

**Inquiry into Access to Justice Arrangements**  
**Legal Aid NSW Submission to the Productivity Commission**  
**May 2014**

Legal Aid NSW welcomes the opportunity to make this submission to the Inquiry into Access to Justice Arrangements. If you would like to discuss its content further, please contact Jane Pritchard, Manager Review and Strategy .

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## Introduction

Legal Aid NSW appreciates the extensive inquiry and analysis undertaken by the Productivity Commission into legal need and access to justice arrangements. This submission responds to the Productivity Commission Access to Justice Arrangements Draft Report (Draft Report) findings, recommendations and information requests, and also provides comments where other issues arise in the Draft Report. A list of supported recommendations is contained in Annexure A.

Additional explanatory information is also annexed to this submission.

### *Future direction of legal aid*

Legal Aid NSW has outlined what it considers to be key components of a future National Partnership Agreement that addresses the legal need of the socially and economically disadvantaged. In summary, Legal Aid NSW welcomes the Productivity Commission's 'assessment that the NPA is a national agreement on paper but is not necessarily working as such in practice' (p.669). In addition, we strongly support the Productivity Commission's statement that:

A true agreement between the Commonwealth and the states and territories on issues such as national priority areas of law and legal problems, priority clients, and eligibility for assistance, would facilitate a more 'holistic' approach to client needs and reduce overlap. (p.669)

Legal Aid NSW submits that negotiation of a national agreement on LAC and CLC legal assistance services should include jointly agreed:

- service priorities, which respond to legal need, capacity of the client and impact of the legal problem on a person's life.
- priority clients and benchmarking against social disadvantage indicators.
- appropriate eligibility principles, including a new realistic means test that looks at indicators of disadvantage and extends assistance to the working poor.<sup>1</sup>
- additional and appropriate Commonwealth/State funding that addresses unmet legal need among disadvantaged people, provides appropriate fee scales for private practitioners<sup>2</sup> and provides a measure of permanency in service delivery arrangements.
- understanding of unbundled services including advice, community legal education, alternative dispute resolution and duty services.
- data definitions and counting rules to enable effective evaluation.

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<sup>1</sup> See the response to Draft Recommendation 21.3 and 21.4 for further analysis of the means test.

<sup>2</sup> See the response to Information request 21.2 for further analysis of private practitioner fees.

## Understanding and measuring legal need

### ***Draft Finding 2.1***

Based on the most recent data, around 17 per cent of the population had some form of unmet legal need that related to a dispute that they considered substantial.

### ***Draft Finding 2.2***

Informal dispute resolution mechanisms such as ombudsmen could be better employed to address a significant share of unmet legal need, potentially reducing the proportion of the population with unmet legal need from 17 per cent to less than 5 per cent.

Legal Aid NSW welcomes the analysis undertaken by the Productivity Commission to quantify unmet legal need. It does however note that the LAW Survey was a general population survey. While the LAW Survey is a valuable evidence source, it was not designed to target disadvantaged people and did not survey people without landlines, homeless people and people in prisons and institutions. As a result, Draft Finding 2.1 represents unmet legal need of the general population.

Given that disadvantaged people are vulnerable to multiple and substantial legal problems, Legal Aid NSW believes the proportion of disadvantaged people with unmet legal need will be significantly higher than 17%. We suggest that extending draft finding 2.1 to extrapolate the level of unmet legal need among disadvantaged people would provide valuable data for targeting legal assistance services.

The identification of unmet legal need is also complicated by people receiving partial assistance, whether through a legal or non-legal advisor, that does not resolve their legal need. This situation often arises when resolution of a legal problem requires representation at court and the individual is unable to afford representation and cannot access free representation.

Legal Aid NSW believes that Draft Finding 2.2 should also be treated with caution, particularly in relation to disadvantaged groups. Ombudsman services are very different from legal assistance services. In our experience, disadvantaged clients will frequently lack the capacity to effectively use ombudsman services because they are illiterate, have English as a second language, or suffer from a cognitive or mental health impairment, or low educational attainment. In addition, Ombudsman's services have little relevance to family law problems.

Ombudsman services, while important and perhaps under-utilised, are not the primary solution to civil (including family) dispute resolution.

## Understanding and navigating the system

### *Understanding when problems have a legal dimension*

#### **Information Request 5.1**

The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support.

Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?

#### **Information Request 5.2**

Information is sought on the costs and benefits of adopting the legal problem identification training module (being developed by the Commonwealth Attorney-General's Department and Department of Human Services) more widely among non-legal workers who provide services to disadvantaged groups.

Feedback is also sought on which agencies' staff should receive this training and whether funding should be provided to cover training costs.

Legal Aid NSW is unable to comment on the Attorney-General's legal problem identification training module. However, we have recently completed a preliminary assessment of the *Law Check-up* developed by Legal Aid NSW, through a pilot in five community based agencies targeting homelessness.

The *Law Check-up* is a legal checklist tool for use by community workers and non-legal caseworkers to gain an earlier pathway to legal assistance for clients. In conjunction with a training session and referral information, the *Law Check-up* enables non-legal agencies to 'diagnose' and assess the level of a client's legal need and to meet that need with appropriate legal referrals.

The preliminary assessment of use of the *Law Check-up* in five homeless outreach clinics in late 2013 found that it was successful in:

- increasing community workers' knowledge of civil law in all five locations.
- increasing referrals to the outreach clinic in three locations.
- increasing the range of civil law matters referred from three locations.
- strengthening the relationship between Legal Aid NSW and the host agency in four locations.

Significantly, incorporating the *Law Check-up* in the intake procedures of the community agency correlated with increased referrals to Legal Aid NSW advice clinics. The results of the preliminary assessment suggest that the tool can have a significant impact in the right agency setting.<sup>3</sup>

The contribution of a legal checklist in itself is limited unless publicly available legal assistance services are available to address the identified legal needs. In addition to providing legal referral options, legal assistance services must have the resources to train community workers and non-legal caseworkers in how to use the checklist. The effectiveness of the tool is also enhanced when legal assistance services maintain an ongoing relationship with non-legal agencies.

#### *Additional comments*

In relation to recommendation 5.1, the evidence is that vulnerable groups should also include Aboriginal and Torres Strait Islander communities, people in remote or outer regional areas, people with low education levels, prisoners and people who are institutionalised.

#### *Information and advice for resolving disputes*

##### ***Draft Recommendation 5.1***

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

Legal Aid NSW supports recommendation 5.1. However, part of the success of LawAccess NSW is its role as a central point of contact as opposed to a single point of contact. In addition, LawAccess NSW customer service officers use resources developed by Legal Aid NSW and other specialist legal services. Aside from the

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<sup>3</sup> For example, where *Law Check Up* becomes part of standard intake in the non-legal community agency and where intake is undertaken by a smaller number of paid staff, rather than a larger pool of volunteer staff.

LawAssist<sup>4</sup> and its internal knowledgebase,<sup>5</sup> LawAccess NSW staff do not develop legal publications.

LawAccess NSW is a contact centre. Its staff are highly skilled in providing telephone legal information, referrals and advice. Production of effective plain language legal resources requires a different, highly specialised skill set.

Legal Aid NSW questions the viability of the suggestion (p.164) that a central telephone service should take the lead on developing self help resources, booklets and information packs. The suggestion appears to be inconsistent with the later statement that 'CLCs, ATSILS and FVPLS should leverage more off the LACs in the area of information and resources' (p.616).

Experience has shown that the production of information resources is most effective and efficient when undertaken by the agency with the most expertise in the area of law and with high levels of client contact, and when resources are developed in close consultation with other relevant agencies

In addition, within the NSW legal assistance sector there is already a high level of collaboration in the development of plain language legal resources.<sup>6</sup> The NSW Legal Information and Referral Forum<sup>7</sup> is just one mechanism used to share and collaborate in the development of legal information resources.

Legal Aid NSW also suggests a cautious approach be taken to the role of online referral tools in addressing legal need. An effective legal referral requires skill, training and tools to identify the nature of the legal problem and its urgency and the most appropriate legal assistance service. The legal assistance sector is complex with different jurisdictions, multiple pathways to resolve legal problems and services with different catchments, priority groups, service times and eligibility criteria. To date the legal referral process has not been effectively reflected in an online tool or website.

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<sup>4</sup> LawAssist [www.lawaccess.nsw.gov.au/lawassist](http://www.lawaccess.nsw.gov.au/lawassist) is a self-help resource to assist people going to court. LawAssist was developed in conjunction with Local Courts, Legal Aid NSW and specialist Community Legal Centres.

<sup>5</sup> LawPrompt is the internal knowledgebase used by LawAccess NSW customer service officers to answer frequently asked questions. LawPrompt is currently available to the entire legal assistance sector in NSW.

<sup>6</sup> Joint publications include the *Discrimination Toolkit* [www.legalaid.nsw.gov.au/publications/factsheets-and-resources/discrimination-toolkit](http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/discrimination-toolkit)  
*Mortgage Stress Handbook* [www.legalaid.nsw.gov.au/publications/factsheets-and-resources/mortgage-stress-handbook](http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/mortgage-stress-handbook) *Speaking for myself* [www.legalaid.nsw.gov.au/publications/factsheets-and-resources/speaking-for-myself](http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/speaking-for-myself)  
*Appealing to the Social Security Appeals Tribunal* <http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/appealing-to-the-social-security-appeals-tribunal>

<sup>7</sup> [www.lawfoundation.net.au/ljf/app/C791FCE680DC67ACCA25714D00059B93.html](http://www.lawfoundation.net.au/ljf/app/C791FCE680DC67ACCA25714D00059B93.html)



### *Additional comments*

Legal Aid NSW suggests the reference to the 2013 Legal Aid NSW client satisfaction survey (p.163) be modified. While 95% of clients were satisfied with the service provided by clerical staff, these staff do not provide legal advice.

### *Referring people to appropriate sources of advice*

Legal Aid NSW welcomes the Productivity Commission's recognition of the important role of outreach services. The Draft Report states:

Outreach services — defined as a proactive approach to contact clients or potential clients to relay information, advice and assistance — can play an important role in identifying legal problems and making legal information available to groups who are unlikely to be reached by more general education initiatives. (p.170)

Legal Aid NSW outreach services go further than identifying legal problems, and providing legal information and community legal education. The primary focus of our outreach lawyers is the provision of legal advice aimed at resolving disadvantaged clients' legal problems. We now provide legal advice services in 198 regular outreach locations.

The Law and Justice Foundation of NSW (LJF) recently completed stage two of the review of Legal Aid NSW outreach services.<sup>8</sup> The review highlights the diversity in outreach practice that arises in response to diverse needs and capabilities of clients, geographical contexts, resourcing, opportunities for local engagement, and the available local services scaffolding to build upon.<sup>9</sup>

The outreach review details features of good practice which include:

- well planned and targeted services.
- coordination and collaboration of outreach, within Legal Aid NSW and between Legal Aid NSW, host agencies and other services.
- services that connect and engage clients.
- services that are appropriate to clients' legal need and capability, and that are consistent and flexible.
- effective referral pathways.
- recognition that legal outreach may be considered a specialist form of practice.

