



22 November 2013

Access to Justice Arrangements
Productivity Commission
LB2 Collins Street East
Melbourne VIC 8003

access.justice@pc.gov.au

Dear Sir or Madam,

**Re: Access to Justice Arrangements - Productivity Commission Inquiry
NLA submission to Issues Paper**

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

Attached please find the NLA submission in response to the *Access to Justice Arrangements* Productivity Commission Issues Paper released in September 2013 as part of the Inquiry into Access to Justice Arrangements.

We thank you for the opportunity to make this submission to this important Inquiry. Please do not hesitate to contact us if you require any further information.

Yours sincerely,

Anthony Reilly
Chair



National Legal Aid

National Legal Aid

Submission to the Productivity Commission Inquiry into
Access to Justice Arrangements

November 2013

National Legal Aid Secretariat
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Executive Summary

- NLA represents the Directors (Chief Executive Officers) of the eight state and territory legal aid commissions (LACs) in Australia.
- Each LAC is established by respective state and territory enabling legislation which sets out the charter for that commission.
- NLA was formed to maximise resource sharing and a consistent approach nationally to access to justice issues.
- In Australia, the acceptance of access to justice and the rule of law is a societal norm. "Maintenance of the rule of law is fundamental to Australia's economy and prosperity."¹
- A key issue that NLA would like the Productivity Commission to address is the total level of resource allocation which is required to ensure that those people with a legal need are able to access an appropriate level of legal assistance.
- Funding constraints result in restrictions on the availability of legal aid services so that some people who need legal assistance but cannot afford to engage a private legal practitioner will not receive either a grant of legal aid for legal representation or the level of assistance that they need.
- The LAW Survey (Law and Justice Foundation of NSW 2012) reported that there was a propensity for substantial legal problems to have a "severe" or "moderate" impact upon the day to day lives of individuals. The nature of the adverse consequences reported by the LAW Survey included financial strain (29%), stress-related illness (20%), physical ill health (19%), relationship breakdown (10%) and relocation to another residence (5%).²
- LACs provide a comprehensive range and high volume of legal assistance and dispute resolution services to individuals, including in prevention and early intervention and to assist those who are self-representing.
- Court based solutions are sometimes necessary. Negotiations take place in the "shadow of the law", including with the authority of earlier court decisions to support settlement in dispute resolution processes.
- The "mixed model" of legal service delivery is considered best practice by National Legal Aid.

¹ Attorney-General's Department, *A Strategic Framework for Access to Justice in the Civil Justice System* (2009) 1.

² C. Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia*, Law and Justice Foundation of New South Wales, 2012, p. xvi.

- LACs currently administer a system for making grants of legal aid which resembles a voucher system and is also well regulated to ensure quality and cost effective services.
- The presence of the in-house practice enables LACs to participate in the broader legal market in a way that enables purchasing of legal services economically.
- LACs work with the private profession and the community and indigenous legal sectors to reduce the justice gap.
- The definition of legal need should take account of expressed and unexpressed legal need, both prospective and retrospective.
- NLA would welcome the Productivity Commission also addressing:
 - i) whether there is a comparative denial of access to justice in Australia as a consequence of total funding levels, and the extent of this
 - ii) which approaches, including existing means testing, are best placed to ensure fair and equitable access to scarce legal assistance resources, nationally
 - iii) the prevalence of legal problems in some of Australia's most remote communities and how improving access to justice can contribute to economic development and improve social conditions
 - iv) conflict of interest as a significant issue particularly in more remote areas including an investigation of the effect of some relaxation of the conflict rules in these locations
 - v) the systemic costs increases in family law matters which impact on the day to day capacity of people to access the court
 - vi) the value of establishing a national "duty mediation service" along the lines of the Court Ordered Mediation Program at Legal Aid NSW
 - vii) the value of establishing a duty advice service at high volume civil tribunals where this service is not already provided.
- Data to be collected should inform service delivery, be proportionate to the service, be cost effective to collect and be capable of accurate collection.
- NLA would be happy to provide any further information that the Productivity Commission would consider useful, and to arrange a visit by Productivity Commission personnel to any of the locations in which LACs deliver services.

End.

1.0 Introduction

1.1 National Legal Aid and Australia's legal aid commissions

National Legal Aid (NLA) welcomes the opportunity to present a submission to this important Productivity Commission inquiry.

NLA represents the Directors (Chief Executive Officers) of the eight state and territory legal aid commissions (LACs) in Australia.

Each LAC is established by respective state and territory enabling legislation which sets out the charter for that commission. LACs may be generally described as independent statutory authorities. This independence provides a necessary separation from the state to ensure a capacity to provide citizens with representation and advice, unfettered by any perception of bias or interference in favour of or from the state.

NLA was formed to maximise the benefits of sharing information and resources and to support a consistent approach nationally to access to justice issues. NLA facilitates the development and delivery of best practice legal assistance services, and the collection and sharing of data and other information which informs service delivery.

This submission focuses on over-arching issues of national significance. Some individual LACs will also make submissions to the Productivity Commission's Issues Paper to provide information and/or further detail about access to justice issues particularly relevant to their state or territory.

1.2 Key aspects of access to justice arrangements

NLA wishes to highlight 4 key aspects of access to justice arrangements which LACs are constantly required to consider.

These are:

1. Who gets help? A key issue for LACs in this regard is the means test against which applications for aid are addressed.
2. For what? LACs provide legal assistance services primarily in child protection, family violence, family law, and criminal law but also practice in a range of civil law areas, mostly in relation to poverty law. A key issue is should further legal aid be available in civil law?

3. What level of service/s should be provided? LACs provide a range of services from online information through to representation in court. A key aspect of LAC service delivery is ensuring proportionality of the service to the problem.

4. What are the means of service delivery? LACs operate within the mixed model of service delivery which we consider world's best practice. LACs currently administer a system which resembles a voucher system. The LAC system is also well regulated to ensure quality and cost effective services.

1.3 Scope of the Access to Justice Inquiry

NLA notes that the Productivity Commission has been asked to consider access to justice arrangements within the scope of the civil law system and "that the Commission will explore interactions between the criminal and civil justice systems where appropriate."³ NLA supports this approach. There are many examples of such interactions, for example;

i) The relevance to any civil law proceedings of investigation/s and possible criminal prosecution following an alleged assault on a partner/child in a family violence situation. Civil law proceedings in relation to such an incident may also be taken, e.g. for a personal protection order (usually in state/territory local courts) and/or for orders in relation to arrangements for the children (Commonwealth family law court) and/or in relation to child protection proceedings (state/territory local courts).

The breach of a civil violence restraining order can also be prosecuted in the criminal jurisdiction and have serious consequences, including a period of imprisonment.

ii) Children who have been or are involved in child protection proceedings, also involved in juvenile justice proceedings, and ultimately, adult criminal law proceedings. This particular cycle of disadvantage is commonly seen by LACs.

iii) Unpaid traffic infringement notices can result in a license suspension order, with the flow on effect of criminal penalties if the individual concerned is detected driving. The penalties for this offence can include imprisonment.

