior lawyers in a small firm, to $500 an hour for senior associates and $800 an hour for partners in a large firm.[55] In addition, by utilising paralegals to undertake certain types of routine legal services, legal practitioners are able to focus on higher level advice and representation.

There is also an argument that 'lawyers are trained to think differently from non-lawyers, and this creates a communication barrier',[56] while paralegals are more likely to use plain language when speaking with clients.

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[55] Source: Lawyers and Law Services Australia http://www.legallawyers.com.au

[56] Churchman, Susan, "Community Legal Education, the last ten years – Socrates revisited", 1987, Legal Service Bulletin, 12. pp 198-201.

Offsetting the lower cost of paralegal services to some extent would be the cost of licensing or other form of regulation of the legal work paralegals were permitted to undertake.

The province of Ontario in Canada has introduced training and licensing requirements for paralegals, and the Law Society of Upper Canada now regulates legal services provided by paralegals in the province of Ontario. Increased use of paralegal services in Australia may result in the need for similar licensing requirements.[57]

Current examples of paralegal representation

There are forums in the ACT and other jurisdictions that already permit non-lawyers to appear on behalf of parties.

Social Security Appeal Tribunal (SSAT)

At the SSAT applicants may appoint an advocate to represent them under s 161(2) of the *Social Security (Administration) Act 1999*. This person need not be a lawyer. If the SSAT allows the appointment, the advocate (or representative as the SSAT calls them) is able to:

- communicate with the SSAT on the applicant's behalf;
- forward written submissions and written evidence on the applicant's behalf to the SSAT;
- request access to documents in relation to the application; and
- accompany the applicant to a SSAT hearing.[58]

[57] http://www.findlaw.com.au/articles/1874/paralegals.aspx
[58] http://www.ssat.gov.au/applying-for-a-review/self-representation

ACT Civil and Administrative Appeals Tribunal (ACAT)

Under s 30 of the *ACT Civil and Administrative Tribunal ACT 2008* a person appearing for another person before ACAT need not be a lawyer.

In each of these tribunals, the tribunal has power to prevent someone from representing someone else in certain circumstances. For example, s 8 of the *ACT Civil and Administrative Tribunal ACT 2008* refers to such power and states that:

> (3). However, the tribunal may only make an order under subrule (2) if satisfied that—
>
> (a) the representative does not have sufficient knowledge of the issues in dispute in the proceeding to allow the representative to effectively represent the party at the hearing of the proceeding; or
>
> (b) the representative does not have sufficient authority to bind the party; or
>
> (c) the representative's representation is inconsistent with the objects of the Act.

Clarifying the focus of pro bono services

The strategic and targeted utilization of pro bono legal services is one of the many ways that the shortfall in legal assistance can be addressed. In this section we consider how the ACT legal profession, working cooperatively, might best progress this form of assistance. An anecdotal examination of the current assistance provided shows that there is an underreporting of this work in the ACT.

'Pro bono' is generally understood to involve either the provision of legal services on a free or significantly reduced fee basis to low-income or disadvantaged social groups, or cases which involve an issue of significant public interest.[59] Pro bono legal services are an important supplement to the existing government-funded legal assistance schemes that provide access to justice for the most vulnerable members of the Australian community.[60] Because of this, effective and accessible long-term pro bono services are vital to the ACT community.

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[59] John Corker, 'Government Lawyers and Pro Bono Legal Work' (Paper presented at the Public Sector In-House Counsel Conference 2012, Hotel Realm, Canberra, 30-31 July 2012) 1-2. See also National Pro Bono Resource Centre, *What is Pro Bono?* <http://www.nationalprobono.org.au/page.asp?from=3&id=189>.

[60] Mark Dreyfus, 'Pro Bono – An Ethical Obligation or a sign of Market Failure?' (Speech delivered at the Victorian Bar Third Annual CPD Conference, Melbourne, 16 March 2013).