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<sup>8</sup> Review of Legal Aid NSW outreach legal services. Stage two report: Evolving best practice in outreach - insights from experience , Suzie Forell, Hugh M. McDonald & Stephanie Ramsey and Sarah A. Williams, 2013

[www.lawfoundation.net.au/ljf/site/articleIDs/D62199089BDDD5D3CA257C9700112861/\\$file/Review\\_of\\_Legal\\_Aid\\_outreach\\_Stage2\\_FINAL\\_WEB.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/D62199089BDDD5D3CA257C9700112861/$file/Review_of_Legal_Aid_outreach_Stage2_FINAL_WEB.pdf)

<sup>9</sup> Ibid p.2

- suitable administrative support arrangements for all stages, from intake through to referral.
- sustained and supported services.<sup>10</sup>

### **Information request 5.3**

The Commission seeks feedback on how best to facilitate effective referrals for legal assistance between organisations responsible for human service delivery, and, where appropriate, greater information sharing across departments and agencies.

Experience has shown that facilitating effective referrals and information sharing between human service agencies and legal assistance services requires multiple approaches. Legal Aid NSW has a number of programs and initiatives that facilitate effective referral and information sharing. Examples outlined below include outreach legal advice services, the Cooperative Legal Service Delivery Program, legal checklists and health/justice partnerships.

#### Outreach legal advice services

Outreach services have been shown to effectively reach people with complex needs who have not sought assistance before or who would not have otherwise sought legal assistance.<sup>11</sup> In 2012-13, Legal Aid NSW provided 12,781 legal advice services through outreach.

The 198 outreach locations and host agencies are selected based on legal need,<sup>12</sup> existing use by the targeted client group and accessibility. Outreach service locations include homeless services, Aboriginal medical services, Aboriginal community organisations, Migrant Resource Centres, Neighbourhood Centres, Settlement Services, Centrelink, courts and correctional facilities.<sup>13</sup>

An evaluation of the role of legal aid lawyers in homelessness projects found that the legal services being provided were extremely effective in not only improving outcomes for individual clients of programs but also in increasing the access of legal services by the broader community of homeless and disadvantaged people in each region.<sup>14</sup>

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<sup>10</sup> Ibid p.2

<sup>11</sup> Outreach legal services to people with complex needs: what works, Law and Justice Foundation of NSW, *Justice Issues* Paper 12 October 2009 , [www.lawfoundation.net.au/ljf/site/articleIDs/69EBF819BDD1BB8BCA25766A0082208C/\\$file/JI12\\_Complex\\_Needs\\_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/69EBF819BDD1BB8BCA25766A0082208C/$file/JI12_Complex_Needs_web.pdf)

<sup>12</sup> In addition to analysing express and unmet legal need, Legal Aid NSW staff use the Find a legal aid advice service, which now includes Community Legal Centre outreach services.

<sup>13</sup> One third of Legal Aid NSW outreach clinics are in community centres, 16% in Aboriginal services and 25% in courts and tribunals.

<sup>14</sup> *Evaluation of the legal component of the Riverina Homelessness Interagency Project and Reaching Home Newcastle*, Matrix on Board (2012) p.6

Analysis of Legal Aid NSW referral data reveals that a significantly higher proportion of clients reached through outreach are referred by a community organisation compared with clients assisted at a legal aid office.<sup>15</sup>

In light of this evidence, Legal Aid NSW is currently exploring establishing a specialist legal advice outreach service based at a Centrelink office where Centrelink Complex Case Managers will use a legal diagnostic tool to identify and refer clients, especially those with complex issues, to legal aid lawyers.<sup>16</sup>

### Cooperative Legal Service Delivery Program

The Cooperative Legal Service Delivery (CLSD) Program has been highly successful in improving access to legal services in regional areas of NSW. By building cooperative networks between local agencies,<sup>17</sup> CLSD enables effective referral paths between human service delivery agencies and legal assistance providers. The evaluation of the CLSD program found participants from 171 different service types attended CLSD meetings.<sup>18</sup>

Each CLSD partnership has a Regional Coordinator based at a local organisation which provides support for the partnerships. CLSD partners work collaboratively on projects that respond to locally identified, emerging and unmet legal need. Initiatives under the auspice of CLSD partnerships typically include community legal education, workshops, training and outreach advice clinics. The work of CLSD partnerships is informed by strategic planning workshops which use local and empirical evidence of disadvantage and legal need to determine service priorities which are then set out in regional Action Plans.

The CLSD evaluation found that at a regional level CLSD has:

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[www.legalaid.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0006/15828/Legal-Aid-NSW-Homelessness-Projects-Final-Dec2012.pdf](http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0006/15828/Legal-Aid-NSW-Homelessness-Projects-Final-Dec2012.pdf)

<sup>15</sup> 14.4% compared to 2.9%. Review of Legal Aid NSW outreach legal services - Stage 1 report Statistical overview of services 2010-2012, Law and Justice Foundation of NSW, 2013

[www.lawfoundation.net.au/ljf/site/articleIds/3495F5A93BBB91BDCA257BD000143795/\\$file/Review\\_of\\_LegalAidNSW\\_outreach\\_Stage1\\_FINAL\\_Web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIds/3495F5A93BBB91BDCA257BD000143795/$file/Review_of_LegalAidNSW_outreach_Stage1_FINAL_Web.pdf) p.27

<sup>16</sup> Legal Aid NSW also has legal advice outreach services located at Centrelink offices in Broken Hill, Bathurst, Cessnock, Maitland, Taree and The Entrance.

<sup>17</sup> Networks typically include Legal Aid NSW regional offices, Community Legal Centres, the Aboriginal Legal Service (NSW/ACT) Ltd, Aboriginal Programs including Aboriginal Community Justice Groups and Circle Sentencing, LawAccess NSW, Local Courts, tenancy, family violence, youth, disability and financial counselling services, local community, neighbourhood and settlement services as well as pro bono legal services, government departments, health services and regional Legal Information Access Centres through local libraries.

<sup>18</sup> Evaluation of the CLSD Program Final Report, August 2012, [www.legalaid.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0012/15240/Evaluation-CLSD-Final-Report-August-2012.pdf](http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0012/15240/Evaluation-CLSD-Final-Report-August-2012.pdf)

- a high level of support from participating partners, who confirm its value as a model to improve access to legal services for disadvantaged people.
- delivered improved referrals between agencies, increased partners' access to information and increased contact between partner agencies.
- increased knowledge among legal and non-legal agencies about the impact of laws on disadvantaged populations.
- assisted in identifying gaps in legal and related services for disadvantaged people in regional areas through cooperative processes.
- delivered collaborative projects that have given some disadvantaged people increased legal assistance on specific issues.<sup>19</sup>

#### Legal Checklists and diagnostic tools

Legal checklists and diagnostic tools are another means of facilitating effective referrals between agencies. However, a preliminary assessment of the Legal Aid NSW *Law Check-up* found that it was the incorporation of the tool in intake procedures of the community agency that resulted in increased referrals to legal assistance services. See the response to Information request 5.1 and 5.2 for further details.

#### Health/Justice partnerships

As a result of the 2013 'Law and Disorders' Forum, a Health and Justice Taskgroup has been established as part of the NSW Department of Premier and Cabinet Sydney East/Great Western Sydney Regional Leadership Group.

The Sydney East Justice and Health Task Group<sup>20</sup> will explore more effective models of collaboration between the Health, Justice, and Family and Community Services sectors with a view to building on existing approaches and identifying possible areas where joint work could be progressed. Possible models or approaches may be trialled within the Sydney East/Greater Western Sydney Region as demonstration projects.

The role of the group is to:

- identify client groups with specific vulnerabilities who have contact with Health, Justice, and Family and Community Services systems.
- identify systemic challenges/gaps for resolution.
- provide analysis of challenges, gaps and opportunities to the Regional Leadership Group.

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<sup>19</sup> Ibid p.4

<sup>20</sup> Participants include representatives from Department of Police and Justice, Department of Premier and Cabinet, Sydney East, Department of Premier and Cabinet, Sydney West, Legal Aid NSW, South Eastern Sydney Local Health District, Sydney Local Health District, Northern Sydney Local Health District, Mental Health Commission and Family and Community Services, Northern Sydney District.

- initiate projects to develop and test strategies to improve outcomes for clients of the Health, Justice and Family and Community Services systems.
- improve collaboration and understanding between Justice, Health, and Family and Community Services agencies.

Following a recent presentation on the 'law as a social determinant of health' to the Western Sydney Population Health Leadership Group,<sup>21</sup> an additional working group has been established to progress Health and Justice partnership opportunities in Western Sydney.

Legal Aid NSW also notes the important role of building relationships with human services community workers and agencies through inter-agency meetings and forums.

## **A responsive legal profession**

### *Regulation of the profession*

#### **Information request 7.4**

How should money from 'public purposes' funds be most efficiently used?

The NSW Public Purpose Fund (PPF) provides a significant, if diminishing, component of Legal Aid NSW funding.<sup>22</sup> The PPF Trustees have advised of further reductions in discretionary payments for 2014-15. Section 292(3) of the *NSW Legal Profession Act 2004* prioritises the adequate supplementation of the Legal Aid Fund over other discretionary payments. Legal Aid NSW would not be able to maintain its existing levels of legal assistance for disadvantaged people without the discretionary payments from the PPF.

Given the declining nature of the fund, Legal Aid NSW suggests that consideration be given to prioritising supplementation of the Legal Aid Fund and in turn other assistance services, over other disbursements from the PPF, particularly the costs and expenses arising from regulation of the legal profession.

#### **Information request 7.5**

In what areas of law could non-lawyers with specific training, or 'limited licences' be used to best effect? What role could paralegals play in delivering unbundled services? What would be the impacts (both costs and benefits) of non-lawyers with specific training, or 'limited licences', providing services in areas such as family law, consumer credit issues, and employment law? Is there anything

<sup>21</sup> The Western Sydney Population Health Leadership Group includes representatives from Aboriginal Health, Drug and Alcohol, Mental Health, Community Health, Oral Health, Children's Hospital Westmead, Public Health unit, Multi-cultural Health and Health Promotion.

<sup>22</sup> In 2013-14, the PPF discretionary payments make up 16% of Legal Aid NSW revenue.

unique to Australia that would preclude the adoption of innovations that are occurring in similar areas of law overseas? If so, how could those barriers be overcome?

### *Paralegals*

Legal Aid NSW employs a number of paralegals to assist with civil law work. For example, outreach clinics and specialist projects such as the Indigenous Consumer Law project, the Children's Civil Law Service, the Work and Development Order project and the employment law service have paralegal support.

Our paralegals' role includes legal tasks which are supervised by Legal Aid NSW lawyers. These tasks include legal research and delivery of community legal education. More complex tasks include assisting with advice clinics by taking notes during client interviews and recording the advice given, and assisting with Tribunal and Court proceedings by taking statements from clients. In addition, they may assist in preparing applications to the Fair Work Commission and the Federal Circuit Court, for example.

Other tasks undertaken by paralegals may include preparation of briefs to counsel, and drafting letters to clients or to the other party. They also attend on return of subpoena listings, access the documents produced and make information requests to government departments, negotiating the parameters of the request.

In addition, Legal Aid NSW paralegals undertake straightforward casework in basic matters including consumer debt and consumer credit matters. For example, paralegals are trained to write to creditors requesting debt waivers using template letters. They assist clients to lodge disputes with Financial Ombudsman Service or to write to creditors requesting Internal Dispute Resolution. In discrimination matters, paralegals are trained to draft complaints for clients to the Anti Discrimination Board and Australian Human Rights Commission. They assist with annulment applications and letters of complaint against authorities. They also maintain contact with clients, which is particularly important with client groups who require frequent and consistent contact.