The decision of the Productivity Commission to concentrate on the access to justice issues of individuals and smaller corporate entities, rather than well-resourced corporate and public sector bodies, is also supported by NLA. Given that the focus of Australia's LACs is

³ Productivity Commission, *Access to Justice Arrangements*, Productivity Commission Issues Paper (2013) 1-2.

the delivery of access to justice services to individuals, individuals are the focus of this submission.

1.4 The importance of access to justice in civil society

As organisations principally focused on frontline service delivery, Australia's LACs are continually exploring different approaches to improve the reach of a limited resource base to as many people requiring legal assistance as possible.

As bodies established under statutory charter LACs, as a general rule, do not engage in public lobbying for changes in funding levels. There is, however, a responsibility on LACs to inform government/s with frank and fearless advice about the effect of funding levels on access to justice for people in Australia.

The United Nations Development Program describes "effective, responsive, accessible and fair justice systems as a pillar of democratic governance". Moreover, "in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable." In this context, "rule of law is the foundation for both justice and security."⁴

In Australia, the acceptance of access to justice and the rule of law is a societal norm. This domestic perspective is perhaps best reflected by the words of the Attorney-General's Department's Strategic Framework for Access to Justice in the Federal Civil Justice System (2009):

Maintenance of the rule of law is fundamental to Australia's economy and prosperity. It enables people to plan and live their life as they choose and underpins social and economic development. The rule of law frames the relationship between state and society, founded upon an accepted set of social, political and economic norms.

Access to justice is an essential element of the rule of law and therefore of democracy. Justice institutions enable people to protect their rights against infringement by other people or bodies in society, and allow parties to bring actions against government to limit executive power and ensure government is

⁴ United Nations Development Program, *Access to Justice and Rule of Law*, <http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law.html> at 21 October 2013.

accountable. If people are unable to access these institutions to protect their rights, respect for the rule of law is diminished.⁵

This jurisprudential basis establishes a firm framework for the proposition that access to justice is essential to protect the most vulnerable in society and to provide the confidence required to promote a free and open economy.

1.5 Role of the Productivity Commission

1.5.1 Economic value of legal assistance services

NLA believes that the Productivity Commission can add value by using its strength in economic and policy analysis to arrive at a firm position in relation to the economic value of legal aid, and implicitly the economic value of access to justice. A resolution of this issue is important because it has been studied by legal assistance providers, and governments, both in Australia and overseas, for a number of years.

In 2009, NLA funded a study by PricewaterhouseCoopers into the economic value of legal aid, in the context of the family law system. This study identified a range of direct efficiency benefits through the presence of legal aid within the family law system and justice system generally, and determined a number of cost benefit ratios. Based on the case studies presented in the report, a cost benefit ratio of between 1.60 and 2.25 was achieved for every dollar invested into the legal aid system. Additionally, the concept of future avoided costs was investigated, in the context of family dispute resolution. The report suggested that the avoidance of domestic violence, the continuation of the care of children by parents, and the retention of ownership of the family home in the matter which had been subject to legally aided intervention, avoided future costs to the community ranging from \$200,000 to \$750,000. The range of avoided cost depended on the ages of the children that would be remaining under the care of their parents.⁶

The economic value of community legal centres (CLCs) was assessed by the Institute for Sustainable Futures at the University of Technology Sydney, in 2006. This study, which was funded by the Combined CLCs Group of NSW and the National Association of CLCs, considered approaches for determining the quantifiable economic value of community legal centre outputs and the qualitative value of those outputs. The case was put that the

⁵ Attorney-General's Department, above n 1.

⁶ PricewaterhouseCoopers, *Economic value of legal aid: analysis in relation to Commonwealth funded matters with a focus on family law*, National Legal Aid (2009).

qualitative benefits of community legal centre outputs - such as the avoidance of domestic violence or confidence in the right to access justice - should also be viewed as having an economic value, even though the task of quantifying the benefit was not straightforward. This concept was summarised by the statement “the total economic value is more than a dollar figure.”⁷

On a similar theme, the UK Citizens Advice Bureau published a paper in 2010 which outlined the business case for civil legal aid. This report also concluded that there were significant cost benefits through investment in legal aid services. It noted that the “adverse consequences associated with civil justice problems, and the downstream cost for other public services, can be mitigated by advice.”⁸

Clearly, there is no shortage of research, commissioned by legal assistance bodies, on the economic value of the services they provide. What is absent, however, is the imprimatur of an independent economic authority that has not been commissioned on behalf of a service provider, to test the notion of economic value in relation to legal assistance services. NLA believes that the Productivity Commission has the authority, independence and capacity to undertake this type of analysis and arrive at a conclusion which has broad support among policy makers. NLA considers that this is one area where the Productivity Commission could add significant value.

1.5.2 Resource allocation

A key issue to be independently addressed is the total level of resource allocation which is required to ensure that those people with a legal need are able to access an appropriate level of legal assistance. This will require some judgments about which people are most in need of legal assistance, the form of assistance which is required, and the best way of providing that assistance. NLA notes that funding levels for legal assistance service vary significantly among western liberal democracies, with Australia one of the lower funding nations on a per capita basis. NLA would welcome an assessment by the Productivity Commission on whether there is a comparative denial of access to justice in Australia as a consequence of total funding levels, and the extent of this.

⁷ P. Edgerton and E. Partridge, *The Economic Value of Community Legal Centres*, Institute for Sustainable Futures, University of Technology Sydney (2006).

⁸ Citizens Advice Bureau, *Towards a business case for legal aid: paper to the Legal Services Research Centre’s eighth international research conference*, London (2010).

1.6 The concept of legal need

1.6.1 Evidence base - the LAW Survey

NLA attaches great importance to the issue of identifying and measuring legal need. In August 2012, the Law and Justice Foundation of New South Wales released the results of the 2008 *Access to Justice and Legal Needs: Legal Australia-Wide Survey* (LAW Survey), which investigated the legal needs of almost 21,000 random respondents, in each state and territory. This seminal study provides a strong evidence base concerning the prevalence and nature of legal problems facing Australians; the strategies and advice used in responding to the problem; and how matters were finalised and the final outcome for those people. Importantly, the LAW Survey also presented information on the social and economic characteristics of those people who identified themselves as having a legal problem, and the effect that these problems had on their lives.

NLA notes that the Productivity Commission has referred to the LAW Survey in its Issues Paper and commends the use of this expansive evidence base by the Productivity Commission.

1.6.2 Defining legal need

The Productivity Commission, in the Issues Paper, proposes to define legal need as “legal issues that individuals have not been able to resolve effectively by their own means.”⁹

NLA is concerned that this definition is retrospective in nature and does not recognise that legal need can often be at its greatest before the process of dispute resolution has commenced. The definition of legal need should therefore be prospective as well as retrospective in nature, such that it includes situations where a party is not capable of resolving a dispute with their own resources.

