



RESPONSE TO ISSUES PAPER 1
THE PRODUCTIVITY COMMISSION INQUIRY INTO
ACCESS TO JUSTICE ARRANGEMENTS
NOVEMBER 2013

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INTRODUCTION AND ACKNOWLEDGEMENT

To: Commissioner Warren Mundy, Productivity Commission

I have pleasure in presenting the South Australian response to the Issues Paper released in September 2013, as part of your inquiry into Access to Justice Arrangements.

The South Australian response considers both national and local issues, particularly where a unique South Australian perspective can add value to your inquiry, for example with regard to the Public Service Association Legal Assistance Scheme described in our answer to question 12 on alternative funding models.

The Legal Services Commission of South Australia is a member of National Legal Aid (NLA). As such we endorse and support the submission prepared by the NLA and the separate submissions prepared by the individual legal aid commissions around Australia.

The Legal Aid Commissions provide efficient, affordable, high quality access to justice for millions of Australians every year, including in regional, rural and remote areas, often where there are no other legal service providers. Our costs scales and strict monitoring of legal expenses means that we deliver cost-effective services and value for money for our funders.

We have developed a strong and positive working relationship with the private legal profession to whom we outsource much of our work. We have built appropriate links with the courts and strong referral networks with other community service providers in order to assist our clients as fully as possible. The legal aid model has much to offer your inquiry as a model of accessible justice.

Following are two tables with information about the legal assistance services provided by the South Australian Legal Services Commission over a single year which give a 'snapshot' of our work and the breadth of our services.

Gabrielle Canny

Director,

Legal Services Commission of South Australia

12 November 2013

Annual Legal Services Case Study: South Australia

In the 2011/12 financial year the Legal Services Commission of South Australia:

- Provided 15 thousand duty solicitor assistance services
- Processed 18 thousand applications for legal aid
- Made 14 thousand grants of aid for legal representation
- Provided 65 thousand telephone advice sessions
- Gave 33 thousand face to face advice appointments, including prison support services
- Provided 8 thousand services to people in receipt of aged and disability pensions
- Delivered 500 legal education and professional development sessions
- Distributed 106 thousand copies of our publications and
- There were nearly 2 million views of our Law Handbook On-line website.

The Legal Services Commission of South Australia

- We have 213 Staff
- We have 8 Offices
- In 2011/12, our financial expenditure was \$39,819,540.
- The population of South Australia is 1,668,000.
- The geographical area of South Australia is 983,482 square kilometres. We are the fourth largest Australian State by size.

Question 3: Legal Need

How Many Australians Experience Legal Need?

The *Legal Australia-wide Survey on Legal Need*¹ (“the LAW Survey”) found that the prevalence rate of legal problems in South Australia was 47%. In other words, almost half the respondents surveyed had experienced a legal problem in the last 12 months. Translated across the South Australian population, the LAW Survey estimated that this would equate to approximately 613,000 persons or 36% of the total South Australian population.

How frequently do Australians, including individuals, businesses and other organisations, experience substantial civil legal disputes including in the area of family law?

The LAW Survey showed that 963 out of 2041 South Australian respondents (or 47%) indicated they had experienced legal problems, whether substantial or not, in the previous 12 months. Of these respondents, 5.7% had problems related to family law and 13% to crime. The remaining problems fell into categories which broadly make up the “civil law.” Of these problems, the largest category was respondents with consumer problems at 20%, followed by housing at 10.4% and credit at 6.5%.² Some respondents had multiple problems in different categories.

Within the group who identified as having legal problems, a total of 525 respondents (or 25% of the total survey group) indicated that they had experienced **substantial** legal problems within the twelve month period.³ Some respondents had multiple problems in different categories over this time.

What is the nature of these disputes?

¹Law and Justice Foundation of New South Wales, *Legal Australia-wide Survey: South Australia*, August 2012, p.154 <http://www.lawfoundation.net.au/ljf/app/&id=4BB9A22F547BC6F1CA257ACA00013393>

² Ibid, Table 3.2, p. 60

³ Ibid, Table 3.3, p.62

The LAW Survey showed that within the categories of legal problems, certain types of problems were more likely to be substantial than others.⁴ Of the 525 respondents with substantial legal problems, 80.8% had health-related legal problems, followed 73% with family law problems, rights-related legal problems at 61.5% and employment-related legal problems at 61%.⁵

How strong is the evidence that a relatively small number of individuals account for the bulk of civil legal disputes at a given point in time and/or over time?

This conjecture is not necessarily supported by currently available evidence. The evidence appears to paint a more complex picture of legal need. The LAW Survey showed that almost 50% (47.2%) of persons surveyed at random in South Australia had experienced a legal problem in the last 12 months.⁶ However, some characteristics meant a higher prevalence of legal problems, some characteristics meant a higher prevalence of substantial legal problems and some characteristics meant a higher prevalence of multiple legal problems. Within groups with particular characteristics, different types of legal problems were more prevalent.

For example, in South Australia, indigenous status was not a significant indicator that a person would or would not experience a legal problem. However, within the group that experienced a legal problem, indigenous status was a predictor of multiple legal problems.⁷ Similarly, while education and remoteness were not indicators of an overall prevalence of legal problems, within the group that experienced legal problems, they were predictors of the prevalence of substantial legal problems.⁸

How well does the legal system identify and deal with cases of persistent need?

The Legal Services Commission, as do other LACs, regularly surveys its client base in order to identify areas of ongoing legal need and conducts community education programs to reach groups who would benefit from greater legal awareness. We have established strong

⁴ Ibid, p.60.

⁵ Ibid, Table, 3.2, p.60.

⁶ Law and Justice Foundation of New South Wales, *Legal Australia-wide Survey*, Methodology for the selection of respondents can be found on page 6 et seq, "Methodology of Legal Needs Survey".

<http://www.lawfoundation.net.au/ljf/app/&id=4BB9A22F547BC6F1CA257ACA00013393>

⁷ Ibid, p.67-69.

⁸ Ibid, p.68.

community networks as well as referral links with other agencies who request services for their in need client base.⁹

What are the characteristics of individuals who experience multiple problems and what types of disputes are they typically involved in?

The LAW Survey found that in South Australia persons aged 25 to 44 years and those identifying as indigenous had a higher prevalence of multiple legal problems. Disabled persons and single parents also had a greater prevalence, though these factors were not as strong as age and indigenous status.

The LAW Survey consistently used twelve categories of legal problem types when questioning respondents, of these 11 related to family and civil law, and one, “crime”, did not.¹⁰ Of the 11 indicators relating to civil and family law matters only, the Survey showed that in South Australia, people with a disability were represented in 8 categories and that people with a disability had a high prevalence of legal problems, substantial legal problems and multiple legal problems.¹¹

⁹ Legal Services Commission of South Australia, *Annual Report 2011/12*, p 84-88

http://www.lsc.sa.gov.au/cb_pages/annual_reports.php

¹⁰ Law and Justice Foundation of New South Wales, *Legal Australia-wide Survey, Classification of Legal*

Problems, p. 48, <http://www.lawfoundation.net.au/ljf/app/&id=4BB9A22F547BC6F1CA257ACA00013393>

¹¹ *Ibid*, pp 73-72 <http://www.lawfoundation.net.au/ljf/app/&id=4BB9A22F547BC6F1CA257ACA00013393>

Question 4: Geographic Constraints

How important is face-to-face contact with lawyers or court officers?

Face to face contact is particularly important in matters involving children, where there are sensitive personal issues, where the client has a disability and where the client has a poor command of language either because English is a second language or the client has a low standard of education. The Legal Services Commission has five regional and two rural offices in addition to its Adelaide head office. The regional offices are at Port Adelaide, Holden Hill, Elizabeth, Noarlunga and Mount Barker. The rural offices are at Port Augusta and Whyalla. These offices provide face to face services for residents in locations that have been identified as needing such services because of the number of disadvantaged residents and/or because travel into the city would impose an additional or unreasonable burden. The rural areas are also locations where obtaining the services of a private lawyer may be more difficult or more expensive or where there may be difficulties with technology as a consequence of remoteness.¹²

Case Study: Benefits of Personal Contact

A Community Legal Education session was convened in Whyalla with the Indigenous Youth Mobility Program as part of a strategy to develop and strengthen information and education networks through various community consultations in both Whyalla and Port Augusta.