The use of paralegals in this way has the most impact in areas where there is a high level of unmet legal need and where there is limited or no other legal services.

Assistance from paralegals enables our lawyers to carry a larger caseload, assist more clients and focus on more complex matters. The benefits of skilled paralegals undertaking appropriately supervised legal tasks, particularly repetitive tasks, significantly outweigh the cost of their task supervision, training and practice management.

### *Role of lawyers*

The integrity of the Australian legal system is protected by the stringent training and best practices of legal practitioners. Lawyers have a unique set of skills underpinned

by complex critical legal analysis and extensive training, and practical knowledge of the law.

Unlike paralegals and non-lawyers, lawyers have paramount duty to the court and the administration of justice. Lawyers are accountable to and regulated by the Law Society of NSW.

Non-lawyers are not equipped to provide legal advice, manage cases or understand the implications to the client's rights and interests of decisions made. For example, the *LAW Survey* identified that family law clients often have four or more legal problems that involve a variety of aspects of the law. In these circumstances a wider knowledge of the law is required, as well as the capacity to interpret legal developments, case law and legislation.

While paralegals have a valuable role in undertaking supervised legal tasks, their role should not extend to tasks which have legal implications for the rights or interests of parties. For example, tasks such as giving legal advice, drafting court pleadings, making decisions about case management, gathering and using evidence, and advocacy and settlement negotiations, require a thorough knowledge of the law and must be undertaken by a lawyer.

It is for these reasons that Legal Aid NSW offers a lawyer assisted model of family dispute resolution. Legal Aid NSW clients have complex legal needs and vulnerabilities that can best be accommodated through a lawyer assisted model. With lawyer assisted mediations, agreements can be negotiated and court orders drafted and signed on the day of the mediation. The scope of agreements can be broader than a parenting plan. Costs and on-going conflict can be minimised by drafting realistic and legally sound proposals that mirror best practice case management. It is the experience of Legal Aid NSW that it is hard to gain agreement after the mediation if parties are not encouraged to commit to an agreement at the mediation.

When a legal problem is delayed, or improperly managed, there are social and economic implications. Protracted legal disputes affect families and communities and lead to an increase in demand for Government services across all sectors.

While acknowledging the important role of veteran and tenant advocates, Legal Aid NSW suggests that limited licences and the delivery of unbundled legal services by unsupervised paralegals be approached with caution.

## **Alternative Dispute Resolution**

*Can ADR be used more extensively?*

### ***Draft recommendation 8.1***

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to

encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

### ***Information request 8.1***

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to \$50 000).

What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions?

The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

#### *Family law*

Legal Aid NSW supports models that require mediation as a pre-action process. For example, our family law guidelines require mediation prior to funding court proceedings.

The Legal Aid NSW Court Ordered Mediation Program (COMP) demonstrates that ADR can be used in urgent or other family law matters that may initially appear unsuitable for mediation. Under the COMP scheme parties are diverted by order of a Judge to participate in a court ordered mediation before further decisions are made. This allows the areas of dispute to be determined and often narrowed. Many legal issues are resolved at these intervention conferences. The mediation can also include the child and importantly, provide a cost effective method of resolving the views of the child where an ICL has not been appointed.

COMP currently operates at Parramatta and Sydney Family Court registries and occasionally at Dubbo Family Court registry. The service also provides litigation intervention for litigants who were initially exempt from mediation before filing.

Eighty four percent of COMP participants had been exempt from participating in mediation before filing.<sup>23</sup>

Of the 172 mediations conducted in 2012-13, 44% achieved full agreement, saving 129 days of hearing time. A further 44% of mediations achieved partial resolution, saving court time by narrowing the issues in dispute. Legal Aid NSW estimates that

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<sup>23</sup> Percentage of previously exempt participants from the 67 mediations conducted between 1 July 2013 and 30 October 2013. Recent data shows that 70% of matters referred to COMP by judicial officers were previously deemed inappropriate by Registrars and given exemptions from mediation.



these resolutions under the COMP scheme saved it funding 253 hearing days, at least \$460,460.<sup>24</sup>

By resolving issues at the most appropriate lowest level, Legal Aid NSW is providing effective, efficient and economical services as well as saving court time and resources, and costs to the community.<sup>25</sup> There is potential to expand the COMP model into all Family Law Court registries. Legal Aid NSW believes that the savings associated with the reduction in court time would outweigh the cost of rolling out the COMP model.

With additional resources, COMP and lawyer assisted mediation to cover matters initially considered inappropriate for mediation and matters for disadvantaged people who are currently excluded under the means test or policy restrictions, for example, for complex property settlements where there is a thin market.<sup>26</sup>

There is also a potential for late stage mediations before the hearing, for example, after receiving a family report or a single expert report. Later stage mediations should be conducted on a conciliation model basis, similar to the COMP scheme.

#### *Additional comments*

Legal Aid NSW conducts property mediations when there is an associated children's matter. Experience shows that property mediations could benefit from stricter guidelines on full disclosure of information.

Given that complex financial issues can arise in property matters, Legal Aid NSW notes the potential role for family law property arbitrations. Queensland Legal Aid has a model of family law property arbitration conducted by barristers, with both written and oral evidence. Arbitrators would need to be appropriately trained and accredited.

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<sup>24</sup> Legal Aid NSW fee scale provides a daily rate of \$700 for a solicitor to attend a hearing and a minimum of \$1,120 for counsel's appearance. Often Legal Aid NSW funds more than one party in a matter.

<sup>25</sup> The *Family Dispute Resolution services in legal aid commissions: Evaluation Report*, prepared for Commonwealth Attorney-General's Department by KPMG, (2008) p.88 [www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0016/5434/FDR-Evaluation-Report.pdf](http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0016/5434/FDR-Evaluation-Report.pdf) found Legal Aid NSW providing a highly cost effective model of FDR making it effective in avoiding the higher cost of litigation. The lawyer assisted model was found to enable FDR practitioners to use a range of clinical and legal strategies to manage complex legal and support needs. The model was also found to be effective in identifying family violence and child abuse at screening. Since this report was published Legal Aid NSW has significantly enhanced its family law service model with the introduction of the EIU, Duty services and COMP.

<sup>26</sup> For example, where the assets are relatively small, hidden or where the client has complex needs.

## *Civil law*

### Compulsory mediation

As noted in the Draft Report, for Alternative Dispute Resolution (ADR) to be effective parties have to conciliate or mediate in good faith. When parties are opposed to ADR, ordering them to attend mediation can be ineffectual.

Legal Aid NSW agrees there are advantages to ADR that go beyond settlement of a matter, such as fact finding and narrowing of issues that facilitate more efficient hearings.

Legal Aid NSW believes there is potential for bodies like the NSW Anti-discrimination Board (ADB) to implement a compulsory conciliation system. Currently the ADB's only means of bringing about a resolution is to conduct a conciliation which requires both parties' consent. The ADB has no compulsory powers. If the parties unsuccessfully conciliate, or don't conciliate at all, the dispute is referred to the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal (NCAT).<sup>27</sup>

Legal Aid NSW suggests that where either party opposes mediation, the conciliation process at the ADB could be a fact finding exercise aimed at narrowing the issues in dispute. Then if a party refused to participate without reasonable excuse, there could be a sanction, for example, a presumption that the claims of the consenting party have been made out.

At NCAT mediation could also be compulsory, except where there was a reasonable excuse. At the hearing the onus would then be on the respondent to rebut the presumption that the claims of the consenting party have been made out. The result is similar to a default judgment.

Legal Aid NSW also notes the importance of compulsory powers in dispute resolution. Just because a forum is less adversarial and more inquisitorial does not mean there cannot be compulsive powers.

The Fair Work Ombudsman ADR model, for example has powers to investigate and litigate where appropriate against an employer. However, such powers are only effective and fair if the ADR scheme exercises these powers and does not encourage settlements in lieu of investigation and litigation.

Not all cases are suitable for mediation. Such cases may include cases that are complex due to the subject matter, the point of law, the evidence or the number of parties involved. In addition, ensuring that those who lack capacity to represent their own interests are not disadvantaged through compulsory mediation must be a key

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<sup>27</sup> NCAT's case management process includes a number of case conferences before the matter is set down for mediation. Case conferences bring the parties together to discuss and narrow the issues in dispute. There is always mediation, although a party can refuse to participate. If the matter fails to settle at mediation it will go to a hearing.

factor in considering whether compulsory mediation is appropriate. Any guidelines on the restriction of representation must include provisions for people who lack the capacity to effectively self represent.

There are a number of areas of civil law where compulsory mediation would have merit in providing a low cost forum to resolve disputes and narrow issues, subject to appropriate protections for people who lack capacity to represent themselves. Examples include, consumer matters, insurance matters, mortgage repossession, wills and estates matters, such as family provision claims for low-valued estates and guardianship matters.

Further information on how Local Court processes could be modified to incorporate best aspects of the inquisitorial system seen in ADR is contained in the Legal Aid NSW submission on the NSW ADR Blueprint.<sup>28</sup>

#### Extension of dispute resolution to other civil law matters and jurisdictions

The Productivity Commission comments that it would be premature to advocate for broadly based pre-action requirements prior to the evaluation of the Commonwealth civil dispute resolution process<sup>29</sup> being made public. However, Legal Aid NSW submits that the requirements under the *Civil Dispute Resolution Act* for parties to file a 'genuine step statement' and encouragement of resolution of disputes prior to litigation should be endorsed. Such an endorsement would be consistent with the Model Litigant guidelines and the overriding objective to settle disputes quickly and cheaply.<sup>30</sup>

It is the experience of Legal Aid NSW that government departments and statutory authorities would prefer plaintiffs to make an offer to settle a matter before commencing proceedings. These offers of settlement take the form of a letter of demand and are handled by in-house lawyers. If the matter does not settle, proceedings are commenced and the matter is referred to a private lawyer, significantly increasing the costs for all parties.

Legal Aid NSW believes that a process of arbitration with strict time limits before commencement of proceedings would resolve a significant number of these matters pre-litigation. Using a process similar to the *Civil Dispute Resolution Act*, to be successful arbitration with government departments and statutory authorities would need:

- parties to be represented, preferably by a lawyer or a person with knowledge of the law, the legal processes and the type of matter.

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<sup>28</sup> [www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0007/19447/Legal-Aid-NSW-Submission-in-response-to-ADR-Blueprint-June-09-FINAL.pdf](http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0007/19447/Legal-Aid-NSW-Submission-in-response-to-ADR-Blueprint-June-09-FINAL.pdf)

<sup>29</sup> Civil Dispute Resolution Act 2011 (Cth)

<sup>30</sup> The Model Litigant Guidelines also apply to civil claims tribunals, inquiries, arbitration and other forms of ADR.

- high volumes of the same types of matters to build up the skills and experience of the people representing the parties.
- time limits attached to each step of the process and sanctions for failure to comply.
- a mediated, rather than determinative process.

Legal Aid NSW notes that the success of industry ombudsman ADR schemes is the result of support from the relevant industries and because determinations made by the ombudsmen are binding. The Australian and New Zealand Ombudsman Association (ANZOA) *Benchmarks for Industry-based Consumer Dispute Resolution Schemes*<sup>31</sup> provide a baseline for a successful ADR model. See Annexure B for details and comments on the principles.

#### *Facilitating greater ADR*

##### **Draft recommendation 8.4**

Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.

#### *Family law*

Legal Aid NSW supports Draft recommendation 8.4. Our Family Dispute Resolution (FDR) process is a mechanism to triage disputes.