Another observation drawn from the experience of LACs is that an individual may have a significant legal need but not be aware that the legal need actually exists. Indeed, there are circumstances where an individual does not become aware of a legal need - the resolution of which would have a significant impact upon their life - until their attention is drawn to relevant legal information. Often it is a lawyer or paralegal operating through a LAC or CLC who identifies the existence of a particular legal problem while dealing with a completely different issue. For reasons such as this, NLA believes that the term “legal

⁹ Productivity Commission, above n 3, 5.

need” must also encompass unexpressed as well as expressed legal need. Moreover, in assessing the economic value of adverse consequences accruing to individuals with a legal need, NLA believes that the Productivity Commission must have regard to need which is both expressed and unexpressed.

This issue is noted in the LAW Survey, with the comment that the persons with low education levels and a main language other than English generally reported a materially lower prevalence of legal problems. The authors of the survey report suggested that this lower prevalence “may reflect a failure to recognise legal problems.”¹⁰

NLA therefore believes that the definition of legal need proposed by the Productivity Commission should be broader, to take account of expressed and unexpressed legal need, both prospective and retrospective. This broader scope of legal need should also represent a base position in the Productivity Commission’s exploration of the extent of legal need. This approach is consistent with the definitions of legal need referred to in the LAW Survey.

1.6.3 Unmet legal need

Australia’s LACs fully understand the concept of unmet legal need. The day to day experience of rationing a limited resource base in order to provide an appropriate level of legal assistance to those most in need implicitly creates some unmet need.

The LAW Survey draws upon the work of Dignan (2004) to derive what it describes as “the best practical working definition of unmet legal need in that it constitutes a gap between experiencing a legal problem and satisfactorily resolving that problem”. NLA agrees with this definition of unmet legal need.”¹¹

The task of measuring unmet legal need is, however, far less straightforward. As noted by the LAW Survey, expressed legal need can be measured by using the data held by various legal assistance service providers. Unexpressed and unmet legal need can generally only be measured through survey methodology.

For LACs, there are a number of avenues through which expressed and unexpressed, met and unmet legal need can be measured.

¹⁰ Coumarelos, above n 2 , xvi.

¹¹ T. Dignan, *Legal need in Northern Ireland: literature review* (2004), cited *ibid*, 4.

Where an applicant for legal aid receives a grant for legal representation in a litigated matter, then it is probable that their legal need has been met. For an applicant who is denied aid of this type (and assuming that the application has merit), then the level of unmet need may be measured by the difference in the level of representation they requested and the level of representation, if any, they ultimately received. This reasoning assumes, of course, that the level of legal assistance requested by the person was in fact appropriate for their particular legal issue. There may be circumstances where a person applies for a higher level of assistance but upon assessment by a LAC it is determined that a lower level of assistance is appropriate for the matter. Again, in this circumstance it is reasonable to suggest that legal need has been met.

As mentioned above, LACs are subject to constrained funding arrangements and, as a consequence, a significant degree of rationing occurs in the awarding of grants of aid. This may result in an individual being refused a grant of legal aid for representation but being provided with a more brief form of legal assistance. Such assistance may include representation by a duty lawyer, and advice and minor assistance for which a grant of legal assistance is not necessary. In these types of situation (assuming the level of legal assistance requested was appropriate) it is reasonable to conclude that there remains a level of unmet legal need.

The issue of funding constraints also creates an entire class of individual who do not seek legal assistance through a LAC because they are aware that through an assessment of their means and/or merit, they will be refused any form of legal assistance. Implicit in this decision not to submit an application for aid, is a knowledge or perception of the restrictive nature of the criteria for granting aid. For individuals who seek legal assistance through a private practitioner, it is almost certainly the case that the practitioner will not submit an application for legal aid if she or he believes that the application will not be successful. Some of these individuals will accept a reduced level of representation from a private practitioner to the extent that their resources will allow, some will self-represent possibly accessing services to support them in doing so from a legal assistance service provider, and others in this group will give up and not pursue their legal rights. These above groups of people will fall within the category of persons with unmet legal need.

NLA believes that the Productivity Commission needs to consider the nature and extent of this 'justice-gap' in its analysis of unmet legal need. In this context there needs to be some practicality applied to the technical definitions of unmet legal need outlined in the preceding discussion. For example, what is the detriment associated with being provided with a service of a lower intensity than full representation? LACs provide a

comprehensive range of services such as advice, minor assistance, and duty lawyer, and through which a person with a legal problem may receive a reasonable outcome to their problem. If the materiality of the difference in outcome for the person receiving non-litigation representation is not significant, then to what extent has justice been denied?

1.6.4 How many Australians experience legal need?

NLA supports the comprehensive analysis undertaken through the LAW Survey to estimate the number of Australians experiencing legal need, the clustering of legal problems and the characteristics of people experiencing multiple legal needs.

It is perhaps important to note that the telephone survey methodology of the LAW Survey potentially excluded a portion of the population for whom contact by telephone is problematic. This includes homeless people, some people living in very remote communities, prisoners and those institutionalised.

NLA believes that further assessment of the legal needs of homeless people is likely to increase the estimated number of Australians who experience legal problems. This could also increase the number of people likely to fall within the consumer-crime-government-housing cluster of legal problems referred to in the LAW Survey.¹²

In relation to remoteness, LACs have first-hand experience of communities in very remote areas of the nation where legal problems are endemic. Within a single community a significant proportion of the population may report problems crossing multiple areas of law, including crime, family law, consumer law, housing, government agencies, health, credit/debt, human rights and personal injury. The intensity of legal problems within some remote communities is so prevalent that it can make these communities difficult to function. NLA strongly urges the Productivity Commission to consider the prevalence of legal problems in some of Australia's most remote communities and to examine how improving access to justice can contribute to economic development and improve social conditions.

1.6.5 Impact of legal need on individual lives

A key finding of the LAW Survey was that there was a propensity for substantial legal problems to have a 'severe' or 'moderate' impact upon the day to day lives of individuals.

¹² Coumerelos, above n 2, 86.

The nature of the adverse consequences reported by the LAW Survey included financial strain (29%), stress-related illness (20%), physical ill health (19%), relationship breakdown (10%) and relocation to another residence (5%).¹³

Implicit and explicit in each of these adverse consequences are private and public costs which reduce overall economic productivity. While not easily quantifiable, it is not unreasonable to suggest that providing access to justice-based solutions to legal problems would reduce the level of adverse consequences facing affected individuals. In turn, there may be opportunities to reduce the level of non-productive resource allocation in the economy for services which respond to the adverse consequences of legal problems.

2.0 Delivery of access to justice services

2.1 General

Australia's LACs are high volume undertakings, providing legal assistance to hundreds of thousands of Australians each year. The statutory mandates of LACs require the LACs to ensure that legal aid is provided in the most effective, efficient, and economical manner. In this context LACs provide a comprehensive range of services to individuals, including:

- online and face to face legal information and resources
- legal and non-legal referrals
- legal advice and minor assistance services
- advocacy
- grants of legal assistance
- dispute resolution conferences
- legal representation services
- community legal education
- training to community service providers and the legal profession in areas of law relevant to their work with disadvantaged people.