According to the Australian Bureau of Statistics, the Australian legal profession undertook 955,400 hours of pro bono legal work in 2007-2008, valued at a total of $238.2 million.[61] In 2012, 32 private firms surveyed by the National Law Firm Pro Bono Survey contributed a combined total of over 343,000 hours of pro bono work, and individual lawyers volunteering at community legal centres contributed 8,369 hours of pro bono work per week.[62] The National Pro Bono Aspirational Target—35 pro bono hours per lawyer per annum—is a useful indicator of pro bono uptake. In June 2011, there were 66 signatories to the Target, covering 5,888 FTE legal professionals, which represented approximately 10.5 per cent of the Australian legal profession. Of these, 52 per cent indicated that they had met the target.[63] As of June 2013 the target covered over 7,000 lawyers.[64] Key areas of pro bono service provision include providing legal advice as well as litigation, community legal education and law reform advocacy.

Currently in the ACT there are a number of services which offer pro bono assistance. The ACT Law Society manages the Pro Bono Clearing House and Legal Advice Bureau. In addition, several community legal centres, and Legal Aid ACT's Youth Law Centre, provide pro bono assistance in partnership with private law firms.

a. *Pro Bono Clearing House* (PBCH) – The PBCH was established in 2004 to provide people and organizations with limited means to seek pro bono legal assistance. Applications for PBCH assistance are submitted to an Assessment Panel and must meet the relevant criteria.[65] If successful, applications are then referred to local firms who take on the client on a pro bono basis. In the 2011-12 period, the PBCH received 47 applications, 29 of which were successfully referred to local firms.[66]

b. *Legal Advice Bureau* – The Law Society also operates a Legal Advice Bureau (LAB), which is staffed by volunteers who offer free legal advice each lunchtime. In 2012 the LAB saw a 19 per cent increase in client visits over the same time the previous year.[67]

c. *ACT Legal Assistance Forum* (ACTLAF) – ACTLAF comprises representatives of the ACT five community legal centres, Legal Aid ACT, the Aboriginal Legal Service, ACT Law Society and the ACT Bar Association. ACTLAF meets quarterly to discuss new initiatives, provide referrals and maintain networks. ACTLAF

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[61] Australian Bureau of Statistics, *Legal Services, Australia, 2007-08* (24 June 2009) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Main+Features82007-08>.
[62] National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey – Final Report* (January 2013), 4, 11 <http://www.nationalprobono.org.au/page.asp?from=4&id=36>.
[63] National Pro Bono Resource Centre, *Fifth Annual Performance Report on the National Pro Bono Aspirational Target* (October 2012), 3 <http://www.nationalprobono.org.au/page.asp?from=4&id=36>.
[64] National Pro Bono Resource Centre, *National Pro Bono Aspirational Target* <http://www.nationalprobono.org.au/page.asp?from=8&id=169>.
[65] There are two types of eligible matters: i) 'public interest' law matters which affect a significant number of people or raise a matter of broad public concern; and ii) 'private interest' law matters or litigation. Such matters or litigation must have reasonable prospects of success. See ACT Law Society, *Eligibility Criteria*, 1 <http://www.actlawsociety.asn.au/documents/item/65>.
[66] ACT Law Society, *Annual Report 2011-2012* (20 August 2012), 10 <http://www.actlawsociety.asn.au/documents/item/105>.
[67] Ibid.

also provides a 'Free Law Directory' which lists the free legal services available in the Territory. The Directory was launched in February 2013 and was well received by ACT Government workers, the community sector, and employees of community legal services.

d. *Pro Bono and Human Rights Stakeholders Group* – The Pro Bono and Human Rights Stakeholders Group brings together the ACT community legal centres and the main local law firms. Firms represented include Clayton Utz, Ashurst, Minter Ellison, Australian Government Solicitor, and ACT Government Solicitor, amongst others. This facilitates a dialogue between the community legal centres and the firms offering pro bono assistance in the ACT. It allows for networking, referrals from the centres to private firms, and monitoring of legal services in both the private and community sectors.

There are other features of the pro bono landscape which are particular to the ACT. Significantly, because of the size of the ACT, it has a smaller pool of legal professionals from which to draw in contrast to larger jurisdictions;[68] and while many national law firms have offices in Canberra, their capacity to undertake pro bono work is often less than their other offices due to smaller size and lean staffing models.[69] Moreover, it has been suggested that pro bono legal culture is underdeveloped in government departments, agencies and authorities, which is a key driver for pro bono services in private law firms. A survey in June 2012 found that of approximately 2,000 government lawyers, only 628 of them held practising certificates and only 304 were members of the Australian Corporate Lawyers Association.[70] This suggests a relatively untapped source of pro bono engagement by government lawyers as members of the profession.