The session with the Indigenous Youth Mobility Program included the Whyalla Police Youth Crime Prevention Officer, and covered a range of topics such as dealing with police (rights and responsibilities), areas relating to employment issues, discussion of the court systems and information about the law in general.

The highlighted activity at Port Augusta this month was the Legal Services Commission's participation at the Child and Family Expo, held at Coinda Hall. This proved to be a great opportunity to network with the 40 service providers in attendance, and to highlight opportunities for the Legal Services Commission and these other organizations to work together, particularly with organizations based outside Port Augusta who may have been unaware of our services.

CLE Report, March 2012

¹² Legal Services Commission, *Annual Report 2011-12, Whyalla and Port Augusta Program*, pp 92 -94.
http://www.lsc.sa.gov.au/cb_pages/annual_reports.php

Does a lack of physical proximity represent a barrier to accessing justice?

Yes. Lack of physical proximity makes it particularly difficult for remote residents to access early intervention and prevention programs which would assist them to avoid civil law problems.

Recognising this issue, in 2011/12 the Legal Services Commission appointed a community education and legal adviser to its Whyalla and Port Augusta offices. This legal adviser is particularly engaged in promoting legal education and advice in civil law amongst local Aboriginal communities.

To what extent can technology overcome geographic barriers?

Technology has a role to play in overcoming geographic remoteness, as has been demonstrated by the use of video links in the criminal justice system. The Legal Services Commission operates a website, the Law Handbook On-line and a Facebook page from its Child Support Unit to connect with clients seeking information. Analysis of the 292,933 views of the Facebook site in 2011/12 financial year, for example, revealed that many users were from outer metropolitan areas and rural locations. However, technology cannot currently overcome all barriers, with cost and access to technology services still an issue for very remote communities.

Which particular regions, groups or case types face geographic constraints to accessing the justice system? What are the costs to individuals and communities as a result of geographic barriers? Which particular mechanisms and jurisdictions have been effective at dealing with these barriers?

Persons living in rural and remote areas face a number of constraints including lack of access to technology, lack of choice in legal service providers, additional travel and personal expenses and lack of access to courts and tribunals where circuit courts are routinely cancelled or restricted for reasons of cost.

In South Australia, the Legal Services Commission and the Aboriginal Legal Rights Movement are often the only providers of legal services to very remote communities. Below

is a map showing remote parts of South Australia, near the Northern Territory and Western Australian borders, where the Legal Services Commission provides legal assistance. The provision of these services is costly and is only possible due to the commitment of regional and metropolitan staff who travel many thousands of kilometres annually.



Map of remote areas visited by the Legal Services Commission of South Australia

In addition to financial costs, timeliness, complexity and geographic constraints, what other issues affect accessibility?

The withdrawal of court services and facilities from regional and rural areas has had a significant effect on access to justice, adding personal and financial costs for the parties.¹³ The articles listed below highlight some of these difficulties.

¹³ ABC Rural News, *Cut Backs to Circuit Courts in SA's APY Lands*, 5 November 2013, <http://www.abc.net.au/radionational/programs/lawreport/cut-backs-to-circuit-courts-in-sae28099s-apy-lands/5068984>

Coober Pedy Regional Times, *SA Court Closures Rile Regional Lawyers*, 1 October, 2009,

<http://cooberpedyregionaltimes.wordpress.com/2009/10/01/sa-court-closures-rile-regional-lawyers/>

Sean Fewster, *SA DPP Adam Kimber Tells Parliament He Wants a Change in Regional Justice*, The Advertiser, 30 October, 2013, <http://www.adelaidenow.com.au/news/south-australia/sa-dpp-adam-kimber-tells-parliament-he-wants-a-change-in-regional-justice/story-fni6uo1m-1226749479676>

Question 5: Concentration of Unmet Need Amongst Particular Groups

Is unmet need concentrated among particular groups?

There is a distinction between legal need and unmet legal need. For example, a particular group in society may have a high number of legal problems, 'high legal need', but their needs may be met because they fall within the guidelines to access legal assistance services. There is also a distinction between the situation where a person does not pursue a legal problem from choice, following an assessment of the risks and benefits, and one where a person wishes to pursue a legal issue but cannot because of external factors like costs.¹⁴ 'Unmet legal need' here is really 'unmet need for accessible legal services', a distinction between knowledge and capability. There are also individuals and groups who do not recognise that their problems are legal problems and that there may be a solution in law which will benefit them. Members of this last group may be entitled to access legal assistance services but choose not to, due to lack of education and information.

What groups are particularly disadvantaged in accessing civil justice and what is the nature of this disadvantage?

The LAW Survey identified people with a disability as the disadvantaged group which had the highest prevalence of legal problems overall, more substantial legal problems, greater frequency of multiple legal problems and they featured in more of the problem groups. They had the lowest level of resolution and finalisation. However, conversely, they had high levels of taking action to resolve legal problems and high levels of seeking advice.

The LAW Survey concluded that legal problems and access to justice issues were not limited to persons who fall within the traditional category of "disadvantaged". The LAW

Alison Sandy, *Up to 30 Courthouses Across Queensland Marked for Closure as Campbell Newman takes Axe to Courts*, The Daily Telegraph, 3 August, 2013, <http://www.dailytelegraph.com.au/news/national/newman-takes-axe-to-courts/story-fndo2iwh-1226441795124>

¹⁴ Law and Justice Foundation of New South Wales, *Taking No Action: Unmet Legal Need in Australia?*, October, 2012, [http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_3_Taking_no_action_Aus_FINA_L.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_3_Taking_no_action_Aus_FINA_L.pdf)

Survey sought to reinforce “the fundamental role of access to justice in promoting well-being throughout the wider community.”¹⁵

One group of which the Legal Services Commission is particularly aware consists of persons of limited means who cannot qualify for legal aid but need assistance accessing the civil justice litigation system. This problem is acute in family law.

How can disadvantage in accessing justice be meaningfully measured?

Disadvantage in accessing justice is most effectively measured by examining the adverse consequences for the individual and the wider community as a result of lack of access, together with an analysis of why the individual did not or could not address his or her legal problem. The LAW Survey’s data on respondents who took no action with regard to their legal problems is particularly useful here.¹⁶

Case Study: Centrelink Advice Line

Our specialist Centrelink legal adviser was given a phone appointment for a young man in Broken Hill. He was subject to an 8 week suspension of payments period by Centrelink. He had rung our telephone advice line and the advisor referred him for a specialist appointment. Under previous laws, it had been very difficult to get a suspended payment reinstated but a recent softening of the legislation meant that a person now only had to reconnect with his or her job network provider (JNP) and the payment could continue.

The legal adviser observed during the advice call that the young man was near to breaking point. He had appealed to the AAT, he thought he had complied with his JNP, he was doing work-for-the-dole, and said he did not see what else he could do. He was now feeling unable to comply with the work-for-the-dole arrangements. He would get dressed ready to go and then just could not get in the car. The young man was advised to seek mental health assistance to obtain evidence of his inability to comply. At the subsequent AAT Preliminary Conference the young man explained that he had waited all day at the local mental health unit, only to be told that he needed a GP referral. In order to get a GP appointment, he needed to wait three weeks and by that time the GP was reluctant to comment on any prior state of health three weeks ago. Our legal adviser wrote a short submission about this man’s circumstances and the intent of the legislation. The Centrelink representative checked his JNP record and the Department made the decision to revoke the 8 week suspension of payments. The case settled quickly, and represents a very good outcome for the young man whose need was identified on our Telephone Advice Line.

June 2013

¹⁵ Law and Justice Foundation of New South Wales, *Legal, Australia-Wide Survey on Legal Need*, August 2012, <http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>, pp.206-207

¹⁶ *Ibid*, Chapter 5.