Whilst family law is the dominant area of service delivery in the civil jurisdiction, LACs collectively provide a broad range of civil law assistance. Notably, LACs have the

¹³ Ibid, xvi.

flexibility, subject to funds, to provide civil law assistance relevant to their respective jurisdictions at any given point in time in acute situations, e.g. providing legal assistance to the public as part of natural disaster recovery.

At a consumer level, and as noted in the LAW Survey, "Legal Aid [LACs] was the only not-for-profit legal service that had very high recognition rates in all jurisdictions".¹⁴ This recognition helps guide people as they encounter legal problems and provides a path towards access to justice. Moreover, LACs have the critical mass of legal resources, accompanied with a robust administrative infrastructure, which are capable of delivering the very high volume of services demanded across the country in hundreds of locations.

2.2 The mixed model

2.2.1 Defining the mixed model

Australia's LACs operate under a system which is known as the "mixed model". In essence this is a partnership between the public, private and community sectors. Under the mixed model, LACs maintain an in-house practice of lawyers and also draw upon the services of others to help meet the justice gap. The most common example of the operation of the mixed model is that, a person receiving a grant of aid for legal representation may be represented by an LAC lawyer or by a lawyer from the private profession. LACs also work with the community sector including the CLCs, and the ATSILS to ensure services are stretched as far possible and that issues such as conflict are appropriately addressed. Representatives of legal assistance service providers meet as needed to discuss co-operative legal services delivery with a view to closing the justice gap as far as possible.

This combination of generalist, specialist and culturally specific legal services, alongside the broad service base of LACs, provides consumers with an appropriate choice of service provider through which they may have their legal problem addressed.

NLA believes that Australia has been well served by the mixed model of legal assistance and has not been subject to the significant legal aid cost escalation which has occurred in the United Kingdom and in New Zealand. These jurisdictions, which operate under the 'judicare' model of legal assistance, have been the subject of major reforms to their legal assistance programs in order to arrest expense growth and improve efficiency. The key advantages of the mixed model in the Australian experience are outlined in detail below.

¹⁴ Coumarelos, above n 2, xvi.

2.2.2 Benefits of the mixed model

Affordability

The presence of the in-house practice enables LACs to participate in the broader legal market in a way that enables purchasing of legal services economically, which is a core role of LACs.

For the community, the advantage of this arrangement is that more legal assistance services can be provided in an environment of scarce legal assistance funding.

Market failure

The mixed model is important in many parts of Australia where there is a market failure in the supply of legal services. There is ample evidence from the registers of legal practitioners in each state and territory showing that legal practitioners are averse to providing services in regional, rural and remote locations. The evidence provided through the Law Council of Australia and the Law Institute of Victoria's *Report into the Rural, Regional and Remote Areas Lawyers Survey July 2009*, affirms this point and places doubt over the future supply of lawyers in areas outside of cities and major regional cities in the medium to long term.¹⁵

It is the LACs and other legal assistance service providers which have responded to this market failure. Indeed, it is this category of lawyer which is ensuring access to justice in Australia's most remote, and often most disadvantaged, locations.

Fixed funding

For the majority of circumstances, LACs receive a fixed budget for legal assistance from the Commonwealth and state and territory governments. Respective LAC enabling legislation requires LACs to administer the Legal Aid Fund and to provide legal aid in accordance with the Act. Based on fixed levels of funding, policy decisions are made which ensure that the distribution of grants of aid occur according to means, merit, matter type, competing priorities and availability of funds criteria which ensure the sustainability of the funding base. It is as a consequence of this fixed funding base that Australia's LACs have not faced the same level of expense growth which has impacted similar bodies overseas, particularly those operating under the *judicare* model.

This fixed funding approach also creates a distinction between legal aid assistance and other forms of social welfare provided through the social security system. Under the legal aid system, the funding is finite, so that criteria for assessing applications can change

¹⁵ Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey* (2009) <http://rrrlaw.com.au/media/uploads/RRR_report090709.pdf> at 23 October 2013.

at any time to increase or reduce the rationing effect, according to the availability of funding. Under the social security system, meeting a set of prescribed criteria for a benefit creates an entitlement to that benefit, regardless of the level of drawdown on the budget for the benefit.

2.2.3 Relationship to public value theory

NLA believes that the intervention of publicly funded LACs into the legal services market is entirely consistent with the widely accepted underpinnings of public value theory. The comments of Moore of the Harvard Kennedy School, who is often credited with stimulating the public value debate since the mid-1990s, are certainly relevant in this regard:

In general, two different justifications for public intervention carry weight. One is that there is a technical problem in the organisation of a market to supply the good in question - some reason why free exchanges among producers and consumers will not result in the proper level of production. Government must intervene to correct the defect in the market.

A second justification is that there is some crucial issue of justice or fairness at stake in the provision of the service - some right or claim of an individual against the society that others agree must be honoured. Government must intervene to ensure that the claim is honoured - not only for the current individual who has a claim but generally for all.¹⁶

In many ways these comments speak for themselves. As outlined above, the presence of LACs under the mixed model is a response to market failure, in situations where the private market is unable or unwilling to supply legal services. Moore's second point is absolutely relevant to the notions of civil society and the rule of law which have been discussed in the introduction to this paper. Indeed, but for the presence of legal assistance service providers the capacity of society to provide access to justice - itself an essential feature of the rule of law and civil society - will be diminished.

¹⁶ M.H. Moore, *Creating Public Value: Strategic Management in Government* (1995) 43-44.

2.2.4 Voucher systems in the context of the mixed model

Recently there has been some public discussion concerning the potential of a “voucher” system for recipients of legal aid. It has been suggested that “vouchers would bring much-needed competition to the legal aid sector” and that “competition puts pressure on service providers to think creatively about the ways they can save money for their clients”.¹⁷

NLA’s position is that LACs already provide a system which resembles a voucher system but which is cost effective and enhances quality assurance to the client.

The difference between the voucher system operated by LACs and the voucher system advocated by some public policy forums lies in the level of regulation which exists in the current LAC system. The primary factor influencing the regulation is the relative scarcity of funding available to LACs for grants of aid. For the purposes of discharging legislative obligations to manage the Funds and to ensure some quality control, legal aid commissions also manage panels or lists of firms/lawyers who are prepared to undertake legal work at legal aid rates. If a grant of aid is approved then the LAC will ensure that the service and the extent of that service covered by the grant is appropriate to the legal need faced by the client.

Regardless of whether the client uses an LAC in-house lawyer or a lawyer in private practice, the LAC will ensure that the lawyer complies with appropriate standards. This is a highly evolved system which supports solicitor of choice on most occasions, quality, and also ensures that the value to the client is maximised and that scarce public resources are deployed in the most responsible and effective manner possible.