Improvements to Delivery

In light of the particular pro bono landscape in the ACT, finding the most efficient ways to identify and refer cases deserving of pro bono work is vital if the pro bono culture is to properly develop. Legal Aid Act is currently developing clear criteria to address this:

Criteria to Identify Pro Bono Casework

For a case to be eligible for pro bono assistance, it must satisfy a test of legal merit. The test comprises three elements:

a) the chances of the proposed legal proceedings being more likely than not to succeed;
b) whether the 'ordinarily prudent self-funding litigant' would risk their own funds in undertaking the proceedings proposed; and

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[68] National Pro Bono Resource Centre, above n 6.
[69] Dreyfus, above n 2.
[70] Corker, above n 1, 10.

c) the costs involved in providing legal assistance are warranted by the likely benefit to the applicant, or to the community.[71]

Such cases must also satisfy a means test, which assesses both the income and assets of the applicant, allowing for deductions when applicable.[72] Apart from satisfying these criteria, many cases merit pro bono referral for their inclusion of a matter of public interest.

'Public Interest'

A distinction should be made between pro bono cases which raise issues of public interest and cases which do not. As stated above, the Pro Bono Clearing House has clear guidelines to assess which cases are eligible for pro bono assistance. The PBCH identifies such matters as:

a) 'public interest' law matters that affect a significant number of people or raise a matter of broad public concerns which should be addressed 'for the common good'. 'Public Interest' is interpreted to include issues that particularly impact on disadvantaged, vulnerable and marginalised groups or raise matters of broad public concern.[73]

A recent case undertaken by Legal Aid ACT in conjunction with a private firm acting on a pro bono basis illustrates the importance of the public interest test. In this case Ms X was employed as a sales assistant on a casual basis with V in NSW. After working there for a few years, Ms X resigned to take up employment with U. Upon discovering this, Ms X's former employer threatened to sue her for alleged breach of employment contract, which contained a restraint of trade clause barring her from working for former clients for a period of twelve months. Ms X's former employer threatened to seek an injunction from the ACT Supreme Court barring Ms X from working at U.

Cases such as these would fit the definition of 'broad public concern' and require substantial casework, making it a costly exercise to fund privately. Rights and obligations relating to the workplace affect a significant number of the population, and contracts of employment are especially important to employees and employers who may be in an unequal relationship. As a starting point, it is important to identify and categorise cases such as Ms X's as deserving pro bono work for its 'public interest' element, and consequently create an express system for referral to either the PBCH or other pro bono providers. What is a 'broad public concern' will vary of course depending on the circumstances of each case.

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[71] National Pro Bono Resource Centre, *The Australian Pro Bono Manual* <http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=9>.
[72] Ibid.
[73] Above n 7.

While there is a strong foundation and practice in providing pro bono services, Legal Aid Act is looking to leverage a number of opportunities for pro bono development in the ACT. Certainly, attention must be directed towards increasing the participation rate of pro bono providers. And by establishing a concrete policy for identifying model pro bono casework acceptable to the private profession—based on criteria such as the public interest test—Legal Aid ACT would improve communication channels between the PBCH and law firms, and greatly enhance pro bono uptake. This approach can provide vital assistance to clients where no other avenue is available and in turn pave the way to advancing access to justice in the ACT.

Reducing the reporting burden

The increase in accountability requirements imposed by governments on agencies of all kinds in recent years has impacted heavily on legal assistance services. The problem has been compounded by the fact that many services receive funding from several sources, including the Commonwealth and state or territory governments, which often means they have to satisfy multiple and different reporting requirements.

The following comments refer to the reporting requirements imposed on legal aid commissions but also apply in general terms to other legal assistance services.