The LAW Survey was conducted in the context of precise definitions of “legal need”, “access to justice” and “disadvantage”. The Survey made use of a number of measurement tools such as the SEIFA Indexes.¹⁷ These were developed by the Australian Bureau of Statistics for comparing socio-economic advantage and disadvantage around Australia and can be a useful tool in identifying disadvantaged groups for targeted community education and surveys. However the correlation between socio-economic disadvantage and disadvantage in accessing justice is not always exact. A person who suffers disadvantage (adverse consequences) by being unable to access justice need not always be a person who is considered “disadvantaged” by other measures.¹⁸

What data and information is available on the extent of disadvantage faced by particular groups?

As already demonstrated, the LAW Survey provides up-to-date and comprehensive information on the role of disadvantage in access to justice.¹⁹ Community Legal Centres (CLCs) have recently published the results of their Australia-wide *National Legal Needs and Strategic Planning Project*²⁰ which “explores legal need in the context of disadvantage” across Australian local government areas using specially developed indicators. The survey has a community rather than individual focus.

The LACs collect data from their own client bases to assist in the provision of services and meet State and Commonwealth reporting requirements.

¹⁷ Australian Bureau of Statistics, *Socio-Economic Indexes for Areas*,
<http://www.abs.gov.au/websitedbs/censushome.nsf/home/seifa>

¹⁸ Law and Justice Foundation of New South Wales, *Legal, Australia-Wide Survey on Legal Need*, August 2012, p27 et seq.

<http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>

¹⁹ Ibid.

²⁰ Dr Judith Stubbs et al, February 2012, *National Legal Needs and Strategic Planning Project*,
http://www.naclc.org.au/resources/National_Legal_Needs_Report_Australia.pdf

South Australian Report: http://www.naclc.org.au/resources/National_Legal_Needs_Report_SA.pdf

South Australian Data on Clients at Risk of Potential Legal Disadvantage 200/12 - CALD and Indigenous Clients and Clients in Receipt of Government Benefits²¹

Country of Birth	Grants of Aid	Advice Services	Duty Lawyer Services
Not stated	325	978	570
Born in Australia	10390	16 240	11 609
Indigenous Australians	1 571	490	1 221
English speaking country	544	1 546	497
Non-English speaking country	1 066	13 781	1 583
Total	13896	33 035	15 480

	Age Female	Age Male	Age Total	Disability Female	Disability Male	Disability Other	Disability Total	Total Pension
Grants of Aid	18	63	81	595	1 695	2	2 292	2 373
Legal Advice Interviews	563	549	1 112	1 010	1 261	1	2 272	3 384
Duty Lawyer	14	71	85	408	1 435	1	1 844	1 929
Total	595	683	1 278	2 013	4 391	4	6 408	7 686

Assistance Sought	Clients in Receipt of a Government Benefit: 2011/12 ²²	Total Number of Assistance Services	Percentage in Receipt of Benefits
Face to Face Advice Services	19 611	33 037	59%
Applications for Legal Aid	12 928	18 471	70%

²¹ Legal Services Commission of South Australia, *Annual Report 2011/12*, http://www.lsc.sa.gov.au/cb_pages/annual_reports.php

²² Not all clients in receipt of government benefits declare their status when asked. Family Tax Benefit is excluded for the purposes of this table.

Question 7: Preventing Issues from Evolving into Bigger Issues

The Commission invites comment on strategies for the avoidance and early resolution of civil disputes. What evidence is there of the benefits and costs of these approaches and strategies?

Early intervention services deliver strategies to avoid disputes, assist quicker resolution of disputes and avoid costs to the justice system which flow on to the wider community and other government agencies. The Legal Services Commission provides a Community Legal Education (CLE) program that focuses on providing innovative assistance for priority client groups and structured information sessions for community sector workers who work with socially and economically disadvantaged people.

The LAW Survey concluded:

“The finding, that ignoring legal problems results in poorer outcomes, underlines the importance of empowering people to act to resolve their legal problems. This finding adds further weight to the argument that legal information and education strategies could play a critical role in mobilising people to resolve their legal problems, by helping them identify their legal rights and to locate relevant advice services.”²³

The CLE program ensures that people have the knowledge, confidence and skills needed to deal with legal problems. The Legal Services Commission provides people with awareness, knowledge and understanding of rights and legal issues, as well as the confidence and skills to deal with problems. Equally important, people are assisted to recognise when they may need support, what sort of advice is available, and how to go about getting it. Focus is on the early stages to help people avoid problems, act more quickly when problems do occur and deal with problems more effectively by knowing when and where to get expert help. While the cost of litigation is beyond the means of most people, timely advice can help to counsel against unnecessary legal action and reduce costs.

The Legal Services Commission’s education and information services have the potential to provide significant economic benefits as they focus on preventative justice measures. Education and access to information support the community’s ability to be self-reliant in terms of understanding and protecting their individual rights. Education and information services also assist people to take the most appropriate path through, or away from the

²³ Law and Justice Foundation of New South Wales, *Legal, Australia-Wide Survey on Legal Need*, August 2012, p.44, <http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>

justice system to resolve their issues. This results in potentially large efficiency savings and improved justice outcomes.

In the 2011/12 financial year, the Legal Services Commission delivered 450 legal education sessions attended by 11,072 participants.²⁴

Case Study: What's The Law? Australian Law for New Arrivals

The Legal Services Commission worked with other legal aid commissions around Australia to produce *What's the Law? Australian Law for New Arrivals*²⁵ an education kit based on ten common legal issues faced by new arrivals in the first years of settlement.

It was developed in response to the need to better inform new arrivals about their legal rights and responsibilities in Australia. The national strategy was informed by a wide range of research produced by government agencies and the community sector about the pressing need to address preventable legal issues experienced by new arrivals.

What's the Law? is designed for teachers to use in English as a Second Language classes for new arrivals. It includes a DVD with stories in simple English, covering topics such as driving, tenancy, child protection, contracts and family violence, as well as activity sheets and notes for teachers and legal help referral information.

The stories reflect some of the legal issues that people can encounter in their first 18 months of settlement, helping them to identify legal problems early and prevent them from escalating.

An evaluation of *What's the Law?* found that the benefits of using the kit were identified as increasing the teachers' legal knowledge and their 'ability to recognise a legal problem and refer a client'. Once respondents used the kit, they were more likely to identify an 'increased confidence to teach legal issues' and the ability to 'meet requirements to provide legal education' as benefits, which were primary reasons for creating *What's The Law?*

²⁴ Legal Services Commission of South Australia, *Annual Report, 2011/12*, p.85, http://www.lsc.sa.gov.au/cb_pages/annual_reports.php

²⁵ http://www.lsc.sa.gov.au/cb_pages/new_publications_whats_the_law.php

What mechanisms help people deal directly with their own legal needs?

Access to legal education and information can help people deal with disputes informally and early. Community legal education can inform people of their legal rights, responsibilities and options prior to, or at the outset of, any legal problem with a view to avoiding or minimising the impacts of disputes.

Improving the clarity and accessibility of laws can allow people to better identify, and act in accordance with, their legal obligations and rights. Similarly, legal information that is clear and accessible makes it easier for people to resolve their own disputes.

The LAW Survey found that, around Australia, 29.9% of all legal problems surveyed were resolved by agreement between the parties. This result emphasizes the need for people to be well-informed about their legal rights so that they can achieve the best outcome from any such agreements.²⁶

The Legal Services Commission provides legal advice, minor work and advocacy services. These are services that help a person with their legal problems at an early stage. They can involve a lawyer looking over documents, researching and providing written advice. In some cases, it may also involve making telephone calls, negotiating on a person's behalf or making a simple appearance before a court or tribunal. In particular we provide:

- Free telephone legal information advice and referral services
- Community information, seminars, workshops and other training sessions provided to members of the public and to other service providers
- Information resources including fact sheets, self help guides, videos and other knowledge resources delivered on line and through free hard copy publications
- Free face to face legal advice appointments in most areas of law
- Family dispute resolution services
- Access to free duty lawyer services in most courts.

²⁶ Law and Justice Foundation of New South Wales, *Legal, Australia-Wide Survey on Legal Need*, August 2012, *South Australian Report*, p.141.

<http://www.lawfoundation.net.au/ljf/app/&id=4BB9A22F547BC6F1CA257ACA00013393>

How successful and cost-effective have these been in resolving disputes?

In October 2012, the Law and Justice Foundation published a paper on effectiveness of public legal assistance services.²⁷ The paper contended that the effectiveness of such services could be measured by examining the causal link between the program and its outcome, in other words, “whether or not the program achieved its aim.”