2.2.5 Judicare model - comparative experiences

Definition

Under the judicare model, the state administers the funding for legal aid representation, with the representation itself being provided principally by the private profession. This contrasts with the mixed model in Australia where there is a division of service delivery by the public and private sectors. The division varies by jurisdiction and has its roots in the type of service required and local conditions, with private sector service provision ranging between jurisdictions but at a national level at around 70% private profession and 30% LAC in-house lawyers.

¹⁷ S. Breheny, “I’ll vouch for vouchers to keep aid on track”, *The Australian*, 27 September 2013 (Sydney) 25.

New Zealand

In New Zealand the judicare approach to legal assistance was reviewed by Dame Margaret Bazley. The Bazley Review found that the largely unregulated system in New Zealand was suffering from unsustainable increases in administrative costs as well as serious declines in service quality and a number of examples of corrupt conduct in the claiming of fees by lawyers. The issues of quality were identified as being probably attributable to some extent to the lower rates of remuneration paid to lawyers who provided services on behalf of the Legal Services Agency.

The following extract from the Bazley Report describes the extent of the problem:

There are many conscientious and experienced barristers and solicitors working in the legal aid system, who are a credit to their profession. There is also a small but significant proportion of lawyers providing very poor services. Behaviour I have heard about includes callous and arrogant indifference to clients' needs, and an absolute disregard and disrespect for the court system, its processes, and its participants. Some lawyers appear to be acting corruptly, and should be disbarred.¹⁸

NLA recommends that the Productivity Commission considers the detailed findings of the Bazley Report when undertaking its examination of the Australian mixed model of service delivery.

United Kingdom

Another judicare jurisdiction, the United Kingdom, has recently changed its guidelines for awarding civil legal aid in an effort to reduce increases in legal aid expenditure. The more restrictive guidelines, both in terms of scope of matter and means, are estimated to deliver savings in the order of £ 320 million from 2014-15 onwards. The overall scale and growth of the legal aid budget was considered to be an issue of significant concern for the Government.¹⁹

¹⁸ Legal Aid Review, *Transforming the Legal Aid System: Final Report and Recommendations* (2009), Ministry of Justice, New Zealand, viii.

¹⁹ Ministry of Justice, United Kingdom, *Transforming Legal Aid: Next Steps* (2013) 5-10.

2.3 Service delivery

2.3.1 Outputs and resources

All LACs are required to provide detailed reports on service delivery under the National Partnership Agreement on Legal Assistance Services, with the performance of LACs pursuant to the partnership agreement recently reviewed by ACIL Allen Consulting. LACs are currently awaiting the release of the report of the review. LACs are also accountable to state and territory Governments, and produce annual reports.

Through NLA, which is supported by a small secretariat, Australia's LACs also work cooperatively to improve client service delivery and to arrive at standard descriptions and measures of their outputs. This in turn supports the publication of nationally consistent data on the NLA website which allows policy makers, researchers and the general public the opportunity to form their own judgment on the performance of LACs.

LACs jointly across Australia are the single largest national provider of legal services.

In 2012-13 the key outputs of LACs included:

16,052,709 preventative legal services including information/referral services, community legal education, publications, and website page views

381,737 instances of duty lawyer services, where members of the public receive advice and representation at court

374,262 instances of legal advice and minor assistance

137,455 grants of aid for legal representation in relation to matters of litigation in the criminal, family and civil law jurisdictions with the representation being provided by internal and outsourced resources, and

8,067 family dispute resolution conferences involving at least 2 parties, with approximately 16,460 individuals participating and therefore receiving a service provided by a LAC.

The location of LACs' service delivery ranges from capital cities, to major regional centres, to small towns, and to the most remote communities in the nation.

The principal budgeted sources of funding for LACs in 2013-14²⁰ were:

Commonwealth government - \$213.7 million

²⁰ See National Legal Aid, finance statistics, at <<http://www.nationallegalaid.org>>.

state and territory governments - \$291.4 million

statutory trust fund interest - \$85.6 million

interest, contributions and fees - \$27.3 million.

It is NLA's assessment that in real terms (taking into consideration change in population and change in CPI), the collective per capita funding position for LACs has increased from 2006-2007 to 2012-2013 by 1.47%. This constrained funding position is reflected in the collective changes in output levels by LACs over the same period. For example, the number of grants of aid in 2006-07 occurred at a rate of 8.17 per 1,000 of population. In 2012-13 the grant rate nationally had fallen to 5.97 per 1,000 of population. Legal advice services increased very slightly from 13.09 per 1,000 of population in 2006-07 to 13.54 per 1,000 in 2012-13. By contrast, duty lawyer services increased from 12.9 per 1,000 of population to 16.57 over the same period.

The subset of data for civil law (including family law) shows a similar trend. In 2004-05 the number of grants of aid awarded by LACs occurred at a rate of 2.54 per 1,000 of population through to 2.58 per 1,000 of population. By 2012-13 the grant rate for civil law had fallen to 2.19 per 1,000 - a decline of 15 per cent.²¹

This data bears a direct correlation with the stringency of assessment imposed upon a person in order to access these services.

One hypothesis for this trend is that with the increasing complexity of the law over time, the unit cost of providing services is increasing. Compared with the situation in 2006-07, a matter now requires a more intensive level of service. This reflects a trend referred to as 'legal inflation'.

2.3.2 Approaches to resource allocation - means testing and guidelines

Each LAC uses criteria consistent with enabling legislation to determine a person's eligibility for a grant of legal aid. In very general terms, these address an applicant's means (based on income and assets); matter type; the merit of the matter and competing priorities in an environment of limited funds. Any special circumstances that might be relevant to incapacity to self-help are also taken into account.

²¹ Information concerning the number of grants of aid made by LACs is available through the NLA website <<http://www.nationallegalaid.org>>. This data has been combined with Australian Bureau of Statistics population data (3101.0) for each year to derive a grant rate per 1,000 of population.

NLA also maintains a national set of benchmark matter type guidelines for Commonwealth matters that are adhered to by most jurisdictions, albeit within constraints of available funding.

Means Testing

Schedule B of the NPA on Legal Assistance Services provides a set of principles for assessing financial eligibility for a grant of legal aid.

The means tests used by LACs take into account a range of factors such as the Henderson Poverty Line, income, assets, allowable deductions, and the cost of the case. When aid is granted it may be granted subject to contribution.

When a person is refused a grant of aid on the basis of means, it does not mean that they can afford to engage a private practitioner as tests are stringent and market rates are markedly different to legal aid rates. There is consequently a significant justice gap.

NLA would welcome the Productivity Commission considering which approaches, including existing means testing, are best placed to ensure fair and equitable access to scarce legal assistance resources, nationally.