Legal Aid NSW submits that triage questions should include:

- Have parties attended mediation?
- If not ,why not?
- Could any concerns about mediation be met by structural processes, such as use of the phone or shuttle mediation?
- Can court time be available prior to mediation?
- Is there the possibility of an interim or partial settlement that may reduce court time? For example, if some urgent matter needs a court determination, can the balance go to mediation?

Triage should always include an assessment of whether ADR is appropriate and address concerns about power imbalance, and physical or emotional violence.

Legal Aid NSW suggests that triage guidelines should be developed by a national body, such as the National Legal Aid Dispute Resolution Working Group.

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<sup>31</sup> [www.anzoa.com.au/National%20Benchmarks.pdf](http://www.anzoa.com.au/National%20Benchmarks.pdf)

### ***Draft recommendation 8.6***

Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.

Legal Aid NSW suggests that recommendation 8.6 could go further and recommend a national approach for accreditation. Currently there are several different accreditation schemes, such as the Family Dispute Resolution Practitioner (FDRP) accreditation, National Mediator Accreditation and Law Society's Accreditation. It is not efficient to have multiple schemes with inconsistent standards and compliance monitoring.

Achieving accreditation as a FDRP is costly and the recognition of prior learning is unnecessarily complex. In particular, the FDRP does not recognise the Law Society's Specialist Accreditation as evidence of expertise. Similar problems exist in the recognition of other relevant post graduate qualifications.

There is currently no peak body for FDRPs. Furthermore, due to the numerous pathways to accreditation many FDRPs are not covered by the other representative bodies such as the Mediator Standards Board (MSB), the Association of Dispute Resolvers (LEADR) and the Australian Dispute Resolution Association (ADRA). The National Alternative Dispute Resolution Council (NADRAC) which was working towards national standardisation was recently abolished.

## **Ombudsman and other complaint mechanisms**

### *Can ombudsman play a bigger role*

Legal Aid NSW notes that the Productivity Commission's estimate of costs is based on total expenditure divided by the total number of complaints resolved (p.284). From this formula, the Productivity Commission concludes that it costs industry ombudsmen an average of \$310 per complaint and government ombudsmen an average of \$1,300 per complaint.

While Legal Aid NSW is supportive of understanding the cost of dispute resolution processes, there are a number of inherent risks in attempting to compare schemes and mechanisms by such a formula. Other factors that must be taken into account include:

- differences in the purpose and function of schemes and mechanisms.
- actual cost to the complainant/consumer.
- actual costs to government. Consumer industry ombudsmen are self-funded with no cost to government.
- industry providers pay for individual complaints thereby reducing ombudsmen cost per complaint.
- industry providers' fees are scalable to encourage early disposal of disputes, resulting in lower cost.

## Tribunals

*How might tribunal performance be improved?*

### **Information request 10.1**

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.

See response to Information request 8.1.

### **Draft recommendation 10.1**

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

Legal Aid NSW has concerns that Recommendation 10.1 could significantly impact on disadvantaged people who lack the capacity to advocate or represent themselves before a Tribunal. Any guidelines on the restriction of representation must include provisions for people who lack the capacity to effectively self represent.

Legal Aid NSW also recognises the power imbalances that arise when a respondent company, government department or authority has representation and the plaintiff is self-represented. Active case management and directions from the Tribunal can manage the concerns raised about the increased use of lawyers (p.316).

Legal Aid NSW notes that in some jurisdictions, such as tenancy, the use of advocates or representatives can promote the efficient and effective resolution of disputes.

### **Information request 10.3**

The Commission seeks views on the cost-effectiveness of consolidating all Commonwealth merits review bodies in one Administrative Review Tribunal along the lines recommended by the Administrative Review Council.

Legal Aid NSW has no fundamental objection to the co-location and shared administration and outreach of the four Commonwealth merits review tribunals.<sup>32</sup> However, such arrangements must be sensitive to the need to preserve the specialisation of tribunal members, processes and tiered appeal rights, which contribute to accessible, effective and efficient dispute resolution.

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<sup>32</sup> Administrative Appeals Tribunal, Social Security Appeals Tribunal, Migration Review Tribunal and Refugee Review Tribunal

Legal Aid NSW does not support the Administrative Review Tribunal (ART) model<sup>33</sup> recommended by the Administrative Review Council, on the basis that it would result in more formal and slower decision making, particularly in the social security matters.

The current merits review system for social security matters provides two tiers of review as a right. The first tier, the Social Security Appeals Tribunal (SSAT), deals with the bulk of appeals in a fair, informal and quick manner. It is very accessible for self-represented litigants. The SSAT acts as a filter, dealing with the majority of matters, with a much smaller percentage of matter requiring second tier merits review.

The second tier, the Administrative Appeals Tribunal (AAT) is a more formal, lengthy and expensive jurisdiction, and there is a greater demand for free legal assistance for these proceedings.

The ART model restricts the second tier of review as a right. Restricting the majority of social security recipients to one tier of merits review at the ART will slow down merits review of all social security matters. Merits review will become more legalistic and therefore more costly.

Another concern is that the ART model restricts legal representation. Consumers appealing against social security, immigration and refugee and veterans decisions are usually disadvantaged people whose appeal involves matters that have a serious impact on in their lives. The legislation which governs their matters is highly complex. An experienced advocate can assist the tribunal to reach an appropriate decision in a quicker and more cost effective way.

The amalgamation model was proposed by the Administrative Review Council in 1995. The concerns which Legal Aid NSW raised in its submissions to the 2000 Bills, which proposed to introduce the ARC model, remain substantially the same.<sup>34</sup>

The option of co-locating and sharing administrative resources between the Commonwealth merits review tribunals (as suggested at 10.4) is more likely to result in cost effectiveness, without damaging the integrity of the current administrative review system.

#### **Information request 10.4**

Where consolidation of tribunals is not feasible, the Commission seeks views on options for greater use of co-location, shared administration and shared outreach.

In principle, Legal Aid NSW has no objection to the Commonwealth merit tribunals co-locating, sharing resources and sharing outreach. However as discussed in the

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<sup>33</sup> Contained in the *Administrative Review Tribunal Bill 2000* and the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*

<sup>34</sup> See [www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0005/19445/Sub-ProposedAdministrativeReviewTribunal-Nov2000.pdf](http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0005/19445/Sub-ProposedAdministrativeReviewTribunal-Nov2000.pdf)

above section, it is crucial that the specialisation of each tribunal be retained. Co-location could provide an opportunity to raise the standard of merits review across all jurisdictions.

For further information see the Legal Aid NSW submissions to the 2000 Bills.<sup>35</sup>

## **Duties on parties**

### *Model litigant guidelines to address power imbalances*

#### ***Draft recommendation 12.2***

Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

#### ***Information request 12.1***

The Commission seeks feedback on the effectiveness of current overarching obligations imposed on parties and their legal representatives in litigation processes. In particular, how might the detection of non-compliance and the enforcement of these obligations be improved?

#### ***Information request 12.2***

The Commission seeks feedback on how draft recommendation 12.1 might best be implemented, including which types of disputes would most benefit from targeted pre-action protocols.

#### ***Information request 12.4***

The Commission seeks advice on how draft recommendation 12.2 might best be implemented. How can the Office of Legal Services Coordination be better empowered to enforce the guidelines at the federal level? What is the most appropriate avenue for receiving and investigating complaints at the state/territory level (for example, a relevant ombudsman)? Can the content of model litigant guidelines be improved, particularly regarding government engaging in alternative dispute resolution?

There can be a tension between a lawyer's duty to act in the best interest of their client and their duty to assist the court or tribunal in the conduct of trials. The model litigant rules can play an important role in the early resolution of disputes. Legal Aid NSW submits that there should be a level of accountability within each department and agency to ensure compliance with the model litigant rules.

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<sup>35</sup> See [www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0005/19445/Sub-ProposedAdministrativeReviewTribunal-Nov2000.pdf](http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0005/19445/Sub-ProposedAdministrativeReviewTribunal-Nov2000.pdf)



For example, the NSW Legal Services Coordination's Legal Services Blueprint<sup>36</sup> recommended the identification of a Legal Service Manager in each government agency and department, whose role would be to procure, brief and monitor external legal services.

Legal Aid NSW submits that an Ombudsman would be an appropriate body to take complaints, detect non-compliance and enforce obligations. For example, the Office of the Legal Services Commissioner (NSW) could have their mandate extended to investigate and/or review complaints about non-compliance with the model litigant policy.

In cost jurisdictions there is already a cost imperative against prolonging proceedings or engaging in unnecessarily obstructive practices and strategies, by way of aggravated damages. Relevant court practice notes could be amended to reinforce to lawyers representing government agencies that non-compliance with model litigant rules may attract a claim for aggravated damages, or could give rise to a claim for indemnity costs.

In a Tribunal or a no costs jurisdiction there could be discretion to award costs in exceptional circumstances, where there has been significant non-compliance with the model litigant guidelines.

Legal Aid NSW submits that existing obligations to encourage cooperation should be strengthened with the aim of resolving legal problems as early as possible, especially those obligations relating to negotiating a settlement and properly conceding liability at an early stage.

However, the model litigant guidelines should not impose an overriding obligation to engage in ADR in all cases. Legal Aid NSW believes the nature of the dispute should guide when ADR is compulsory.

Strengthened obligations to resolve legal problems as early as possible would provide the same benefits as formal ADR. For example, a model litigant process should ensure:

- claims are dealt with promptly.
- claimants with a legitimate claim but who lacks the resources to litigate are treated fairly.
- legitimate claims are settled.
- litigation is avoided where possible, particularly where the issue is quantum not liability.
- costs are kept to a minimum.
- apologies are made where the State has acted inappropriately.

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<sup>36</sup> [www.lsc.lawlink.nsw.gov.au/publications/Documents/legal\\_services\\_blueprint.pdf](http://www.lsc.lawlink.nsw.gov.au/publications/Documents/legal_services_blueprint.pdf)

### ***Information request 12.5***

The Commission seeks feedback on whether model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). How might such requirements best be implemented?

Legal Aid NSW submits that all parties should be model litigants, particularly those parties who are expected to set the example for others. Governments, business leaders and good corporate citizens would fall into this category.

However, Legal Aid NSW cautions against the use of an interlocutory hearing to determine whether there is a disparity in resources, or whether a party is a large corporation and therefore whether the model litigant policy should be imposed, on the basis that this would add further costs and complexity to the litigation.

Where a party is self-represented and opposed by a party that is legally represented, the court or tribunal should ensure appropriate and fair conduct and control of the litigation. Legal Aid NSW suggests that aligning practice rules with model litigant guidelines would also assist in regulating behaviour.

### **Cost Awards**

*Who should costs awards apply to?*

### ***Draft recommendation 13.4***

Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. The amount to be recovered should be a fixed amount set out in court scales.

Legal Aid NSW supports Draft Recommendation 13.4. In addition, it suggests the recommendation be extended to legally aided matters which are currently paid well below scale. This would provide an incentive for more private practitioners to undertake legal aid work.

### ***Information request 13.1***

The Commission seeks feedback on the most appropriate means of distributing costs awarded to pro bono parties. Options to consider may include allocating the awarded costs from a case to:

- the legal professional providing pro bono representation
- the not-for-profit body providing or coordinating the pro bono service
- a general fund to support pro bono services.

The Commission is interested in any other options that could be examined.