The Legal Services Commission tests the effectiveness of its programs through the use of **client satisfaction surveys**, the most comprehensive survey being conducted in 2009. ‘Snapshot’ and similar surveying continues on a regular basis. The 2009 survey found that across most client groups satisfaction with the Legal Services Commission was very high, with a total of 73% of those surveyed stating that they received all or part of the assistance they needed. The current National Partnership Agreement on Legal Assistance Services²⁸ requires a form of benchmark reporting which also seeks to measure the effectiveness of legal aid programs.

What barriers and incentives do individuals face in attempting to avoid disputes or to resolve them? Which types of disputes are more or less amenable to avoidance and early intervention?

The LAW Survey found that individuals who are already disadvantaged in some way find it difficult to avoid legal disputes and to resolve them because they lack the resources, particularly educational and financial resources, to assist them. Consequently, such persons ignore legal disputes until they escalate. This conclusion illustrates the benefit of investing in community legal education as undertaken by the LACs around Australia. It is the experience of the Legal Services Commission that most civil law disputes are amendable to negotiation and settlement if the person seeks assistance as soon as the problem becomes apparent.

In its 1999 study on *Legal Expenses Insurance*²⁹, the Law and Justice Foundation identified the financial cost of justice as a major barrier to justice, but also identified fear of the legal system as a major impediment, especially fear of exposure to uncertain costs and uncertainty about the nature of the legal problem.

²⁷ Erol Digiusto, *Effectiveness of Public Legal Assistance Services*, Justice Issues 16, Law and Justice Foundation of New South Wales, <http://www.lawfoundation.net.au/ljf/app/&id=18C587ECBD959D50CA257A91001F76F0>

²⁸ Commonwealth Attorney-General’s Dept, *National Partnership on Legal Assistance Services*, <http://www.ag.gov.au/LegalSystem/Legalaidprograms/Documents/National%20Partnership%20Agreement%20on%20Legal%20Assistance%20Services.pdf>

²⁹ <http://www.lawfoundation.net.au/report/insurance/E6CA4E7AEA3EEB90CA257060007D145C.html>

Can indicators be used to predict disputes or the individuals more likely to experience them?

The LAW Survey used demographic characteristics related to the experience of legal problems to predict the prevalence of legal problems overall in the Australian population and produced a regression summary to show the significant independent predictors of legal problem prevalence in Australia.³⁰ Age, disability and family status were found to be the top three predictors. Indicators such as the LAW survey are invaluable tools in identifying groups most in need of legal assistance, however their cost is such they cannot be conducted on a regular basis.

How can the use of instruments, such as legal health checks, be used to best effect?

A 'legal health check' is a checklist that can be used to identify legal issues or assist in taking instructions from a new client. In our experience, most clients present with an urgent problem rather than seeking a general legal check up.

In Queensland they have been used to as triage tool to assess and assign cases appropriately when assisting flood victims.

While we do not have direct experience in this area, we believe there is scope for a legal health check with new family law clients to reduce delays and help avoid the escalation of family conflicts over the care of children into bitter and intractable disputes.

³⁰ Law and Justice Foundation of New South Wales, *Legal, Australia-Wide Survey on Legal Need*, August 2012, pp65 et seq and in particular Table 3.5, <http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>

Question 9: Using Informal Mechanisms to Best Effect

The Commission seeks data on the number, proportion and types of disputes resolved through ADR and the relative satisfaction of disputants with the outcomes of using these mechanisms.

What evidence is there that ADR translates into quicker, more efficient and less costly dispute resolution without compromising fairness and equity (particularly where there is an imbalance of power between disputants)?

The Legal Services Commission offers lawyer assisted, alternative dispute resolution in family law, referred to as FDR (family dispute resolution). This service is offered for couples in dispute over matters relating to children and, to commence shortly, low value property disputes. To qualify for funded dispute resolution, the parties involved must meet the criteria set out in the legal aid funding guidelines. Private practitioners receive legal aid funding to represent the parties and a trained mediator is provided by the Legal Services Commission from a panel of appropriately qualified practitioners.

What is the potential for resolving more disputes through ADR without compromising fairness or equity?

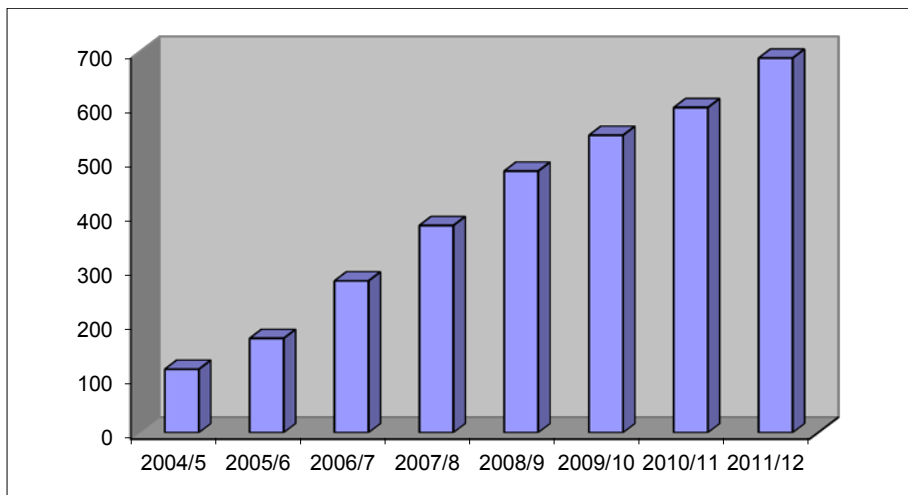
Since it commenced in 2004, demand for the Commission's FDR services has risen dramatically as illustrated by the graph below. Such demand reflects the measure of confidence in FDR by lawyers, the courts and parties in dispute.

In the financial year 2011/2012, 706 FDR conferences were arranged, with 689 proceeding to conference. Of that 689, 527 were fully or partially resolved, with 162 matters not resolved. The settlement rate for full and partial settlements was 76.5%, with 23.5% not resolved.³¹

In a client survey conducted with clients who had accessed our services in the 2008/2009 financial year, clients who received a grant of aid in family law rated their satisfaction with the Commission higher than any other group except clients with criminal matters.³²

³¹ Annual Report 2011/12, p. 78, http://www.lsc.sa.gov.au/cb_pages/annual_reports.php

³² Harrison Research, *Detailed Findings*, Legal Services Commission, Client Survey 2008-2009.



Rise in demand for FDR conferences over 10 years.

How successful has ADR mandated by courts and tribunals been in resolving disputes and lowering the cost of litigation?

In 2011/12, approximately one third of the matters for which a conference was held were Court referred cases, involving complexity, serious conflict or dysfunction.³³

The FDR Unit of the Legal Services Commission works closely with the Family Court, conferencing matters where litigation has commenced. These cases are subsequently referred back out of the litigation stream to our conferencing program, in an effort to achieve a negotiated resolution. There is a well defined referral pathway which has been developed between the Court and the FDR Unit, and the types of matters which are referred to the program are the more complex ones. These matters are assisted by the provision of a Family Assessment Report in most cases and often the involvement of an Independent Children's Lawyer at the conference, where one has been appointed.

Should practitioners delivering ADR services be regulated? If so, who needs to be accredited and at what level for the provision of different types of services?

In South Australia, there are essential qualifications for anyone wishing to join the FDR Chairperson panel of practitioners.

A Chairperson must have significant experience in the area of Family Law, either as a lawyer or, if a social scientist, as a Family Court counsellor, report writer or have some other expertise in the area of family law. The chairpersons must have undertaken mediation

³³ Annual Report 2011/12, p. 78, http://www.lsc.sa.gov.au/cb_pages/annual_reports.php

training and be registered as a Family Dispute Resolution Practitioner (FDRP) under the Family Law Act 1975.³⁴

Chairpersons must maintain their FDRP accreditation by undertaking at least 24 hours of professional development in each 24 month period. If they are a legal practitioner holding a practising certificate, they must also meet the Law Society's mandatory Continuing Professional Development requirements.