A final observation on this point is the comparative experience of the United Kingdom with regard to eligibility for civil legal aid (noting that the British system of legal aid has always been more extensive than that which has existed in Australia). Sir Rupert Jackson LJ, author of the 2009 *Review of Civil Litigation Costs*, noted with approval the following point made by Britain's Legal Action Group:

When the legal aid scheme was set up, approximately 80% of the population was eligible for civil legal aid. In 1986 some 63% of the population was eligible for civil legal aid. By 2000 that figure had dropped to 50%. By 2007 the figure had dropped to 29%. In other words, more than two thirds of the population were ineligible for legal aid on financial grounds.²²

The Review of Civil Litigation Costs indicates that the UK Ministry of Justice has “models of civil eligibility based on the Family Resources Survey, 2009.”²³ Such modeling may be

²² S. Hynes and J. Robins, *The Justice Gap. Whatever Happened to Legal Aid?*, Legal Action Group (2009), 70-71, cited in United Kingdom, *Review of Civil Litigation Costs*, The Stationery Office (2009), 68. On this point Jackson LJ also comments that with the subsequent economic downturn in the UK in 2009 the proportion of the population eligible for civil legal aid increased to 36%.

²³ *Ibid.*

instructive in assessing the changes in legal aid eligibility which may have occurred in Australia.

2.3.3 A role for litigation

As referred to above LACs provide a range of non-court based solutions to legal problems, including state/territory-wide legal help lines, advice clinics, and legally assisted models of family dispute resolution.

NLA considers that with appropriate early intervention strategies, the propensity of matters to escalate to litigation and to move across jurisdictions can be reduced.

NLA believes, however, that the importance of court based solutions where necessary should not be undervalued. There are many matters in the family law system, for example, that cannot be resolved without the authority of a court order. There are many vulnerable individuals in the child protection system who rely on the authority of the courts for their personal safety. Early resolution of matters by informal/formal negotiation and dispute resolution processes is also undertaken in the "shadow of the law" with authority to encourage settlement being found in earlier decisions of the courts.

Moreover, the suggestion by the Productivity Commission in the Issues Paper that 'the bulk of civil disputes are resolved privately by the parties'²⁴ should not, arguably, be construed as an endorsement of other forms of dispute resolution, to the exclusion of the courts. It is not an unreasonable proposition that many disputes are resolved privately because at least one of the parties does not have equal bargaining capacity or the wherewithal or the financial capacity to obtain legal advice and representation. Indeed, the resolution of a matter should not on its own be an indicator that a party has achieved a just outcome.

For these reasons, NLA believes that improving the capacity of individuals to access court-based solutions to their legal problems where appropriate should be within the scope of the Inquiry. LACs must continue to grant aid for litigation services in appropriate circumstances, notwithstanding the fact that litigation is the most highly resource intensive activity of LACs and the solution that assists the least number of people within the LAC service mix.

²⁴ Ibid.

2.3.4 The value of dispute resolution

The reality for Australians with legal needs is that the various forms of dispute resolution available through a variety of forums are more likely to offer a pathway which will offer an acceptable outcome for all parties. LACs provide dispute resolution services and also refer people to other FDR service providers where it would be appropriate to do so and in accordance with various arrangements/protocols between providers.

Family dispute resolution services (FDR)

The general aim of LAC FDR programs is to resolve family law disputes before matters go to court or before a final hearing is needed if proceedings have commenced. Conferencing programs combine mediation and conciliation processes. Matters will only be conferenced where it would be appropriate to do so and all matters are screened for issues such as family violence. Generally, conferences are offered for parenting issues, and for some division of matrimonial property and spousal maintenance issues.

During 2012-13, Australia's LACs funded 8,067 family dispute resolution conferences using a mix of in-house and private family dispute resolution practitioners as chair people. 16,460 individuals participated in these conferences. 76% of these conferences resulted in full or partial settlement, with 49% being fully and 27% partially settled.

An immediate benefit of a full settlement is that the matter does not require ongoing funding, saving further litigation costs for both parties and the courts. A partial settlement restricts the issues in dispute and therefore results in reduced costs in terms of the length of court hearings with the attendant savings for the parties and the courts. Given that the cost of convening a FDR conference is significantly lower than providing a grant of aid for representation in the Family Court, the dispute resolution process produces direct financial benefits for the LAC and collateral efficiencies for the courts.

NLA would welcome the Productivity Commission also considering the value of establishing a national "duty mediation service" along the lines of the Court Ordered Mediation Program at Legal Aid NSW.

External dispute resolution services

A recent example of the effective role of dispute resolution services external to an LAC is the experience of the Financial Ombudsman Service and its handling of insurance claims arising from the 2011 Queensland floods and cyclones

Following the flood and cyclone disaster, it was soon recognised that significant legal issues were likely to arise for people affected by these events and a well publicised,

swiftly organised, coordinated response would be needed. Queensland Flood and Cyclone Legal Help (QFCLH) was established as an initiative of the Queensland Legal Assistance Forum, incorporating Legal Aid Queensland (LAQ), Queensland Association of Independent Legal Services, Queensland Public Interest Law Clearing House, Queensland Law Society, the Aboriginal and Torres Strait Islander Legal Service and the Bar Association of Queensland.

The Collaborative Insurance Law Service was subsequently launched to assist clients to progress their claims through their insurers' dispute resolution processes and beyond to the Financial Ombudsman Service. The CILS took detailed statements, reviewed hydrology reports, assessed the policy disclosure statements and insurance policies against the current benchmarks in the Insurance Contracts Act 1984 and other applicable law and codes of practice, and identified any legal issues. A written submission was prepared to rebut the insurer's claim refusal and advice given on any third party remedies.

A number of people benefited from receiving early legal advice and assistance, resulting in their insurance claim rejection being overturned. Internal dispute resolution submissions were made to insurers, and a number of these were successful. Matters that could not be resolved resulted in a referral to the FOS to review refusals or resolve delays in providing a response to an insurance claim.

By July 2013, the Flood Legal Response team had finalised 565 of its 569 files arising from these weather events. The outstanding four files were waiting for a determination from the FOS. This legal response assisted people affected by these events to recover over \$15M in insurance payouts.

3.0 Responding to future challenges

3.1 Making pathways for civil dispute resolution more accessible

3.1.1 Equity of access and personal capacity

There is not necessarily equity of access to avenues of civil dispute resolution for many individuals.

The capacity of an individual to seek justice through any number of forums will vary, for example, according to their level of literacy, understanding of the English language, age or level of education. The legal system, regardless of the forum, may also appear complex

and daunting for many people who may in usual circumstances be reasonably competent at self-expression and protecting their rights. However, when faced with what appear to be procedural complexities and a requirement for reasonable precision in submitting documentary information, these same people may opt for a 'do-nothing' approach and accept the adverse consequences of not having a matter adequately resolved.

NLA aims to prevent as many issues as possible from arising and escalating and to this end LACs aim to raise awareness of the law, legal issues, and legal assistance services through appropriate community legal education and training to community service providers. One example of an NLA prevention initiative is *What's the Law?* a flexible education resource for newly arrived migrants who are developing English language skills. *What's the law?* can help new arrivals to get basic information about some common legal issues, and identify legal problems and know how to get free legal help.