Legal Aid NSW suggests that the costs awarded to pro bono parties be allocated to a general fund to support pro bono services. Allocating funds in this way provides an

incentive for opponents to behave reasonably, preserves the social capital of pro bono work and encourages further pro bono assistance.

### **Information request 13.2**

The Commission invites comment on the most appropriate arrangements for the governance and funding of a public interest litigation fund (PILF), including:

- appropriate mechanisms and criteria to govern access to the fund
- whether the PILF should be established as a new entity, or integrated into existing legal assistance funds or bodies.

Legal Aid NSW supports the establishment of a public interest litigation fund.

## **Self represented litigants**

*How effective are current measures, and what more could be done?*

### **Information request 14.1**

What is the most effective and efficient way of assisting self-represented litigants to understand their rights and obligations at law? How can the growing complexity in the law best be addressed?

#### *Civil*

Legal Aid NSW advice and duty services at the NSW Civil and Administrative Tribunal (NCAT), Social Security Appeals Tribunal (SSAT), and Administrative Appeals Tribunal (AAT) provide discrete, unbundled legal services, including advice and representation on the day but not ongoing representation. Legal Aid NSW submits that the most effective and efficient ways of assisting self-represented litigants are inquisitorial dispute resolution processes and extending the availability of duty advice services.

It is the experience of Legal Aid NSW that courts and tribunals assist self-represented litigants more effectively and efficiently when there is a clear understanding of litigants' rights and obligations, and proceedings are more inquisitorial rather than adversarial. This includes, identifying the key issues in dispute, obtaining evidence, facilitating conciliated outcomes and reaching determinations where required.<sup>37</sup>

Getting legal advice through a duty service assists self-represented litigants to focus on the issues in dispute that the tribunal can deal with. Self-represented litigants are advised of the key issues in dispute, what evidence they need to obtain and how best to present their case. They are also given realistic expectations about their prospects of success and what can be achieved in that forum. Finally they are given referrals if there is another alternative to resolving their problem.

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<sup>37</sup> This type of 'hands-on' dispute resolution procedure is demonstrated by ASIC approved external dispute resolution schemes.

Duty advice services also assist self-represented litigants by reviewing their applications, submissions and evidence, and advising on settlement offers.

### *Family*

As noted in the Draft Report, the Legal Aid NSW Family Law Early Intervention Unit Duty Service:

proactively assists self-represented litigants to draft documents to ensure that they are pursuing an appropriate action, seeking appropriate orders and providing the court with the necessary information to progress their matters. (p.446)

The NSW Law and Justice Foundation evaluation of the EIU Duty Service identified a number of ways in which the service had contributed to the effectiveness and efficiency of the court process. These included:

- diverting matters that should not have been in court and advising and assisting clients to take the most appropriate course of action.
- contributing to the resolution of matters on the day, through the drafting of documents and reality check with clients – while explaining the processes and implications and negotiating with other parties for clients.<sup>38</sup>

For example, the evaluation of the EIU Duty Service at Parramatta Family Law Court found that the early intervention services successfully divert family law matters that should not be in court, de-escalating proceedings between parties and saving court time. In nearly 40% of matters, clients who should not have been going to court were assisted to take a more appropriate action. Where matters did progress to court, the EIU service assisted clients to progress their matters more efficiently with 16% of matters finalised by the court on the day or finalised by consent.<sup>39</sup>

These findings echo the evidence from the evaluation of the Dandenong Family Court Support Program (p.445-446).

Legal Aid NSW believes there is also a strong case for expanding family and civil law duty lawyer services provided by LACs. These services demonstrate effectiveness and efficiency by limiting the number of non-meritorious matters proceeding and where matters have merit, assisting parties to reach a resolution.

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<sup>38</sup> In nearly 40% of matters, clients who should not have been going to court were assisted to take a more appropriate action. Where matters did progress to Court, the EI service assisted client to progress their matters more efficiently with 16% of matters finalised by the Court on the day or finalised by consent

<sup>39</sup> *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](http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf)

How can the complexity of the law be addressed?

Legal Aid NSW submits that funding legal assistance services with expertise in specialist areas of law is critical to addressing the growing complexity in the law. Specialist knowledge about an area of law is essential, particularly where a self-represented litigant may only receive one off advice about their legal matter. Effective and efficient assistance to self-represented litigants includes realistic advice about the prospects of success in their matter and practical advice about how the court or tribunal processes work in the relevant jurisdiction. This advice is best provided by a lawyer with the knowledge and expertise in that jurisdiction.

**Information request 14.2**

There are a number of providers already offering partially or fully subsidised unbundled services for self-represented litigants. The Commission seeks feedback on whether there are grounds for extending these services, and if so, what are the priority areas? How might existing, and any additional services, better form part of a cohesive legal assistance landscape? What would be the costs and benefits associated with any extension of services? Where self-representing parties have sufficient means, what co-contribution arrangements should apply?

*Civil*

Legal Aid NSW already provides unbundled legal services to the most vulnerable self-represented litigants in the form of minor assistance through its duty services.<sup>40</sup> In determining the extent of assistance, our lawyers consider the characteristics and capacity of the self-represented litigant, complexity of the area of law, impact on the self-represented litigant if assistance is not provided and the cost/benefit in providing assistance.

As discussed above, Legal Aid NSW submits that there are grounds for extending these services. Priority areas include consumer credit and insurance matters, employment law matters, social housing disputes and government law matters, such as social security, immigration, National Disability Insurance Scheme and child support. It is in these types of matters that the power imbalance between parties is most evident, as a self-represented litigant is opposed by legally represented corporation or government agency.

The benefits of duty services are outlined in the previous section.

Legal Aid NSW notes that a cost/benefit assessment is an important criteria for deciding whether to provide unbundled assistance. For example, in complex cases that involve a large volume of materials, the time a lawyer needs to spend assessing

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<sup>40</sup> For example, at the AAT conference registrars in addition to referring clients for initial one off advice, often refer clients back to the duty service to discuss settlement offers that SRLs have received from Department advocates, or for assistance to seek evidence needed for their appeal, or to discuss alternative solutions to the legal dispute.

the documents prior to providing minor assistance and advice may outweigh the benefit to the self-represented litigant and the court or tribunal.

There may also be a risk that the unbundled services may duplicate the existing assistance provided to self-represented litigants by registry staff.

#### Co-contribution

Legal Aid NSW suggests that co-contribution arrangements for self-represented litigants could be based on contingency fee models. The method of contribution would need to be flexible and include options such as charges on a home and flexible payment plans.

#### Conflict of interest

##### **Information request 14.3**

How widespread are problems around conflicts of interest for providers offering unbundled services? Do provisions that deal with conflicts of interest need to be refined so as not to prevent people benefitting from discrete, one-off forms of advice from assistance services and if so, how might this best be done?

Legal Aid NSW submits that conflict of interest rules can significantly impact on a person's ability to access discrete legal advice and assistance. A recent research project undertaken by Deakin University School of Law<sup>41</sup> explored whether regional communities are disadvantaged in their administration of law, compared with their metropolitan counterparts. Using the results of 62 interviews and 117 survey responses, one of the key findings of the research was that 69% of regional lawyers surveyed regarded the potential for 'conflict of interest' as an issue which adversely impacted on their ability to provide services to regional clients.

The relatively uniform conflict of interest rules across Australia mean that if a legal firm or legal assistance service has given any form of legal assistance to a person in the same or a related matter then it cannot provide legal assistance to another party to the dispute.

Conflict of interest case law is derived exclusively from litigation experience. In turn, it is this case law that has informed the development of the conflict rules. Consideration of client conflict is focused on traditional legal services extending over a substantial period of time. Where a lawyer is providing a one-off advice or duty service a different type of lawyer/client relationship is created, in that the retainer is very limited and the client has no reasonable expectation that the relationship is ongoing. There is also no risk of confidential information being disclosed during such limited retainers.

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<sup>41</sup> Coverdale, R., *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria*, Deakin University Centre for Rural and Regional Law and Justice, July 2011.

Public legal assistance services such as legal aid commissions, the ALS and CLCs are often prevented from providing much needed legal advice services to disadvantaged clients by an approach to conflict that is appropriate for case work but is unnecessarily restrictive for discrete legal services. As indicated by the Deakin University research, private practitioners are also affected in their ability to provide legal services due to the present form of the conflict of interest rules.

Legal Aid NSW has made submissions to the Law Council of Australia and the Law Society of NSW that the professional conduct rules should include a supplementary rule which recognises the limited lawyer/client relationship that arises in the provision of discrete legal services. The rule should provide that a lawyer can provide a discrete legal service unless the lawyer has actual knowledge of confidential information that could give rise to a conflict. Such a rule would be consistent with current law. It would also be consistent with international approaches to limited legal representation and conflict of interest that have been in place in Canadian provinces and various states of the United States for some time.

Legal Aid NSW submits that such a supplementary rule would greatly assist in reducing the social and economic costs that arise from people being 'conflicted out' from receiving discrete legal assistance service. We believe that support from the Productivity Commission for a supplementary rule would assist in progressing this reform.

## **Court and Tribunal Fees**

### *Increasing cost recovery in courts*

#### **Information request 16.1**

The Commission invites views on the most appropriate means of determining fee contributions to indirect costs, based on the economic value at stake, in cases where a monetary outcome is not being sought, such as a major planning dispute.

Legal Aid NSW submits that a sliding fee scale is fairer and provides a more accessible system for all users of the court system.

### *Reforms to fee relief*

#### **Draft recommendation 16.4**

The Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals granting fee relief on a discretionary basis in exceptional circumstances.

Fee guidelines should ensure that courts and tribunals use fee postponements — rather than waivers — as a means of fee relief if an eligible party is successful in recovering costs or damages in a case.

Fee guidelines in courts and tribunals should also grant automatic fee relief to:

- parties represented by a state or territory legal aid commission
- clients of approved community legal centres and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief.

Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.

Draft Recommendation 16.4 is strongly supported. This recommendation should also include parties represented by a private practitioner under a grant of legal aid.

#### *Additional comments*

The Draft Report states that a party is exempt from paying a court fee in certain cases, including where they are in prison or otherwise detained, or have been granted legal aid (p.476). Legal Aid NSW notes that people with migration matters before the Administrative Appeals Tribunal can only apply for a reduced fee of \$100.<sup>42</sup> There is no discretion within the AAT to waive or postpone this application fee. In some visa cancellation matters, applicants for legal aid are often unable to appeal a decision to cancel their visa because they do not have \$100.<sup>43</sup>

#### **Information request 16.2**

The Commission invites comment on the relative merits and costs of automatically exempting parties from paying court fees based on:

- the possession of a Commonwealth concession or health card, with the exception of a Commonwealth Seniors Health Card
- passing an asset test in addition to possessing a concession or health card
- the receipt of a full rate government pension or allowance.

The Commission also seeks feedback on the most appropriate means of structuring a system of partial fee relief in Australian courts, including feedback on the costs associated with administering and collecting partial fees.

The Draft Report recommends that courts have cost-reflective fee structures so that the entire cost of the litigation is paid by the parties. However, the Productivity Commission has also acknowledged the justice gap amongst low to medium income

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<sup>42</sup> The normal fee is \$816.

<sup>43</sup> Legal Aid NSW under its agreement with the Commonwealth cannot pay the application fee.



earners who are unable to afford legal assistance to protect or defend their rights. Legal Aid NSW notes that imposing further costs through court or tribunal fees will act as a further disincentive to resolving legal problems.