Accountability requirements under the National Partnership Agreement

The National Partnership Agreement on Legal Assistance Services (NPA) commenced in July 2010 and established a new statistical and financial reporting regime for legal aid commissions. The new regime altered some of the service types and definitions used for reporting under previous funding agreements. This necessitated legal aid commissions making changes to their IT systems and work processes to capture and report the new data. This in turn required staff retraining and the revision of data recording procedures and documentation. While some of the larger legal aid commissions were provided with additional funding under the NPA which assisted them to meet the cost of these changes, smaller commissions like Legal Aid ACT received no additional funding. This meant the smaller commissions not only had to fund these changes from within existing budgets but the cost of the changes relative to the size of their budgets was greater than the cost to the larger commissions that received additional funding.

The recent review of the NPA is likely to result in further extensive changes to reporting requirements. There is concern that in addition to changing the way services are defined and recorded, the NPA review may result in a heavier ongoing reporting burden.

It is essential that legal aid commissions and other legal assistance services be provided with the additional resources necessary to implement and manage new reporting requirements.

The reporting burden

In 2011-12 Legal Aid ACT engaged Dr Liz Curran to undertake research into the quality and outcomes of its services. Dr Curran's report[74] was launched by the ACT Attorney-General on 30 April 2012. The report has been well received in legal aid circles in Australia and overseas as an important addition to research into the measurement of legal service outcomes. Dr Curran and Legal Aid ACT's CEO, Andrew Crockett, presented a paper on the research at the International Legal Aid Conference at The Hague in June 2013.

In her report Dr Curran warns against legal assistance services being held accountable for outcomes they cannot control:

> . . . , the international and domestic research suggests that without great care in how outcomes are defined and measures measured, ill-defined outcomes can set of service up to fail, because the deliverable is not within the agencies control and/or relies on factors outside the agency sphere of influence.

Referring to the burden that reporting requirements can impose on legal assistance services Dr Curran said:

> The ACT is a small jurisdiction and thus has few resources. It is therefore critical that legal aid services remain focused on delivering [services]. While funders, stakeholders and others are rightly interested in assessing accountability and transparency, measuring these things must not divert essential and scarce resources and services away from the most disadvantaged sections of society. Given the limited resources of the legal aid sector, such measures can become burdensome. For example, at one Victorian community legal centre where all staff members were engaged in direct service delivery, 36% of staff time was being dedicated to measurements and accountabilities. This often occurs because one service has a number of funders (such as Territory/State and Commonwealth governments), each with their own accountability requirements. It is therefore imperative for those who set accountability criteria to ensure the measurement tasks are efficient and do not prevent or distract staff from providing services to clients.

Writing in his preface to Legal Aid ACT's Annual Report for 2011-12, the President of Legal Aid ACT said:[75]

> Hundreds of hours of staff time have been spent in discussions with the Commonwealth and other legal aid commissions to clarify, and seek and a nationally consistent approach to, the new reporting requirements of the NPA. This work included redefining service types; discussing how service outcomes might be measured; developing new reporting formats, and writing new reports to extract the required information from Legal Aid ACT's data base. Two years into the agreement this additional work is ongoing. What is particularly frustrating about this

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[74] L Curran, *We Can See There's A Light at the End of the Tunnel Now: Demonstrating and Ensuring Quality Service to Clients,* Legal Aid Commission (ACT), 2012 http://www.legalaidact.org.au

[75] *Legal Aid Commission (ACT) Annual Report 2011-2012.*

> diversion of resources from core service delivery is that the funding arrangements that will replace the NPA in 2014 are likely to impose an entirely new set of reporting requirements. . . .
>
> Over the years the time spent by legal assistance providers around the country in negotiating and renegotiating Commonwealth funding arrangements has absorbed hundreds of thousands of dollars of legal assistance resources. Add to this the time spent on reporting and accountability requirements under the various funding and accountability models across the legal assistance sector, and there is a compelling case that the biggest impact this [NPA] review could deliver in terms of better use of resources, is more efficient funding and accountability arrangements.
>
> The current NPA and the underlying Commonwealth/State funding 'divide' are significant impediments to further improving legal assistance service delivery in Australia. The NPA review will deliver lasting benefits if he can successfully address these issues.