Chairpersons attend local conferences, and many attend the national mediation conference held biannually. Additionally the Legal Services Commission provides regular in-house training.

³⁴ For further explanation see: section 601 Family Law Act (Cwth) 1975
http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60i.html

Question 11: Witnesses and Experts

How and to what extent do the current approaches to expert evidence impact on access to justice?

Expert evidence is playing an increasing role in civil legal matters, particularly in Family Law where expert evidence from doctors and allied health professionals such as psychologists is being presented in matters involving children.

In what areas do issues relating to experts particularly affect access to justice?

The cost of expert reports and their fees on attendance at hearings and conferences is born by the party who seeks the expert's assistance. In some cases, one party may be able to afford an expert and another not, leading to an imbalance between the parties' abilities to argue in support of their own position. Courts have become increasingly reluctant to order expert reports themselves, even where they have the power to, for reasons of cost.

How could they be reformed to improve access?

One option to balance this unfairness is for both parties to contribute to the cost of a single expert and both agree to accept the expert's report.

Another option is that of "concurrent evidence" or "Hot Tubbing" where courts put multiple experts on the stand together.³⁵ This results in cost saving for the court but not necessarily for the parties.

³⁵Hon Justice Gary Downes AM, *Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience*, 27/02/2004
<http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/concurrent.htm>

Case Study: Use of In-house/neutral Psychologist in Family Dispute Resolution (FDR)

It is the practice of Chairpersons when conducting a conference to consider whether resolution of the matter can be assisted by enlisting the services of Dr Peter, our in-house psychologist, to meet with the children to provide their input into the conference between the parents. The following is a case study of such a conference:

The parties had a son K, aged 9 years. He had always lived with his mother and the father had regularly spent time with his son each weekend. The father applied for aid asking for the boy to live with him. It transpired that for some time K had been refusing to leave his mother to go into school, and recently the father had been obliged to attend at his school every day where he was able to get the boy to go into the classroom quite readily.

At the first Conference the parties agreed that Dr.Peter would interview K (in the absence of the parents) to ascertain his wishes and perceptions of his current care arrangements, and report orally to all parties at a review conference two months later. At this review Dr Peter reported that K wanted to live with his parents on a 50/50, week-about basis. Dr Peter reported to the parties that their son said he loved them equally and trusted both of them. Through the FDR process the parties were able to reach agreement about K's living arrangements taking into account their son's wishes.

This matter demonstrates the benefit of an impartial expert's input into FDR Conferences in that he had gleaned at his first interview with the boy what was troubling him, and the parents were able to reach an agreement in his best interests.

November 2012.

Question 12: Legal Assistance Services

Do legal assistance service providers deliver the right mix of services (in terms of forms of assistance and across the various areas of law)?

In South Australia, legal assistance service providers focus on the provision of personal legal services, for example civil law, family law and criminal law. They do not offer business law assistance and only one, the Environmental Defenders Office³⁶, becomes involved in public interest law. The Legal Services Commission of South Australia provides legal advice in civil law matters to **all** persons, regardless of means, across all categories of personal law but does not provide court representation except in Family Law and Commonwealth criminal law, and where applicants meet its guidelines for legal assistance.

In its South Australian report, the LAW Survey³⁷ found that the most prevalent legal problems concerned consumer goods and services, followed by criminal matters (as a victim), and then housing issues especially neighbourhood disputes, problems with Government, accidents, credit problems, personal injury, money, family matters, employment, legal rights such as anti-discrimination and health care complaints. Consumer problems represented the largest single area at 20% of all problems. The Legal Services Commission's own data shows, for example, that of 2,311,488 on-line page views of its resources, 1,266,290 or 45% were for civil law matters.³⁸ The LAW Survey also found that for those with substantial legal problems, 73% reported family law problems. South Australia provides a comprehensive legal advice and, for those who qualify, assistance service in the area of family law.

Legal assistance service providers use surveys such as the LAW Survey to identify areas of legal need and attempt to target their services appropriately. Consumer problems are particularly amenable to negotiated settlement and for this reason negotiation and mediation services represent a large part of the assistance offered. Many consumer problems can also be avoided if both sides to a transaction are aware of their legal rights and obligations and for this reason the Legal Services Commission commits resources to early intervention and community education. The model employed by the Legal Aid Commissions (LACs) which has a filter for determining the level of assistance available depending on the seriousness of the case and the personal circumstances of the client, has very efficiently and effectively delivered legal aid services to the community.

³⁶ <http://www.edo.org.au/edosa/> p.60

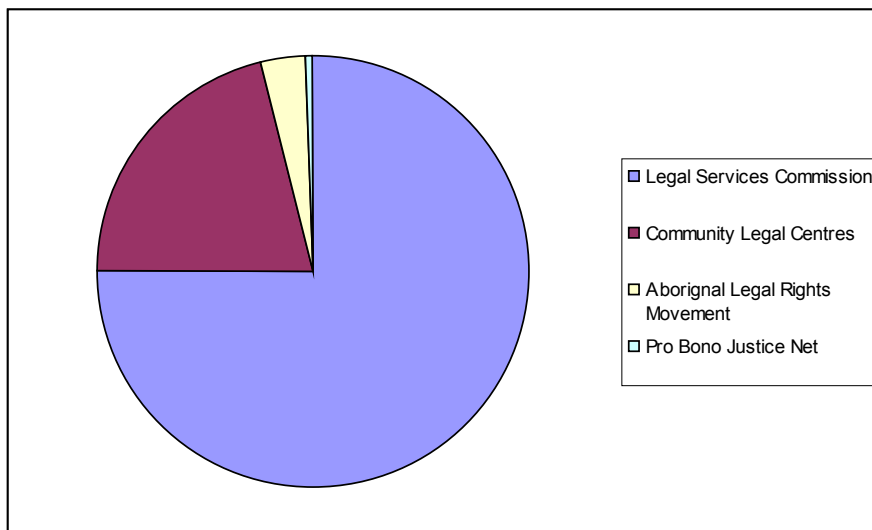
³⁷ <http://www.lawfoundation.net.au/ljf/app/&id=FC6F890AA7D0835ACA257A90008300DB>

³⁸ Legal Services Commission, *Annual Report 2011/12* http://www.lsc.sa.gov.au/cb_pages/annual_reports.php

Do they complement each other or are there areas of overlap?

Legal Aid Commissions (LACs) are the major suppliers of legal assistance services in Australia and this situation is also true of South Australia. The LACs function as law firms offering a full range of services in personal legal advice, and litigation services according to their legal aid guidelines. In the area of litigation, the LACs work in partnership with the private legal profession. In South Australia, about 70% of legal aid litigation work is briefed to the private legal profession.

South Australian Community Legal Centres offer legal assistance relevant to their geographical location or specialise in particular areas of the law, for example, domestic violence, or particular identifiable groups, for example, women or aboriginal clients. The pro bono centre, JusticeNet SA, specialises in brokering appropriate pro bono services for clients with particular legal problems. Below is a chart showing the market share of legal assistance services held by the different providers in South Australia.



Is the current model of legal assistance service delivery efficient, effective and appropriately focused on specific legal needs?

The current model of legal assistance service delivery at the Legal Services Commission is a multi-faceted approach focussing on education, early intervention, advice, minor assistance, representation and dispute resolution. It offers general advice services and targeted

assistance to those individuals and groups identified as particularly vulnerable to legal problems.

The *Legal Australia-wide Survey on Legal Need* found that “(g)iven that a large proportion of the legal problems experienced by the community are concentrated within disadvantaged groups, quality public legal services constitute a critical component of a holistic justice system, providing the backbone infrastructure necessary to support integrated and multifaceted access to justice strategies.”³⁹

How effective and appropriate are the current eligibility criteria for legal aid at targeting service provision?

To a large extent, eligibility criteria for court representation are linked to available funding. The current eligibility criteria for representation in family law are directed towards the area of greatest need and vulnerability which is the area of disputes affecting children.

Which Australians are not eligible for legal assistance but also not in a financial position to pursue a legal problem?

Advisory, information, education, minor assistance and duty lawyer services are **provided free of charge** by the Legal Services Commission to **all** South Australians regardless of means.