Where issues do arise, equity of access is facilitated by LACs by reason of good signage and branding (with LACs having high recognition rates according to the findings of the LAW Survey²⁵), and by the provision of an integrated suite of front-end legal aid services which seek to ensure accessible pathways for civil dispute resolution, i.e.:

- web based information services about legal issues and what help is available
- State/territory-wide legal assistance call centres which manage hundreds of thousands of calls every year about a vast range of legal issues; provide information/advice and channel people to legal aid services where appropriate, and also make other legal and non-legal referrals
- face to face information, advice and minor assistance clinics (delivered in some locations by video link), and
- duty lawyer services.

Whilst suggestions are made from time to time that equity of access would be supported by one on-line presence, or one contact point, NLA's experience has been that the differing laws and local conditions, such as capacity, across the country mean the clients are best served by service providers within their state/territory who understand these conditions and have good referral pathways with other providers established.

²⁵ Coumarelos, above n 2, xvi.

3.1.2 Information asymmetry

The importance of improving the access to and usability of civil dispute information is an effective response to the issue of information asymmetry, which is noted in the Inquiry's Terms of Reference as an issue of concern.²⁶ Removing the negative aspects of information asymmetry reduces the power imbalance between parties in the civil justice and assists with a more efficient market for legal information.

3.1.3 Duty lawyer services

LACs have expanded their duty lawyer services into family courts. These are generally "one-off" services which are offered at the door of the court, and which facilitate resolution of matters, and create savings for the justice system generally.

There is high demand for these services and significant growth in the numbers of the services being provided.

It should be noted that duty lawyer services are not however necessarily suited to the more complex cases and clients, as duty lawyers operate in high pressure quick turn-around environments.

NLA would welcome the Productivity Commission addressing the value of establishing a duty advice service at high volume civil tribunals where the service is not already provided.

3.2 Costs of accessing civil justice

3.2.1 Impact of legal aid restrictions

NLA refers to paragraph 2.3.2 of this submission 'Approaches to resource allocation - means testing and guidelines'.

The impact of legal aid restrictions is that some people who need legal assistance but cannot afford to engage a private legal practitioner will not receive a grant of legal aid for legal representation or the level of assistance that they need.

²⁶ Productivity Commission, above n 3, iv.

The only alternative for many people is to personally manage and to self-represent. Depending upon the complexity of the matter, this can result in a person being denied justice through a lack of opportunity to present their case in a meaningful manner.

NLA also refers to paragraph 1.6.5 of this submission 'Impact of legal need on individual lives'.

3.2.3 Situation in the Family Court

For many people, the family courts are the forum where people are most likely to have significant contact with the civil justice system, particularly if arrangements for children are in contention. The general position for LACs is that representation for matters in the family court is provided for only the most complex matters, where for example, issues of

It is NLA's observation that unit costs for litigated matters in the family law courts have experienced significant growth over recent years. This escalation in expense has been driven by factors including the increasing costs and scarcity of expert witnesses; increased filing fees; and a more extensive case management process within the courts. For those persons who are not receiving any form of legal assistance, this additional cost serves to further exclude their capacity to privately engage legal representation. Given the rate of contact of many people with the family law courts, NLA believes that any recommendations by the Productivity Commission to reduce the ongoing increases in expense in this forum would be extremely beneficial for a broad cross section of the community.

Family Court data consistently shows that over the past five years, around 35% of matters at trial have included at least one party who is self represented.²⁷ On the issues of self-represented litigants, the Family Court comments:

Self-represented litigants add a layer of complexity because they need more assistance to navigate the court system and require additional help and guidance to abide by the Family Law Rules and procedures.²⁸

A 2003 Griffith University study, funded by NLA, examined the characteristics of self-represented litigants in the Family Court and, in particular, considered the issue of links between the affordability of representation and the decision to self-represent. The

²⁷ Family Court of Australia, *Annual Report 2011-12* (2012) 61-62.

²⁸ *Ibid.*

following observations and conclusions were drawn in relation to the sample of 495 litigants, 85% of whom were self-represented and 15% who were represented:

Half the litigants interviewed currently did not have paid work. Those in paid work were more likely to be currently self-represented, while those not in paid work were more likely to be currently represented. Almost 60% of litigants were in receipt of some type of government benefit, although again, currently represented litigants were more likely to be in receipt of benefits than were currently self-represented litigants. Currently self-represented litigants were more likely to have an after-tax income of between \$25,000 and \$39,999 per annum, while currently represented litigants were more likely to have an after-tax income under \$25,000 or over \$40,000. This pattern suggests that people who are employed but earning less than \$40,000 after-tax are ineligible for legal aid but feel unable to afford a lawyer, and consequently decide to self-represent, while those earning more than \$40,000 after-tax are more able to afford their own lawyer.²⁹

The results of the research make it clear that there is an extensive relationship between the unavailability of legal aid and self-representation in the Family Court.³⁰

Notwithstanding the propensity of persons within a certain income range to self-represent if denied legal aid, the majority of self-represented litigants were reported as having used other services provided by LACs to assist them in their preparation. This included information and advice sessions and the use of the duty lawyer provided at court by LACs.³¹

3.2.4 Alternative assistance strategies

The position of people on low to middle incomes who fall outside means tests, but who are still not in a sufficiently strong financial position to purchase private legal services, is of ongoing concern to LACs. Again, family law is a particular area of focus where low to middle income earners have difficulty with the affordability of legal representation. This

²⁹ R. Hunter et al, *Legal Aid and Self-Representation in the Family Court of Australia*, Socio-Legal Research Centre, Griffith University (2003) iii.

³⁰ *Ibid*, v.

³¹ *Ibid*, 32.

is arguably a variation of the welfare trap, where the loss of welfare benefits above a set income threshold makes an individual worse off financially until increases to his or her income have more than offset the value of the welfare. Of course this assumes that legal aid payments are restricted on the basis of means only, with no component in relation to merit or areas of priority.

LACs have responded to this stratum of unmet need by providing other forms of self-help assistance, such as the video series 'When Separating'.³² This resource is available online through YouTube and presents a real-life scenario to guide separating couples through legal and parenting issues in the early stages of separation. The catalyst to this production was the demand from "mainstream" couples for advice and assistance which was beyond the resource base of LACs through traditional grant of aid or minor assistance programs.

3.3 Geographic constraints

3.3.1 General expense of travel

For individuals with a legal problem in the civil jurisdiction, particularly in the area of family law, the importance of face to face contact with a lawyer goes without saying. However, the reality for many Australians living in regional, rural and remote areas is that it is very difficult and in some cases impossible to have regular contact with a lawyer. The requirement in some cases to travel long distances to access legal advice adds to the cost of access to justice and in many cases adds a layer of expense which makes using a lawyer an even more financially difficult proposition.