Reducing the reporting burden

The reporting burden on legal assistance services would be reduced, enabling a reallocation of resources to more service oriented tasks, if funders agreed to a single national data reporting regime consistent with the following principles:

1. Funders should explain the rationale for collecting particular data.
2. Data should be demonstrably useful and feedback should be provided to services on the results and use of data analysis.
3. The effort required to collect data should be proportionate to its usefulness (the data should be cost effective to collect).
4. Data should reflect the diversity of the legal assistance sector (not all service providers provide the same or comparable services).
5. Data collection should not be intrusive or deter clients from seeking services.
6. Funders should meet the cost of implementing changes to data requirements.
7. Continuous data collection should be limited to data necessary for the provision and monitoring of services.
8. Collection of other data (including qualitative data) should be undertaken on a survey basis.
9. Process benchmarking or system capability indicators should be used in preference to service counts to satisfy accountability requirements in regard to services of short duration such as information and

referral services at courts, by telephone or at the front counter.[76] In this regard the following observations of the NPA reviewers are noted:[77]

> Process benchmarking enables comparison of elements of performance across dissimilar organisations. The approach is premised on the assumption that the presence of good practices and the more entrenched those good practices are in an organisation's operations, known as maturity of the process, the more likely the organisation is to perform well.

Changes to *Family Law Act 1975* regarding property settlement matters

The current legislative regime relating to family law property settlements requires some recourse to court with consequent costs to parties, the community and the court system. In particular, recourse to courts is required where:

1. couples who are transferring real property need to enter into orders (whether judge made or by consent) so they can be exempt from stamp duty on the transfer;
2. couples who are splitting superannuation only have recourse through a court order or a superannuation agreement;
3. the discretionary component of adjustments in Section 75(2) of the *Family Law Act 1975* (Cth) to some extent encourage recourse to judicial determination.

To obtain court orders in property matters parties have to either lodge an application, affidavit and a financial statement; or lodge an application for consent orders and terms of settlement. This mechanism requires the use of court resources on an administrative level (creation of file, storing of file, inputting data) and on a semi-judicial level as the registrar is required to consider the application and make an assessment as to whether it is just and equitable (for consent orders).

The financial dispute that can follow the breakdown of a marriage should be subject to legal intervention where necessary as occurs in the breakdown of a business relationship. Similarly there should be legal sanctions for criminal behaviour between parties to a sexual relationship just as there are for criminal behaviour between unrelated citizens.

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[76] These services are often provided in pressured circumstances in which it is easy for staff to forget to record them, or to record them accurately. Because the recorded data invariably understates the number of services provided the value of collecting the data is questionable.

[77] Allen Consulting Group, 'Draft Evaluation Framework Discussion Paper', July 2012, p 23.

A simplified system in relation to property settlement might offer savings on government expenditure. Statistics on the numbers of unrepresented parties arguing over property; post-relationship reliance on government funded housing and on Centrelink may give some indication.

A simplified system has potential to save legal costs, although this will not always be possible since the largest costs in property settlements are likely to be incurred over issues that cannot be simplified, for example untangling complex trust systems. Perhaps more importantly, a simplified system could save unrepresented people and unadvised people from arriving at an outcome that is not just and equitable. It is not at all unusual to find people who have entered into poor arrangements for want of legal advice; for fear of ending up in Court; due to pressure from an intimidating partner; or just due to ignorance of their rights.

Prior to the establishment of the Child Support Agency, relatively few parents received any child support. They needed to go to Court to get it; the courts were obliged to maximise eligibility for Centrelink benefits, and orders were routinely for small amounts. Enforcement required further court action and the 12 month rule applied. It is now relatively simple once you have some basic information to calculate how much child support should be paid. Where the answer does not adequately reflect real circumstances or agreements there is room to request the Agency to reconsider and review the case. Where that result is considered unsatisfactory there is recourse to the Social Security Appeals Tribunal and, in limited circumstances, to the court.