At present the Legal Services Commission does not offer court representation in civil matters other than in family law matters involving children and subject to its legal aid guidelines. Eligible persons under the guidelines are also entitled to access Family Dispute Resolution Conferences conducted by the Legal Services Commission.

Persons with other types of family law matters, small businesses and persons whose financial means put them outside the legal aid funding guidelines cannot access the Legal Services Commission’s Family Dispute Resolution (FDR) conferences or representation services. The Legal Services Commission is currently running a two year pilot program offering FDR to separating couples with low asset pools who also meet the general eligibility guidelines.

³⁹ Executive Summary, p. xxiii

[http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/\\$file/LAW_Survey_SA.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf)

What course of action do these individuals take after being denied assistance?

The Legal Services Commission is able to provide assistance to these individuals through its advisory, information, education and duty lawyer services. If these services achieve a satisfactory result for the client, that result is more efficient and effective than on-going court action. For those clients who do end up in court, they can be assisted by Legal Services Commission and court staff to self-represent.

The most important action for clients is to recognise that they have a legal problem and seek assistance. To this end, in 2012/13, the Legal Services Commission ran an advertising campaign “We Can Help” to promote its free advice services and to raise awareness in the community about the need to seek early assistance. *The Legal Australia-Wide Survey on Legal Need* found that “a sizable proportion of people take no action to resolve their legal problems and consequently achieve poor outcomes.”⁴⁰

What options (including private sector involvement) are there for improving their ability to access the legal system?

The Legal Services Commission has entered into several public/private partnerships to provide access to justice for a greater proportion of the population. At present the Legal Services Commission is contracted to provide legal services to members of the Public Sector Association, a union representing South Australian public servants, through an insurance-style arrangement with the union. A detailed explanation of the PSA legal system is set out below under “Other Approaches.”

The Legal Services Commission also provides advisory and minor assistance services to claimants wishing to appeal to the Workcover Tribunal through a funding arrangement with the South Australian Workcover Corporation.

Duty lawyer services at the Family Court, civil Magistrates Court and the Administrative Appeals Tribunal provide advice and assistance to persons representing themselves in those forums.

All LACs including the Legal Services Commission, through tendering by National Legal Aid, have recently been successful in securing legal work arising out of applications in the Administrative Appeals Tribunal from DisabilityCare Australia (NDIS).

⁴⁰ Legal Australia Wide Survey: South Australia, p.xiv,
[http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/\\$file/LAW_Survey_SA.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf)

How well do legal assistance services assist those with complex needs?

The Legal Services Commission has a referral strategy to assist clients who need the help of other agencies in addition to legal help. Over time, the Legal Services Commission has built strong network pathways with many service providers including for example financial counsellors, domestic violence services, migrant groups as well as the member organisations of SACOSS, the South Australian Council of Social Services. The Legal Services Commission also provides training and information sessions for community workers to assist them in developing an understanding of legal issues to better help their clients and to recognise matters which might need referral to the LSCSA. The Legal Services Commission provides lecturers to the Law for Community Workers course offered by TAFE.

What is the evidence on the relative merits and success of targeted strategies to increase access to justice for particular groups?

The Legal Services Commission offers a wide range of community education services. On-line tools like the Law Handbook⁴¹ are designed to assist clients to help themselves by providing guidance on the law. In the 2011/12 financial year, there were 1,859,228 page views of the *Law Handbook Online* and there were 452,260 visits to our website.

We offer more targeted education programs to groups which have been identified as particularly disadvantaged, such as migrant groups with little or no English language skills. For example, in the 2011/12 financial year, our Community Education division provided 457 community education sessions with a total of 11,072 attendees. Our Migrant Education program has grown by 26% since its inception in 2004. In 2011/12, over 4,100 new migrants took part in one or more legal education sessions.⁴² Education strategies have translated into legal advice and minor assistance services. In the financial year 2011/12, 13,781 legal advice services were provided to persons who identified as being from a non-English speaking background.⁴³

The *Legal Australia-wide Survey* found that disadvantaged groups benefitted from information and education strategies that helped them identify legal problems and alerted them to the availability of legal assistance services. Self-help strategies did not benefit this group, but did benefit groups who had higher levels of education and more resources.⁴⁴

⁴¹ <http://www.lawhandbook.sa.gov.au/>

⁴² Legal Services Commission, Annual Report 2011/12 http://www.lsc.sa.gov.au/cb_pages/annual_reports.php

⁴³ Ibid, p. 57.

⁴⁴ Legal Australia-wide Survey, South Australia Report, xxii
[http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/\\$file/LAW_Survey_SA.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf)

What are the costs and benefits of these strategies?

Early intervention strategies like community education are highly effective because they provide clients with the means to avoid or limit legal problems. They are cost effective for the justice system as a whole because they assist in the settlement of legal matters before they reach court.

How difficult is it for legal aid services to attract and retain appropriately qualified lawyers as core staff?

The Legal Services Commission has no difficulty attracting and retaining staff. It has a large alumni group of Senior Counsel and Judges, including the present Chief Justice of the Supreme Court of South Australia. Its current Chief Counsel is an SC, as was, until recently, the head of its Criminal Practice Division, who was elevated to the Bench. Lawyers who choose to work for legal aid agencies are often motivated by a strong sense of fairness and a belief in access to justice. Others are attracted by the specialised criminal and family law work, others by the research, policy and jurisprudential opportunities. Those who come from private law firms often do so because they are dissatisfied with the focus on the six minute unit system which they see as devaluing the lawyer/client relationship.

How well does the 'mixed' service delivery model work for the successful delivery of legal aid services?

In South Australia, the mixed private/public representation system works very well. The Legal Services Commission outsources 70% of its legal work to the private legal profession. Private lawyers must agree to payment terms set by the Legal Services Commission and published in fee scales on our website. These fee scales are updated annually in accordance with increases in government funding to the Legal Services Commission. Legal aid fee scales are, on average, one third of the equivalent fees charged by the private profession, although this can depend on the type of work being undertaken.

To what extent are the fees paid to private lawyers/law firms to undertake legal aid work sufficient to attract adequately qualified lawyers/law firms?

Private practitioners undertake legal aid work for many reasons, for example, to assist a current client who has no capacity to pay privately, to encourage new clients to the firm, as 'bread and butter' work for junior practitioners, to expose practitioners to new areas of law such as criminal law where private payers are scarce, or to build up a speciality practice based on high volumes of legal aid cases. In this last category, for example, one Adelaide law firm has a turn-over of over \$1 million a year in legal aid work.

Legal Aid clients can, within certain parameters relating to the lawyer's skills and experience, choose the lawyer who will represent them in court. The allocation of cases to Senior Counsel requires the consent of the Legal Services Commission. If legal aid clients do not wish to choose their own lawyer, the Commission chooses suitable ones for them. In the 2011/12 financial year, the Commission approved 13,896 applications for legal aid. Of these, 68.71% were outsourced to the private legal profession, and 31.29% were conducted by in-house staff.⁴⁵ Legal work done in-house tends to be of a particularly sensitive, complex or specialist nature requiring skills or resources not found in the private sector.

In order to control legal expenses, the Legal Services Commission pays private solicitors according to fixed costs scales, with fixed hourly rates. Lawyers working for the Legal Services Commission are not permitted to charge a rate based on 6 minute units as they would in private practice. Legal aid fees are mostly based on lump sum amounts determined by the work task.

Lawyers must seek approval from the Legal Services Commission for the legal work that is to be done and associated disbursements, before commencing work on behalf of the client. When the proposed work has been approved, the Legal Services Commission issues a Certificate of Commitment to the lawyers, setting out the approved work. Bills rendered by private lawyers must match the approved work and are scrutinised, and sometimes challenged, by trained Legal Services Commission staff.

There are financial benefits for private practitioners doing legal aid work as their payments are predictable and paid promptly on conclusion of the case.

⁴⁵ Annual Report, 2011/12 http://www.lsc.sa.gov.au/cb_pages/annual_reports.php

What other approaches (such as the use of vouchers) could be more effective?

1. *Legal Expenses Insurance: PSA Scheme in South Australia*

One alternative approach could be the introduction of a legal expenses insurance scheme, similar to a private health insurance scheme.⁴⁶ In South Australia, the Legal Services Commission administers a type of legal insurance scheme on behalf of the Public Service Association, the union which represents State public servants. Members of the union currently contribute a proportion of their union subscription fees to a trust fund for future legal needs.