Legal Aid NSW also notes the importance of full or partial relief schemes for people who are ineligible for free legal assistance due to means, but have difficulty affording legal assistance. The overriding principle in setting court or tribunal fees should be accessibility. A sliding scale or 'litigation levy' for governments or corporations could be considered to offset court or tribunal costs.

## **Courts – technology, specialisation and governance**

### *Technology*

#### ***Draft Recommendation 17.1***

Courts should extend their use of telephone conferences and online technologies for the purpose of procedural or uncontested hearings where appropriate, and examine whether there should be a presumption in favour of telephone hearings or use of online court facilities (where available) for certain types of matters or litigants.

#### ***Information request 17.1***

The Commission seeks views on how best to enable courts to identify their technological needs and service gaps, and promote work practices that maximise the benefits of available technologies. In particular, the Commission seeks views on whether, and to what extent, this involves greater use of court information technology strategic plans and/or greater coordination and leveraging of technology solutions across and within jurisdictions. Investment in which types of technologies, including those to better assist self-represented litigants, would be most cost effective? What are the likely costs of addressing the different technological needs of different courts?

Disadvantaged clients often cannot travel long distances to Court and this affects their access to justice. Legal Aid NSW submits that appearances in Court through the use of the telephone and online technologies saves costs and reduces the likelihood that parties will fail to appear.

However, more investment in technology is required to ensure that Audio Visual Link (AVL) and phone communications are reliable and all parties can be clearly heard. Legal Aid NSW lawyers appear by phone or AVL whenever appropriate.<sup>44</sup>

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<sup>44</sup> Legal Aid Regional Offices have AVL facilities, which reduce the need for travel to long distance courts.

Legal Aid NSW submits that for certain proceedings including complex trials and interim hearings, an appearance in person is required to ensure that legal interests are not put at risk. Appearances in person also provide opportunities for negotiations that do not arise when parties are not present at Court. Whether or not parties need to appear in person should be determined by the circumstances of each case.

Particular problems arise when clients who are incarcerated are appearing by AVL in Local Courts. For example, parents appearing in the Children's Court by AVL often cannot hear or see the proceedings or the court cannot hear them. Court staff are often unfamiliar with the technology. These technological issues affect the incarcerated client's right to procedural fairness and create to delays in the Court list.

Legal Aid NSW notes the access to justice issues that can arise from the requirement to appear in person and not send an agent. These issues particularly affect clients who cannot travel or live in regional, rural and remote locations.

Legal Aid NSW would welcome an increase in Family Law Circuit Courts resourcing to increase the use of AVL facilities. Efforts to expand the use of telephone conferences and online technologies for court matters will need to take into account the reluctance of some judicial officers to deal with matters in this way by, for example, insisting on personal attendance by independent children's lawyers in regional areas.

## **Bridging the gap**

### *Legal expense insurance*

#### **Information request 19.1**

The Commission seeks feedback on the prospects of legal insurance being offered by private providers and whether there are any public policy impediments to such an offering.

Legal Aid NSW notes that disadvantaged people and the working poor are unlikely to be able to afford legal expense insurance over other basic needs.

However, if such a scheme was introduced for middle income earners, adequate safeguards would be required to protect consumers. These safeguards include measure to ensure:

- independence of lawyers acting for the insured person. For example, lawyers must act in the best interest of the policy holder and not in the interest of the insurer.
- coverage and suitability of insurance products. Our experience is that general insurance products are often not suitable for the consumers' needs and do not effectively cover their risk. The increasing complexity of products makes comparisons between products difficult. It is therefore crucial that the

products on the market be simple to understand and easily comparable so consumers can make informed choices.

- ability of insured person to enforce their rights. There can be significant barriers for consumers in enforcing and protecting their rights in insurance. For example, there is a significant imbalance of power between an individual and an insurance company so an accessible, independent and effective dispute resolution process must be in place to protect the consumer. As part of their licence general insurers are required to be a member of an EDR scheme. The same should apply to LEI providers.

### *Legal Expenses Contribution Scheme*

#### **Information request 19.2**

The Commission seeks feedback on the strength of the case for a Legal Expenses Contribution Scheme and views on any relevant design features, including what legal expenses should be covered and whether it should be limited to particular matters.

Legal Aid NSW does not believe there is a strong case for a Legal Expenses Contribution Scheme (LECS). We also note that income contingent interest free loans do not address the cost of legal assistance nor provide adequate consumer protections.

#### **Legal assistance landscape**

##### *Who are services targeted at?*

Legal Aid NSW suggests that the following paragraph in the Draft Report on the Legal Aid NSW Means Test be modified to clarify that legal aid may still be available with an asset based contribution:

As well, an applicant's net assessable assets must be less than \$100 to obtain a grant of legal aid. Above this amount, the amount of contributions payable depends on the value of the assets. [p.581-582]

The suggested text is:

As well, to obtain a grant of legal aid **without an asset based contribution** an applicant's net assessable assets must be less than \$100. Above this amount, contributions are payable **on assets**.

##### *What areas of law can people get assistance with?*

While crime is the largest area of legal aid expenditure, representing 73.5% of the State funding appropriation, Legal Aid NSW suggests that this section of the Draft

Report should also recognise the level of civil law assistance provided by Legal Aid NSW.

In 2012-13, Legal Aid NSW provided 32,927 advice, 16,287 minor assistance, 13,436 duty services and 1,378 litigation services across commonwealth and state civil law. The total service count of 64,028 is higher than the commonwealth and state civil law services provided by NSW Community Legal Centres.

#### *What's been happening to funding levels over time?*

The percentage of the Commonwealth's contribution to funding Legal Aid NSW has dropped from 50% in 1996<sup>45</sup> to 31% in 2013-14.<sup>46</sup> When calculated against WPI<sup>47</sup> from 1996-97 to 2013-14, there has been a decrease in funding in real terms of approximately 14.7%. This is a significant proportion of the Legal Aid NSW budget.

The decrease in Commonwealth funding was the result of a fundamental shift in policy with the introduction of the Commonwealth/State divide in grants of legal aid.

In light of the impact of the Commonwealth/State divide on meeting legal need, Legal Aid NSW believes the Draft Report Figure 20.8 'Real funding growth to LACs by source of funding' should include funding for the 1996-97 financial year, which is available on the National Legal Aid website.<sup>48</sup> In addition, the statements such as 'real government funding to Legal Aid Commissions has grown steadily over time' should be qualified as the source of this growth in NSW is the State Government and the Public Purpose Fund.

Legal Aid NSW also suggests that Figure 20.9 should separate the Commonwealth and the State funding, and include 1996-97 funding to fully demonstrate the trend in real capita funding.

#### *Additional comments*

Legal Aid NSW notes the recently announced withdrawal of \$15 million from the \$30 million provided to LACs over two years.<sup>49</sup> Since December 2013, \$58.1 million in

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<sup>45</sup> In 1996-97 the Commonwealth made up 57% of government funding of Legal Aid NSW.

<sup>46</sup> Not included is the additional Commonwealth temporary funding of \$4.58 per annum over two years.

<sup>47</sup> Legal Aid NSW believes that an appropriate way to calculate the increase/decrease in funding in real terms is to inflate the base year figure using the Wages Price Index (WPI). This is consistent with the mechanism the Commonwealth uses (inflation/escalation percentage) to increase funding each year, to keep pace with rising costs. This percentage is approximate because the WPI was estimated for 1997-98 and 2013-14 as actual WPI was not available.

<sup>48</sup> [www.nationallegalaid.org/home/finance/income-and-expenditure-1996-2001/](http://www.nationallegalaid.org/home/finance/income-and-expenditure-1996-2001/)

<sup>49</sup> Commonwealth Budget 13 May 2014

funding has been withdrawn from the legal assistance sector.<sup>50</sup> At a time when there is so much evidence of unmet legal need it is extremely disappointing that the Commonwealth has reduced its contribution to access to justice arrangements by such a significant amount.

The Commonwealth savings from LACs of \$6.5 million over four years will be found from the Expensive Commonwealth Criminal Cases Fund.<sup>51</sup> These savings are additional to the reductions already made in previous forward estimates, significantly increasing the impact of this savings measure. Depending upon the type and number of criminal cases that come into the system, Legal Aid NSW anticipates a budgetary decrease of \$2.5 million from 2014-15, which will increase each year. In addition, LACs will have additional costs as a result of the cuts to ATSILS.

The cuts to the Expensive Commonwealth Criminal Cases Fund will have policy and service delivery implications on the availability of crime, family and civil law assistance. Expensive and/or significant increases in commonwealth criminal law matters cannot be predicted by LACs. Without a mechanism to fund very expensive cases, such as terrorism, bikie or people smuggling trials, LACs must consider whether to fund such cases, when they will no longer be reimbursed under the Expensive Commonwealth Criminal Cases Fund.

### **Reforming legal assistance services**

#### *Are the right mix of services being provided?*

Legal Aid NSW strongly supports the statements made in the Draft Report about the importance of legal assistance providers' contribution to identifying and acting on systemic issues through policy and law reform.

The LACs and CLCs are also involved in policy and law reform. They play a key role in identifying and acting on systemic issues. (p.622)

The Productivity Commission recognises that legal assistance lawyers are:

uniquely placed to identify systemic issues, particularly those affecting disadvantaged Australians. (p.623)

Furthermore, the Productivity Commission considers that:

advocacy should be a core activity of LACs and CLCs (particularly peak bodies and larger CLCs. (p.625)

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<sup>50</sup> The Mid-Year Economic and Fiscal Outlook (MYEFO) in December 2013 announced savings measures of \$43.1 million. These savings consist of \$13.3 million from ATSILs, \$19.6 million from CLCs, \$6.5 million LACs and the remainder from FVPLS.

<sup>51</sup> The ECCCCF will be reduced by \$3.5 million in 2013-14, \$1 million in 2014-15, \$1 million in 2015-16 and \$1 million in 2016-17.

The Draft Report also recognises the benefits of law reform and advocacy to the wider community through positive spill-overs or externalities. It also states that advocacy can be 'an efficient use of limited resources' and 'an important part of a strategy for maximising the impact of LAC and CLC work' (p.623).

Law reform and strategic advocacy makes a significant contribution to reducing demand and consequently the costs on the justice system. Law reform and strategy advocacy therefore must be included in any future NPA agreements.

*Is the balance right in terms of area of law?*

**Draft recommendation 21.1**

Commonwealth and state and territory government legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure that demand for criminal assistance does not affect the availability of funding for civil matters.

**Information request 21.1**

The Commission seeks views on whether the above demarcation of funds would be sufficient to ensure that appropriate resources are directed towards non-criminal, non-family law matters.

Legal Aid NSW submits that Draft recommendation 21.1, while well intentioned, is not possible within existing funding arrangements. However, we would strongly support Commonwealth and State government funding for civil law matters (including family law matters) being determined and managed separately if additional funding was available and mechanisms were in place to address criminal law expense over-runs.

Criminal law expenses can rise unexpectedly and significantly due to:

- changes in government law and policy, such as mandatory minimum sentencing laws.
- increases in prosecutions.
- increases in expensive cases, such as terrorism and people smuggling.
- increases in the criminal law cost drivers.