The Child Support system provides significant certainty as to entitlements but retains the flexibility to allow individual assessments based on non-standard arrangements. It must be feasible therefore to establish a system whereby separating couples can enter in the details of requested variables into a sophisticated computer program and then have it determine an appropriate property split; and perhaps suggestions as to how that can be achieved, together with precedent orders achieving that outcome. It could have a result in some complex cases similar to the following, 'your situation is outside the standard parameters; you will need specialist legal advice'"

A computer program of this kind would not need to involve a Child Support Agency type of infrastructure. The exercise could for example be undertaken by:

- registered property mediators;
- registrars of the Federal Circuit Court;
- accountants;

People dissatisfied with the outcome could make application to the court for rulings on narrow issues or the total outcome.

If the legislation was more formulaic, perhaps no additional system would be needed and there would be less room for dispute. This would require consideration of what framework would be most likely to lead to a just and equitable outcome in most circumstances. The scheme could take various forms including, for example, an initial 50:50 assessment. The key aspect is that the system could be simplified virtually to the point of an accounting exercise thus reducing the need for people to spend money on lawyers or court proceedings.

Tax concessions for Legal Aid providers – tax measures to improve equity and access to justice

Limits on tax deductibility of legal fees

The Issues Paper canvases a potential approach for reducing the perceived inequality of access to legal services, by reducing the ability of businesses to claim tax deductions for legal costs.

For example, while a business would often be able to claim a full tax deduction for legal expenses incurred in defending its business practices, a private individual plaintiff who may be seeking legal redress against that business would likely not be entitled to a tax deduction for their legal expenses.

This scenario could typically arise where a private tenant seeks legal redress against a landlord. In that case, the landlord would typically be able to claim a tax deduction for the legal costs against their rental income, whereas the tenant would treat their legal expenses as being private in nature, on the basis that they relate to the plaintiff's dwelling, a private/personal matter, and accordingly no tax deduction would in general be available for those costs.

The approach canvassed in the Issues Paper could result in some potential litigants being more prepared to accept the outcome of pre-trial mediation or negotiation of a settlement to the dispute. However, it does not deal with the potential inequality of bargaining position that may arise between the landlord and the tenant during those alternate resolution procedures. In those circumstances, the additional tax cost to the landlord would not necessarily result in a more equitable result from the point of view of the ability of the tenant to seek redress.

The aims of the inquiry are 'constraining costs and promoting access to justice and equality before the law'. We submit the proposed limitation on tax deductibility:

a) Does not reduce the cost of litigation (other than by dissuading parties from seeking to access justice 'before the law'); and

b) While arguably improving 'equality' by removing a potential tax concession for one party, does not 'improve' access to justice.

Alternate approach – tax exemption for legal aid fees

The available funding for legal aid in Australia is, almost by definition, limited and unable to meet the demands for legal aid around the country.

(a) At present, the rates of fees able to be paid to lawyers by legal aid services is relatively low, in an effort to stretch the available funding across the maximum number of persons in need.

(b) This means most legal services are provided by lawyers with lower fee levels and cost structures, who are better able to manage the differential between their 'normal' fees and those payable for legal aid work.

(c) As a result, the 'pool' of available lawyers is narrowed and (with due respect to those lawyers who currently provide assistance to legal aid clients) many very able lawyers are forced to restrict the amount of work, or the experience level of staff, they can apply to legal aid clients.

Given this, any reform should seek to increase both the number of lawyers and the quality of lawyers able to assist legal aid clients while maintaining the number of people receiving assistance.

One approach could be to amend the tax legislation to provide that the legal fees paid to a private law firm by a legal aid office would be exempt from income tax (whether whole or in part), without affecting the tax deductibility of the costs incurred by the lawyer in providing those services. The scope of the exemption could be subject to restrictions. For example:

(a) there could be a ***full or partial exemption***, with the exemption 'capped' at a proportion of the fees, whether as a percentage or as a flat dollar amount;

(b) the exemption could be ***targeted*** to certain types of legal services where a particular need for access to more qualified lawyers has been identified, for example, in family law property matters where the parties are on low income but do not qualify for legal aid.

(c) Given the inherently lower rates of fees payable by legal aid organisations in Australia, this exemption would enable legal aid services to be provided on a more economic basis by firms who would otherwise feel cost pressures to restrict legal aid work in lieu of general, non-legal aid work.