The fund is managed by a board of trustees whose long term goal is to build up the fund to a point where it is self-sustaining and contributions are no longer required. The Legal Services Commission is paid by the trustees to administer the scheme and is the point of contact for union members wishing to access assistance. The Legal Services Commission provides a “disputes based” legal service. In other words it provides assistance to union members who are caught up in a legal dispute rather than assistance with non-contentions legal matters such as making a will. It does not fund guilty pleas in criminal matters for public policy reasons.

The service consists of telephone advice, minor assistance in self-representation such as writing letters and drafting court documents, a “Family Mediation Package” for disputes over children and access to a panel of private legal practitioners who offer representation services. The Legal Services Commission monitors and if necessary, challenges accounts rendered to the trust fund by the solicitors on the panel. The scheme encourages settlement and has a high rate of resolution. Union members pay a portion of the fees if the matter goes to court. The current average amount of financial assistance provided by the fund to a member is \$1,300.

PSA Scheme as a Case Study

The PSA chose the Legal Services Commission to administer the scheme because of legal aid’s diverse legal experience and reputation for integrity. All legal funding is approved by the Legal Services Commission as scheme managers in advance of legal work being performed which ensures that legal costs are tightly controlled.

This type of scheme would be most attractive to representative groups like unions and larger employers where the contributions could be kept down and a large trust fund built up.

⁴⁶ Alexis Goodstone, *Legal Expense Insurance: An Experiment in Access to Justice*, Law and Justice Foundation, 1999 <http://www.lawfoundation.net.au/report/lei>
Legal Access Services, *Legal Expense Insurance – A Definition*
<http://www.legalaccess.com.au/all/Article.aspx?ArticleId=37>
Francis Regan, *Whatever Happened to Legal Expenses Insurance?*
<http://dspace.flinders.edu.au/dspace/handle/2328/1031>

2. *Unbundling*

Another alternative which is currently being put forward particularly in the pro bono sector is the unbundling of legal services, also called ‘discrete task assistance’.⁴⁷ Under this proposal, clients pay a lawyer to undertake some of the tasks in a legal matter, such as the drafting of pleadings, and the clients undertake other tasks such as self-representation in court.⁴⁸ Advocates of unbundling believe it could open up legal services to a wide variety of groups, including those, like small businesses, currently outside the parameters of legal aid. To a large extent, minor assistance and duty lawyer services provided by the LACs already offer a form of unbundled assistance. For the private sector and pro bono area unbundling raises issues about the application and limits of professional indemnity insurance as well as questions of legal ethics about where to draw the line on assistance.

3. *Loan Scheme*

Another alternative funding model was proposed by the Australia Institute in its 2012 paper, *Justice for All*.⁴⁹ This model is directed particularly at persons who fall outside means tests guidelines yet are unable to afford private legal assistance, and would be a “complimentary funding model” to work along side traditional legal aid. The proposed model recommends providing interest free loans which would operate in a similar manner to HECS fees for university. The authors comment: “A scheme of this nature would provide much greater access to justice for middle income Australians.... It would also expand the current (legal assistance) scheme to cover civil litigation for plaintiffs and defendants.”

4. *Litigation Assistance Funding*

In South Australia, the Law Society runs the Litigation Assistance Fund and the Disbursements Only Fund for certain types of civil matters.⁵⁰ The Litigation Assistance Fund is a charitable trust established by the Law Society of South Australia. It aims to assist plaintiffs to proceed with litigation where they would be otherwise unable to afford to sue. It is available to both individuals and companies and is subject to a set of criteria.

5. *Vouchers*

Voucher systems are only effective in marketplace where there is strong competition for what is on offer.⁵¹ There is no evidence of any such level of demand for legal aid work, particularly in the civil arena. Most of the larger law firms in Australia do not take legal aid work because the fees offered are lower than those attainable in the private marketplace. A

⁴⁷ Renouf, Anderson and Lovric, *Pro Bono Opportunity in Discrete Task Assistance*, National Pro Bono Resource Centre, Law Society Journal, (NSW) July, 2003, p.54.

<http://www.nationalprobono.org.au/ssl/CMS/files/cms/UnbundlingLegalServices.pdf>

⁴⁸ de Smidt and Dodgson, *Unbundling Our Way to Outcomes*, Queensland Public Interest Law Clearing House, 2012, http://www.qpilch.org.au/dbase_upl/QCAT_2012_21_JJA_246.pdf

⁴⁹ Denniss, Fear and Milane, *Justice for All*, The Australia Institute, March 2012.

<http://www.tai.org.au/node/1831>

⁵⁰ http://www.lawsocietysa.asn.au/other/litigation_assistance_fund.asp

⁵¹ N Gregory Mankiw, *Vouchers: Schools Need Competition*, Harvard University, 7 June 1999, <http://scholar.harvard.edu/mankiw/content/vouchers-schools-need-competition>

voucher system would mean that clients would need to expend energy, time and expense trying to find a lawyer to provide the service they require. In some instances, it is likely that they would not be able to find that assistance for the price of the voucher at current legal aid rates. In order for a voucher system to work effectively, the vouchers would need to match current private legal fees in value. In South Australia for example, this would require an increase in legal aid rates by an average of two thirds. Voucher systems also rely on clients having some understanding of the nature of their problem and of the marketplace where the vouchered services are provided. The recent *Legal Australia-wide Survey on Legal Need*⁵² revealed that many Australians are uncertain about where to turn for legal assistance.

Legal assistance service providers offer a large number of free services which are not means tested such as telephone and 'over the desk' advice and minor assistance. These services provide early intervention which keeps legal matters out of court and therefore keeps legal costs down. It is not clear how such services would continue to be provided under a voucher system where private lawyers may be orientated towards litigation in order to obtain maximum financial benefit from the voucher.

How effective has the NPA for legal assistance services been in addressing its objectives?

Currently, the National Partnership Agreement is negotiated between the Prime Minister and the Premiers of each State or Administrators of each Territory. This arrangement places the legal assistance sector at a distance from arrangements which are fundamental to their operations, and makes interpretation and implementation of the Agreement difficult. The current protocol does not allow sufficient input into the Agreement by the sector.

Reporting requirements under the National Partnership Agreement impose a significant data burden on the LACs, and use a large amount of staff resources. The purpose, relevance and subsequent use of this data are not always clear.

⁵² <http://www.lawfoundation.net.au/ljf/app/&id=FC6F890AA7D0835ACA257A90008300DB>

Question 12: Legal Assistance Funding

What factors determine the volume and distribution of current funding for legal assistance at both the Commonwealth and State and Territory level?

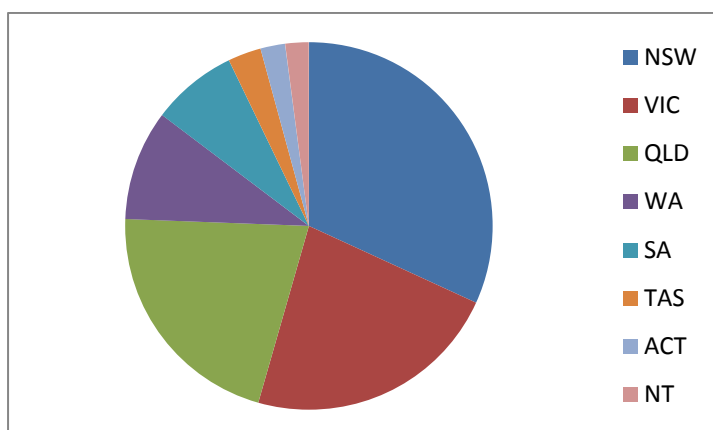
Commonwealth funding is provided to the Legal Services Commission and other Legal Aid Commissions (LACs) pursuant to the National Partnership Agreement on Legal Assistance Services (“the Agreement”) signed by the Prime Minister and Premiers in June and July 2010.⁵³ The Agreement established a new Commonwealth legal aid funding model. The model determines funding by reference to “population size, demographic characteristics and socio-economic variables”. An important aspect of the model is the “risk factor” assessment which considers potential demand for legal aid by reference to population characteristics which occur frequently in legal aid statistics, such as disabled persons for example.