Research indicates that the incidence of criminal law issues will be higher for disadvantaged people than the general population. In the *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas (2006)*,<sup>52</sup> general crime legal events

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<sup>52</sup> Coumarelos, C, Wei, Z & Zhou, AH 2006, Justice made to measure: NSW legal needs survey in disadvantaged areas, Law and Justice Foundation of NSW, Sydney  
[http://www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BB\\_A/\\$file/Justice\\_Made\\_to\\_Measure.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BB_A/$file/Justice_Made_to_Measure.pdf)

were experienced by 27% of all survey participants.<sup>53</sup> In addition, criminal law assistance meets the cost/benefit test (p.611) - criminal law is a high area of legal need, criminal law problems have significant consequences<sup>54</sup> and there is a thin market for disadvantaged people charged with criminal offences. We therefore suggest that the statements comparing legal needs arising from crime with the level of criminal law assistance (p.628) be further nuanced to acknowledge that it is not viable to take resources away from criminal law assistance.

The inability of LACs to control criminal law assistance demand and cost drivers and the implications of Dietrich are such that the demarcation of civil and family law funds would require mechanisms in place to fund criminal law budget shortfalls, such as expensive criminal cases funds or some form of contingency fund.

Demarcation of funds alone is insufficient to ensure appropriate resources are directed towards non-criminal, non-family law matters. There would also need to be a significant increase in government funding to ensure appropriate resources are directed to address express and unmet civil law needs and to narrow the justice gap for the working poor.

Legal Aid NSW has extensive experience in managing and maximising the effectiveness of dedicated funding, as demonstrated by its use of funding under the National Partnership on Legal Assistance Services (NPA).

#### *Additional comments*

Legal Aid NSW suggests that some of the statements in the Draft Report about the level of civil law assistance provided by LACs (p.628) need to be qualified. While constrained by available resources, Legal Aid NSW has a highly effective civil law division that targets assistance to those communities most in need and to legal issues that impact most on their lives. This is later acknowledged (p.633). The Legal Aid NSW civil law service outputs are outlined in the previous section.

There also appears to be some confusion in section 21.2 as to whether the Draft Report is referring to civil law matters (including family law) or civil law matters (excluding family law). For example, p.628 makes reference to criminal, family and civil law matters, while in other paragraphs there are statements about civil law matters. Further clarification would aid understanding. For example, it is suggested that Draft recommendation 21.1 be reworded to specify that it relates to civil law matters (including family law) as stated in the paragraph above the recommendation (p.632).

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<sup>53</sup> If domestic violence and traffic offences are included 30.2% of survey participants experienced crime legal events.

<sup>54</sup> Consequences include incarceration, family law issues, loss of income, difficulty gaining future employment, housing and debt problems.

*Are assistance services targeting the right people?*

***Draft recommendation 21.2***

The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the National Partnership Agreement on Legal Assistance Services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.

***Draft recommendation 21.3***

The Commonwealth and state and territory governments should use the National Partnership Agreement on Legal Assistance Services to align eligibility criteria for civil law cases for legal aid commissions and community legal centres. The financial eligibility test for grants of legal aid should be linked to some established measure of disadvantage.

Legal Aid NSW strongly supports the statement in the Draft Report that the LACs' financial eligibility test is too tight. It is telling that the Productivity Commission have assessed that just over 8% of NSW households would qualify for a grant of legal aid (p.647).

Furthermore, Legal Aid NSW agrees with the Productivity Commission's assessment that a 'hard line for eligibility is problematic where the net benefits of assisting someone who just misses out are greater than someone who qualifies for assistance' (p.648). Legal Aid NSW submits that any eligibility test should be set at a level that includes the marginally disadvantaged, including the working poor.

However, changes to the means test will require additional funding. Without funding, means test changes will result in more restrictive legal aid policies on the types of matters for which aid is available and an inability to assist the same number of disadvantaged people.

Legal Aid NSW recognises the benefits of restructuring our means test to incorporate a more effective income measure than the Henderson Poverty Line (HPL). One option is to use a figure derived from population expenditure data. This approach would mean benchmarking the threshold for reasonable living expenses against survey information, which describes how much income people actually spend on living expenses.

The relevant Australian expenditure survey is the ABS Household Expenditure Survey (HES). The latest HES survey relates to data collected in 2009-10. If funding was available, the upper income threshold could, for example, be benchmarked to the HES weekly living expense threshold based on expenditure data for lone person households in the 3<sup>rd</sup> quintile of the population: \$433. This is \$115 more than the



current upper income threshold in the Legal Aid NSW means test after allowable deductions.

If funding was available to make the means test fairer, Legal Aid NSW would re-examine the income deduction thresholds we apply in our means test to keep pace with inflation. For example, Legal Aid NSW currently allows up to \$320 per week in housing costs for Sydney residents and up to \$220 per week for other NSW residents as allowable deductions. These figures should be reassessed in light of current rental costs. According to the Australian Property Monitors, the median rent of a unit in Sydney is \$485 per week.

The above suggestions relate only to potential financial eligibility tests. Non-financial indicators could be incorporated in a number of ways. For example, the Social Exclusion Monitor uses an integrated model, whereby income is only one of many factors taken into account in a single-step process to reach a decision about eligibility.

Another potential approach, closer to the current Legal Aid NSW means test model is a two-step process. For example, a means test could consider financial eligibility as the first step and non-income based measures of disadvantage as a second step for applicants whose financial means are up to 20% higher than the threshold. This approach prioritises financial eligibility, which is easier to measure over other considerations. In contrast, the Social Exclusion Monitor approach values economic and non-economic considerations equally.

Formulating an appropriate eligibility test is important work. Any assistance from the Productivity Commission in developing a new national means test and quantifying the cost of increasing eligibility based on existing legal aid policies would be of great assistance as it would provide an indication to government of the scale of resources required.

Legal Aid NSW supports linking the eligibility test to an established measure of disadvantage. However, implementation of common eligibility criteria across LACS and CLCs would come with an administrative cost that could not be met within the existing CLC funding level.

*Is the service delivery model the right one?*

### **Information request 21.2**

The Commission seeks views on the appropriate relationships between legal aid rates and market rates for the provision of legal services. What might be the cost of altering the relationship between the two rates?

As stated in the Draft Report,

One of the benefits of the mixed service delivery model is that LACs are able to use general and specialist private expertise and specialise themselves in areas

where the market is thin (such as welfare law and in rural and remote locations) (p.649).

However, the mixed service delivery model requires a level of private practitioner remuneration sufficient to attract private practitioners of sufficient skill and experience.

While legal aid services are delivered at well below market rates, Legal Aid NSW recognises that the gap between legal aid fees and the market rate is at a level where the delivery of legal aid services by the private profession is at risk. Fees paid to private practitioners have been falling in real terms since the 1990s and are inadequate. Private practitioners with a commitment to legal aid work advise that it is not economically feasible for experienced practitioners to accept legal aid matters.

The level of remuneration for private practitioners must be sufficient to ensure that appropriately skilled and experienced legal practitioners continue to undertake all legal aid matters. Legal Aid NSW is unable to support fee increases within available funding and maintain existing services.

As there are no national fee scales to follow and no single accepted way of assessing costs it is difficult to express a view as to a single rate that would be appropriate, while having regard to the type and location of work. However, Legal Aid NSW submits that the legal aid rate should be closer to \$250 than \$150. Furthermore, even that rate would be insufficient to attract the senior counsel and highly experienced private practitioners required to ensure effectiveness and efficiency in complex cases. There are times, particularly in test and public interest cases, where it is necessary to engage private practitioners at the higher end of the market.

Based on its 2012-13 payments to private practitioners, Legal Aid NSW has calculated that increasing the fee from \$150 to \$200 per hour across Commonwealth and State matters would cost an additional \$29.320 million. Increasing the fee from \$150 to \$250 would cost Legal Aid NSW an additional \$58.640 million for the same level of work.

The hourly rate for legal aid work must also be considered in light of what private practitioners are allowed to claim under the legal aid fee scales. Resource constraints have resulted in reductions in available work items such as caps on the number of appearances for mentions that can be claimed. The result is that private practitioners are not allowed to claim payment for the amount of hours required to sufficiently perform the work. Therefore, in addition to being paid an inadequate rate, private practitioners are not being paid fully for the work performed.

Legal Aid NSW submits that LACs need to retain flexibility in their ability to set fees rates that are less than ordinary professional costs, in consultation with the private profession.<sup>55</sup> For example, the same fee rate is not appropriate for every type of work and complexity is a valid consideration in setting a fee rate.

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<sup>55</sup> *Legal Aid Commission Act 1979* section 39

### *Additional comments*

Legal Aid NSW notes that the base hourly rate of \$150 for commonwealth law matters (p.652) only applies to NSW.

#### *Does the distribution of funds need changing?*

As stated in our initial submission, Legal Aid NSW supports the use of socio-demographic variables and weightings in the distribution of funds but submits that the volume of funding needs to reflect the level of legal need in the community, including unmet legal need experienced by disadvantaged groups.

There is a high incidence of disadvantage in NSW, which affects both the level of legal need and increased cost and complexity in service delivery. For example, NSW has the largest population of any State, with 32% of Australians (7.272 million people) living in NSW. An estimated 208,364 Aboriginal and Torres Strait Islanders live in NSW, representing 31% of all Aboriginal and Torres Strait Islander people in Australia, the highest percentage of all states and territories. In addition, NSW has the largest number of migrants, with 35% of recent migrants living in NSW. Migrants arriving after 1996 have been responsible for an 11% growth in the population of Sydney.

18.6% of people living in NSW are reported to have a disability.<sup>56</sup> The incidence of disability rises in regional and rural locations. The National Disability Strategy Implementation Plan considers there to be 1.3 million people in NSW with disability, of which 420,000 have a severe or profound disability that affects their ability to communicate, get around and care for themselves.

Just over one-third of NSW residents (2.61 million) lived outside of Greater Sydney as at June 2011. Within NSW, 442,387 people live in outer regional areas, 32,194 in remote areas and 4,417 in what is classified by the ABS as very remote areas of Australia. The spread of the population across NSW and the distances between remotes areas, towns and regional centres makes the delivery of face-to-face services resource intensive.

Most Commonwealth prosecutions are brought in NSW. This is due to the nature of Sydney as the largest capital city in Australia and a common entry point for illegal drug importation. In addition, a significant share of the Commonwealth Director of Public Prosecutions' resources are located in Sydney. The incidence of prosecutions leads to higher crime duty volumes per capita in NSW compared with other states.

The NPA distribution formula has been developed with regard to family law matters. Should the NPA cover Commonwealth and State/Territory national objectives and

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<sup>56</sup> Survey of Disability, Ageing and Carers (SDAC) 2009

core priorities as per Recommendation 21.5, the funding model would also need to consider criminal law and civil indicators.<sup>57</sup>

*Is the quantum of funding adequate?*

Legal Aid NSW strongly supports the Productivity Commission's statements on demand being largely driven by external factors and the importance of LACs and CLCs having flexibility to manage their funds in accordance with priority areas.

A key point made by the LACs and CLCs was that there are challenges associated with demand for services being largely driven by external factors while funding is fixed (section 21.3; box 21.14). Policy and legislation changes can significantly impact on the demand for legal assistance services. (p.660)

The combination of externally driven demand for legal assistance services and largely fixed budgets points to the importance of providing flexibility to the LACs and CLCs to manage their allocation of funds under guidelines for prioritising activities and clients to where the highest returns (broadly defined) will be. (p.661)

Legal Aid NSW submits that a justice financial impact statement, including the impact on legal assistance services, should be a requirement in cabinet proposals for all new legislative and policy changes. This measure would raise awareness of the impact and costs of new legislative and policy initiatives on legal assistance service providers and the need to adequately resource changes. If implemented, it would greatly assist legal assistance providers to manage demand.