3.3.2 Legal professional conduct rules concerning conflict

In regional centres with one or possibly two local lawyers, the legal professional conduct rules concerning conflict of interest often serve to exclude one party from accessing a lawyer in that location. In the simplest of terms, the conflict rule prohibits "lawyers engaging with their clients in circumstances involving a conflict of interest and duty...".³³ Inherent in this rule is a requirement that a lawyer may only act for one party in a matter. Consequently, if party A has engaged lawyer A - who is the only lawyer in the town - then

³² See <<http://www.whenseparating.legalaid.wa.gov.au>>.

³³ G.E. Dal Pont, *Lawyers' Professional Responsibility* (5th ed) (2013) 209.

lawyer A is duty bound not to accept instructions from party B, who is the respondent to party A's application. In a two lawyer town it will be necessary for party B to seek to instruct lawyer B. However, it is anecdotally the case that persons in the position of party A will often instruct lawyer A and lawyer B in order to exclude party B from any local access to legal advice or representation. The only recourse for party B is to seek a lawyer in another town and incur the additional expense associated with travelling longer distances. In some parts of Australia this can be significant.

Adding to the complexity of this issue is the rule that "where an individual lawyer cannot act because of a conflict between interest and duty, that conflict is not avoided by another person in the lawyer's firm...".³⁴

For people living in rural and regional Australia, this problem is likely to become more prevalent over the medium to long term, with the future sustainability of legal practices in these areas in doubt. The Law Council of Australia in its *Survey of legal practitioners in rural, regional and remote (RRR) areas of Australia* (2009) reported the likely closure of many RRR practices over the next five to ten years due to no succession plan being in place; and the intention of many young lawyers to return to the city after short periods in RRR practices, in search of better remunerative outcomes. The survey also noted that 51% of the firms surveyed undertake legal aid work and 64% provide pro-bono services.³⁵

The restriction caused by the conflict rules has a particular impact upon legally aided clients in rural and remote areas (and persons generally in the group which is the focus of the Productivity Commission Inquiry). NLA believes that there is merit in the Productivity Commission investigating the effect of some relaxation of the conflict rules in these locations, particularly in relation to the rule excluding different lawyers in a single firm representing both parties to an action. The consideration should also extend to LACs, CLCs, Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS). NLA understands that such a change would need to be limited to the unique circumstances of locations where access to lawyers is extremely limited. Certainly for larger organisations, such as LACs, NLA considers that there may be the potential to establish Chinese walls to overcome any actual or perceived conflict (noting of course the required 'organisational elements' of Chinese walls).³⁶

³⁴ Ibid, 210-11.

³⁵ Law Council of Australia, *Survey of legal practitioners in rural, regional and remote (RRR) areas of Australia* (2009) <http://rrrlaw.com.au/media/uploads/RRR_report_090709.pdf> at 19 October 2013.

³⁶ Dal Pont, above n33, 300-302.

3.3.3 Problems of extreme remoteness

While not strictly linked to the cost of accessing civil justice, NLA believes the Productivity Commission must consider the position of those Australians living in the nation's most remote and often disadvantaged locations. In many of these areas the only access to a lawyer occurs on a handful of occasions when a duty lawyer from a LAC and/or ATSILS arrives to provide criminal duty lawyer services for the visiting circuit Magistrate's Court. These are locations where there is never any service delivery from the private profession and access to information and advice on civil matters may only occur after the duty lawyer has dispensed with her or his primary responsibilities to the court. It is often the case that the window of opportunity to provide civil law assistance is limited to a few hours, with many people with legal problems needing to wait until future visits to receive the most rudimentary level of service.

NLA would welcome the opportunity to convene a visit for the Productivity Commission to a very remote location where geography presents an extremely high barrier to access to justice.

3.4 Self-represented litigants

Of particular importance is the availability of services and resources which guide self-represented litigants through the legal process and court procedure. As mentioned previously, the presence of self-represented litigants can add a layer of complexity to the court process. LACs provide duty advice and lawyer services in civil courts and tribunals including the Family Court and the Administrative Appeals Tribunal. The presence of duty lawyer services on the day at court has been proven to contribute to the effectiveness and efficiency of the court process for both the client and the court or tribunal.³⁷ LACs also produce a wide range of self help resources and community legal education services. These range from resource kits for parents when their partner will not follow court orders in relation to children or appealing a Centrelink decision, to divorce classes which assist people to complete a divorce application.

³⁷ *An evaluation of Legal Aid NSW's Early Intervention Unit Duty Service at Parramatta Family Law Courts*, Law and Justice Foundation, 2012 www.legalaid.nsw.gov.au/_data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf found that the duty service contributed to the efficiency and effectiveness of the court process by: diverting matters that should not have been in court and advising and assisting clients to take the most appropriate course of action; and contributing to the resolution of matters on the day through the drafting of documents, including providing a 'reality check' with clients – while explaining the processes and implications and negotiating with other parties for clients.

3.5 Better measurement of performance and cost drivers

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

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 LAW Survey which has been referred to extensively in this submission.

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.

3.5.2 What data are and can be collected across the justice system to enable better measurement and evaluation?

See paragraph 2.3.1 of this submission 'Outputs and resources'.

3.5.3 How can the costs of data collection be minimised?

NLA believes that whilst the collection and supply of data and other information is important it needs to be relevant to designing and improving service delivery.

The LACs have, over the years, made a considerable investment in computer software which collects data for their specific needs and to supply the information requested by Commonwealth and state/territory funding bodies. Data gathered relates to the LACs core tasks and their financial management systems. As the cost of systems adjustment are high and volumes of service delivery would mean manual collection was resource intensive, requests to produce data outside of these parameters has the potential to impose significant additional costs burdens.

Currently, pursuant to the National Partnership Agreement on Legal Assistance Services, it is understood that data provided to the Commonwealth was passed to ACIL Allen Consulting for use in its review of the NPA on legal assistance service delivery. The report of the Review is yet to be released but we understand will address data collection.

The effort required to collect data should be proportionate to its usefulness. It must be practical and cost effective to collect. It must be capable of being collected accurately.

3.5.4 What is the value of the data currently being collected?

Data collected by NLA and LACs is used for all sorts of purposes associated with effective budget and service management, to understand who is using the service, to inform service delivery and to achieve access and equity targets.

3.5.5 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?

Please see above.

The LACs collect data about the personal circumstances of their clients 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.

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

NLA has a website which includes detail about funding sources, statistical data, and submissions. The website can be found at: <http://www.nationallegalaid.org/>.

Each LAC also maintains its own website and produces annual reports which contain information which may be of interest to the Productivity Commission.

Not all information regarding the work of LACs is publicly available as the LACs are bound by secrecy provisions in enabling legislation, other confidentiality requirements relating to information which would identify their clients, and legal professional privilege.

Conclusion

NLA thanks the Productivity Commission for the opportunity to make this submission. We would be happy to provide any further information that the Productivity Commission would consider useful, and to arrange a visit by Productivity Commission personnel to any of the locations in which we deliver services.

End.