(d) This could also be expected to result in a 'deeper' pool of talent and legal services that could have been provided to persons not otherwise able to obtain access to legal services while maintaining the capacity of legal aid commissions to grant assistance.

(e) If for example the tax exemption was limited only to fees paid by legal service organisations (such as Legal Aid ACT and other legal aid commissions), then the extent of the cost to the federal budget from the exemption would be able to be managed over time, given the funding of such organisations is effectively within the control of government.

For example, if the legal aid fee for a solicitor was $110 per hour, at the top marginal tax rate a full tax exemption would increase the equivalent non-exempt rate to $205 per hour. This rate is still quite low for legal work by the types of experienced lawyers, but would allow the lawyer to justify accepting more legal aid work than would otherwise be the case (including adding to the expanding pro-bono work being undertaken by law firms). Legal aid offices would still be able to control the amount of fees they pay, by agreeing total fees for specified types of services. Further, the cost to revenue would not be 'open ended' given the level of legal aid funding in Australia.

Under current tax laws, an exemption for legal aid fees can be achieved where the legal aid service provider is a charitable or otherwise not-for-profit tax entity, and in effect the fees it receives from providing those services are exempt from tax.

(f) The current exemption is restricted only to entities which qualify as tax exempt bodies. Salvos Legal Limited is an example of this type of model.

(g) However, as most private practice lawyers are ordinary professionals, they would not qualify for this exemption.

(h) Potentially, a number of lawyers and law firms (perhaps under the auspices of the relevant Law Society or local legal aid commission) could 'band together' to establish such a legal aid charitable practice under the existing meaning of 'charitable' (whether 'for the relief of poverty' or 'for other purposes beneficial to the community').

(i) However, requiring lawyers to arrange their operations in this way would provide a limit on the kind of services that could be provided, and the freedom by which a legal firm may wish to operate. It would also add a layer of administrative complexity and 'red tape'.

For this reason, we submit it would be preferable, and less administratively burdensome, to merely provide an income tax exemption for legal fees paid by legal aid organisations.

Conclusion

The Productivity Commission Inquiry has provided a timely opportunity for Legal Aid ACT to consider the current operability of legal aid, and present some options for reform. Akin to other legal aid providers in Australia, and indeed worldwide, we face increasing pressure to respond to an exponential growth in the need for legal assistance within finite and limited resources. As our President recently reported:

> . . . the overall financial outlook of government remains constrained; annual increases in base revenue are not keeping pace with increases in operating costs such as rent, salaries and the cost and complexity of many legally assisted cases. This gap between revenue and expenditure continues to grow and has caused Legal Aid ACT to seek an increase in its base government revenue. The reality is that unless Legal Aid ACTs can secure additional base revenue, expenditure will have to be cut further in order to balance its budgets and this will inevitably have an adverse impact on services.

The community is looking for more legal assistance, not less. As this submission well illustrates, legal aid commissions are at the forefront of trying to meet this need, and are constantly seeking innovative and agile solutions to ensure the maximum assistance is able to be provided to the community. The legal aid commissions are the engine room for providing the bulk of the assistance in the legal aid sector: and evidence of the *added value of the legal aid dollar* is now well established. Crucially however, the evidence also strongly suggests that an immediate redress in the resourcing of legal aid services is essential, and that without such services access to justice for the disadvantaged and vulnerable will continue to be eroded simply due to the inability of services providers to meet that need. This is not an outcome we expect government will want to see.

We have also gone on to argue in our submission that a range of fundamental changes to the legal system – such as a move away from an adversarial system, the use of trained paralegal staff and taxation reform for legal aid providers – may point the way to more long term improvements to community access to justice. These kinds of system reform can engender significant social change, and we suggest, build a more resilient and accessible legal system.

The challenge is immediate: on the one hand, further delay in addressing funding shortfall to the legal aid sector will continue to see services reduced. And on the other hand systemic reform now would be seen as dramatic or precipitous even though it might likely lead to better access to justice in the longer term. We appreciate that the current constrained economic climate and the lack of appetite for major reform militate against our suggestions, however we urge that full consideration is given to the evidential base that establishes the extent of unmet legal need in the community and the inescapable conclusion that reform now is essential.