The total volume (quantum) of Commonwealth legal aid funding, or the “funding pie” as it is sometimes known, is divided up between jurisdictions. The volume of funding is not determined by the Agreement but is a matter of Commonwealth budgetary policy.

Commonwealth funding is available for Commonwealth law matters, and was subsequently extended to new prevention, education and advice programs for all law types provided that State funding for these programs was maintained at current levels. Additionally State funding is provided for State law matters. In South Australia, state funding is adjusted for CPI annually, with further funding grants provided for specific projects and increased activity in identified areas.

Commonwealth Funding of Legal Aid Agencies 2011/12⁵⁴

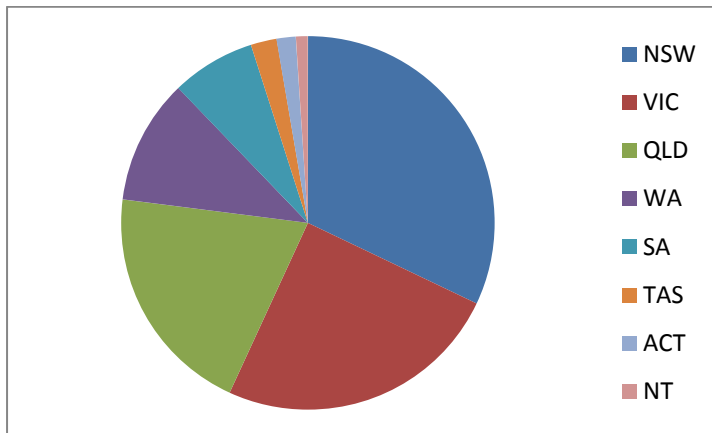
Total Funds Pool: \$204,506,000



⁵³ <http://www.nla.aust.net.au/res/File/NPA%20signed%20agreement.pdf>

⁵⁴ Senate Standing Committee on Legal and Constitutional Affairs, Attorney-General’s Department, 16 October, 2012, per Senator P Wright.

Populations of the Australian States and Territories 2012⁵⁵



In South Australia, the State Government provides annual funding for State law matters and contributes to education, advice and minor assistance funding. The Legal Services Commission receives additional financial assistance from the State Government for the funding of expensive criminal trials. It has entered into an Expensive Criminal Cases Funding Agreement⁵⁶ with the South Australian Attorney-General for the use of that funding. The State Government provides approximately 60% of funding for the Legal Services Commission, though this division can vary from year to year.

What principles should determine the relative contribution of Commonwealth and State governments to that funding? How should it be apportioned in terms of responsibility for funding particular types of matters and for specialist services?

The LACs would benefit from greater autonomy in decision-making about the use of legal aid funds as they are best placed to identify areas of need. A reduction in Commonwealth reporting requirements would allow the reallocation of some resources to front-line services.

How does the funding of legal assistance for criminal matters affect the funding available for civil (including family law) matters?

These areas are affected by the rigid Commonwealth/State funding divide. According to our State legal aid guidelines, representation assistance is only provided for criminal matters

⁵⁵ Australian Bureau of Statistics, Demographic Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/>

⁵⁶ Annual Report 2011-12, schedule 3, http://www.lsc.sa.gov.au/cb_pages/annual_report_current.php

where there is a risk of imprisonment. For this reason, State criminal law matters are given priority over State civil law matters.

Family law matters are funded solely by the Commonwealth and Commonwealth criminal matters must compete with family law matters for these funds. Family law matters involving the care and protection of children are given priority over other Commonwealth law civil matters.

Other than direct competition for resources, how does the funding of civil and criminal matters interact, especially in relation to people with complex legal issues?

Many legal aid clients present with complex multi-jurisdictional legal issues. It is artificial to allocate assistance for only one aspect of the legal problem while refusing legal aid for other, related legal issues.

14. Better Measurement of Performance and Cost Drivers: The Legal Aid Commissions

How can the performance of the civil justice system be best measured?

Legal Aid Commissions (LACs) are focussed on providing services which assist clients to resolve disputes privately instead of commencing court action, wherever possible. In civil law, this assistance predominantly takes the form of information, advice, minor assistance, duty lawyer services, and community education. In Family Law, the LACs provide advice, structured family dispute resolution conferences, representation and duty lawyer services.

One effective method for the measurement of performance used by the LACs is the customer survey. Large, Australia-wide surveys are expensive and are conducted using shared resources. The most recent of these was the *Legal Australia-Wide Survey on Legal Need* conducted by the Law and Justice Foundation of New South Wales.⁵⁷

Within individual jurisdictions, targeted or “snapshot” surveys of specifically identified groups with questions that focus on:

- the usefulness of the assistance provided; and
- the whole of life outcomes for the client

are an effective means of measuring the benefit of the legal assistance provided.

Qualitative data are as important to the LACs as quantitative data. Some LACs have undertaken Program Evaluations and Early Intervention Evaluations of FDR processes. The LACs predominantly keep data on the front end of their services, such as how many and what type of advice sessions and minor assistances are provided, or how many community education sessions are provided. In Family Law, statistics are kept on dispute resolution conferences, and court matters conducted by both in-house and external practitioners and on duty lawyer services. These statistics are available in their Annual Reports. The LACs collectively through National Legal Aid and individually commission surveys of their clients and the wider community.

Are there limits to the extent to which data can inform comparisons across jurisdictions or across time?

Yes. Variations exist between the LACs due to differences in funding levels, local law, geography, demographics and assistance priorities.

⁵⁷ <http://www.lawfoundation.net.au/lif/app/&id=FC6F890AA7D0835ACA257A90008300DB>

What data are and can be collected across the justice system to enable better measurement and evaluation of cost drivers and the effectiveness of measures to contain these?

The LACs receive fixed funding amounts from State and Commonwealth governments and adopt individual strategies to manage these funds, depending on identified needs in each jurisdiction. The division of Commonwealth funds between the jurisdictions is based on a number of factors and on population size.

The LACs contain external costs by setting fixed fees for work done by external legal practitioners. These fees are usually lower than those paid to legal practitioners by private clients and as a consequence, not all legal practitioners are willing to take work from the LACs.

The LACs measure the costs of the different types of services they provide as a percentage of their operational budgets, for example, the salaries of staff engaged in a particular activity. They maintain strict budgetary control over their funds. Financial constraints mean that not all services can be offered in every jurisdiction and that from time to time it is necessary to cease providing certain services. Data regarding the LSCs funding can be found in their Annual Reports.

How can the costs of data collection be minimised?

The LACs have made a considerable investment in computer software which collects data for their specific needs and to supply the information requested by Commonwealth and State funding bodies. Data gathered relates to the LACs core tasks and their financial management systems. Requests to produce data outside of these parameters impose significant additional costs burdens on the LACs which could not be considered at the present time.

Extensive data is collected from the LACs by the Commonwealth Government pursuant to the National Partnership Agreement. The costs of providing this data are high and to date no feedback has been received as to the purpose for or use to be made of this data.

What is the value of the data currently being collected?

Data collected by LACs are used to identify demand for services and areas of unmet legal need. The data are also used to provide funders with reports on the expenditure of funding provided and to identify areas where funding is lacking or additional funding is needed. Data are used for long-term financial management and the projection of future expenditure.

What administrative data are currently collected, at the Commonwealth and state/territory level, which may be useful in early identification of individuals at high risk of substantial legal need?

The LACs collect data about the personal circumstances of their clients such as employment status, family composition, postcode and ethnicity, where it is relevant to the LAC's core functions and to assist the LACs to direct their limited resources to the greatest areas of need. LACs collect data on the financial circumstances of their clients when deciding whether to fund applications for court representation as part of means testing.

What can be done to access such information and how can it best be coordinated and used?

National Legal Aid, the representative body for the LACs, has established a website which regularly publishes statistical data on their work and client base. The website can be found at: <http://www.nationallegalaid.org/>.

Each LAC maintains its own website with on-line information about the services it offers.

Not all information regarding the work of LACs is publicly available as the LACs are bound by confidentiality requirements relating to information which would identify their clients.

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