**Information request 21.4**

The Commission seeks feedback on the extent of, and the costs associated with, meeting the civil legal needs of disadvantaged Australians, and the benefits that would result.

As discussed in the Draft Report, Legal Aid NSW has developed a problem solving approach to civil law matters based around 'law for everyday life'(p.630). Our scarce civil law resources focus on areas that have the most impact on people's lives, including tenancy and housing issues, debt, social security, employment, human rights or access to basic services, and consumer issues. Legal Aid NSW submits that the 'law for everyday life' priorities provide a good model for the legal assistance sector.

Notwithstanding Legal Aid NSW having the largest civil law program, funds are woefully inadequate to address the level of unmet legal need. Funding constraints limit the availability and level of assistance that can be provided and tightly restrict eligibility for more intensive services.

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<sup>57</sup> Some examples include rates of homelessness, disability and migrant populations, and criminal charge and prosecution rates.

In addition to the cost of increasing the means test and practitioner fees, the costing of a comprehensive civil law program in NSW and other jurisdictions is difficult to quantify. Legal Aid NSW would welcome further work by the Productivity Commission to quantify the cost of meeting the civil needs for disadvantaged Australians.

*How well do the governance arrangements work?*

**Draft recommendation 21.5**

The Commonwealth and the state and territory governments should renegotiate the National Partnership Agreement on Legal Assistance Services (following the current one expiring) and seek agreement on national core priorities, priority clients, and aligned eligibility tests across legal assistance providers.

Legal Aid NSW strongly supports this recommendation and the statements made in the Draft Report acknowledging the constraints arising from separate Commonwealth and State priorities and funding agreements (p.632 and section 21.8).

Legal Aid NSW has a legislative duty to ensure co-ordination of legal aid services and the state wide provision of legal assistance services to disadvantaged people.<sup>58</sup> Within NSW, Legal Aid NSW works cooperatively with other legal assistance services, particularly the ALS and CLCs.

The National Partnership Agreement on Legal Assistance Service (NPA) should apply to LACs and CLCs. Legal Aid NSW believes that as ALS and FVPLS are funded to provide indigenous legal services, which is a Commonwealth responsibility, an NPA is not the appropriate mechanism to distribute funding.

CLCs provide complementary services to those provided by LACs. Legal Aid NSW works closely with NSW CLCs through a number of cooperative and collaborative partnerships. These include:

- New South Wales Legal Assistance Form (NLAF).
- Legal Information Referral Forum (LIRF).
- Co-operative Legal Service Delivery Program (CLSD).
- A range of other forums such as the Western Sydney legal assistance forum.
- Regional Outreach Clinic Programs (ROCPs).
- CLC/Legal Aid NSW Partnership Program which has funded twelve collaborative partnerships to respond to unmet or emerging legal needs to date.
- Family Law Pathways networks.
- Conflict protocols to provide advice or assist in mediations for the other party where either the CLC or Legal Aid NSW has a conflict of interest.

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<sup>58</sup> *Legal Aid Commission Act 1979 (NSW)* section 12(h) and (b)

- Information sharing about Legal Aid NSW and CLCs outreach locations, through six monthly database updates to avoid duplication of services and improve referrals.
- Community Legal Education projects such as the discrimination toolkit and mortgage stress handbook.
- Long-term collaborative projects such as the Older Persons Legal and Education Program, Insurance Law Service and Homeless Persons Legal Service.

While CLCs are established on the initiative of their communities, the growth of CLCs in NSW from the 1990s has been targeted at regional, remote and other metropolitan areas with high levels of legal need.<sup>59</sup> Legal Aid NSW also notes that while some NSW CLCs are located in increasingly gentrified areas, these CLCs' catchment areas are large and are targeted at low income clients and vulnerable clients.<sup>60</sup>

CLCs in NSW use legal needs analysis to identify the areas of greatest need within their catchments. This process includes analysis of SEIFA data, consideration of the availability of other existing legal assistance providers and consultation at a local and state level. The methodology devised by Judith Stubbs & Associates for the sector has been applied across all CLCs.<sup>61</sup>

Legal Aid NSW acknowledges that there could be further integration and coordination between CLCs and LACs. For example, there could be improvements in the service delivery for disadvantaged people through:

- consistent data definitions and collection.
- integration, co-ordination and prioritisation of services including outreach services.
- access to resources including administrative support, distribution of publications, training, policy advice, practice management, mentoring and risk management.
- prevention of duplication arising from one-off Commonwealth funding.

Legal Aid NSW does not believe that competitive tendering model is the appropriate model for ensuring that legal assistance is properly targeted. Legal Aid NSW notes that forthcoming research on integrated legal services suggests that the UK

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<sup>59</sup> For example Central West, Far West, Mt Druitt, North and North West, Northern Rivers, Western NSW and Mid North Coast CLCs.

<sup>60</sup> For example, Redfern Legal Centre targets services to clients with a disability, Aboriginal clients and clients in social housing which still represent some of the most disadvantaged clients in the State. Similarly, Inner City Legal Centre has a catchment that runs from Sydney to the Northern Beaches and North Shore of Sydney. It focuses on disadvantaged clients such as homeless people, victims of domestic violence and sex workers in the Kings Cross and Darlinghurst areas. Marrickville Legal Centre has a catchment that runs from Marrickville south to Sutherland and west to parts of Auburn and Lakemba. It focuses on low or no income clients who have difficulties accessing services because of language barriers.

<sup>61</sup> Legal Needs Project [www.clcnsw.org.au/cb\\_pages/publications.php?category\\_id=1206](http://www.clcnsw.org.au/cb_pages/publications.php?category_id=1206)

Community Legal Advice Centre (CLAC) competitive tendering process destroyed long term referral pathways and collaboration between services due to the competitive threat.

Legal Aid NSW submits that while there is some scope for prioritising service locations to address gaps, the current funding envelope constrains the resources available to further collaborative partnerships.

However, were additional funds allocated to address unmet legal need amongst disadvantaged communities, Legal Aid NSW would work collaboratively with the CLCs to ensure resources are used efficiently and cost effectively to address gaps. Legal Aid NSW notes the options outlined by the Productivity Commission for allocating funds to CLCs (p.657) and either funding distribution model could be utilised to transparently distribute funds to identified areas of highest need through a collaborative process with CLCs.

Legal Aid NSW agrees with the 'subsidiarity principle' (p.657), that policy should be administered by the lowest level of government that can effectively do so and that the Commonwealth is not best placed to understand and allocated resources to the highest level of legal need within each jurisdiction.

Legal Aid NSW notes the Victorian Legal Aid (VLA) Guiding Principles for CLC funding decisions. These guiding principles are used to allocate additional community legal centre funding. VLA states:

These guiding principles will ensure that funds are better allocated to address unmet legal need in geographical locations of growth and disadvantage, and to centres that effectively target services to legal need. The guiding principles also recognise the importance of centres engaging in strategic advocacy and legal education, as well as legal advice services.<sup>62</sup>

*A 'true' National Partnership for legal assistance*

Legal Aid NSW welcomes the Productivity Commission's 'assessment that the NPA is a national agreement on paper but is not necessarily working as such in practice' (p.669). In addition, we strongly support the Productivity Commission's statement that:

A true agreement between the Commonwealth and the states and territories on issues such as national priority areas of law and legal problems, priority clients, and eligibility for assistance, would facilitate a more 'holistic' approach to client needs and reduce overlap. (p.669)

Legal Aid NSW submits that negotiation of a national agreement on LAC and CLC legal assistance services should include jointly agreed:

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<sup>62</sup> Victorian Legal Aid, 2012-2013 Annual Report p.81  
[ar2013.vla.vic.gov.au/sites/default/files/ar\\_2012\\_13.pdf](http://ar2013.vla.vic.gov.au/sites/default/files/ar_2012_13.pdf)

- service priorities, which respond to legal need, capacity of the client and impact of the legal problem on a person's life.
- priority clients and benchmarking against social disadvantage indicators.
- appropriate eligibility principles, including a new realistic means test that looks at indicators of disadvantage and extends assistance to the working poor.<sup>63</sup>
- additional and appropriate Commonwealth/State funding that addresses unmet legal need among disadvantaged people, provides appropriate fee scales for private practitioners<sup>64</sup> and provides a measure of permanency in service delivery arrangements.
- understanding of unbundled services including advice, community legal education, alternative dispute resolution and duty services.
- data definitions and counting rules to enable effective evaluation.

Legal Aid NSW also submits that allocating LACs' NPA funding directly to LACs, rather than through the State would reduce red tape and double handling. We would continue to report to both the Commonwealth and the State under the new form of NPA against the agreed priorities and targets.

### **Assistance for Aboriginal and Torres Strait Islander People**

*There are good grounds for specialised services*

#### **Draft finding 22.1**

Specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.

Legal Aid NSW works closely with the Aboriginal Legal Service NSW/Act (ALS). In 2006, Legal Aid NSW and the ALS signed a Memorandum of Understanding, followed by a Statement of Commitment in 2011 and 2013. Under the Statement of Commitment both organisations agree to work together to:

- Deliver high quality, culturally sensitive and innovative legal services to Aboriginal people.
- Improve the justice system for Aboriginal people.
- Share information and resources, and support the professional development of each other's staff.

Legal Aid NSW welcomes the Productivity Commission's draft finding that specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified. It also notes the statement made by the Productivity Commission:

<sup>63</sup> See the response to Draft Recommendation 21.3 and 21.4 for further analysis of the means test.

<sup>64</sup> See the response to Information request 21.2 for further analysis of private practitioner fees.



That said, it would not be feasible, nor is it the case currently, that all Indigenous legal needs are met by Indigenous specific services. CLCs and LACs will remain important providers of legal services for Aboriginal and Torres Strait Islander Australians, particularly in regional and metropolitan areas. (p.677)

*Multi-faceted responses are required to help bridge the gaps*

In 2012-13, 10.3% of Legal Aid NSW case grants and inhouse duty services were provided to Aboriginal clients. In addition to its collaboration with the ALS,<sup>65</sup> Legal Aid NSW has undertaken a number of initiatives to increase access to legal assistance for Aboriginal people including:

- expansion of the civil law outreach program to communities of high need in regional and remote locations. 16% of Legal Aid NSW outreach clinics in 2012-13 were located in Aboriginal specific organizations. In 2012, 13% of all outreach assistance was provided to Aboriginal clients and 20% of services provided under the Regional Outreach Clinic Program (ROCP) were provided to Aboriginal clients.<sup>66</sup>
- introduction of the Work and Development Order Service. Almost 25% of all fines and WDO advice and minor assistance services to individuals were provided to Aboriginal clients.
- roll-out of the 'Civil Law - What's that' training program to frontline Aboriginal justice sector workers to identify civil and family law issues before matters escalate into the criminal law jurisdiction.
- establishment of the Family Law Early Intervention Unit, targeting disadvantaged communities including Aboriginal people and Aboriginal organisations.
- provision of a significant community legal education program, which included 354 Legal Aid NSW community legal education events targeting Aboriginal people.<sup>67</sup>

Central to the success of these initiatives has been the Aboriginal Field Officer positions funded by Legal Aid NSW. The Aboriginal field officers enable a flexible and culturally appropriate response for Aboriginal clients by being cultural advisors and trainers, community liaison officers, community legal educators and client information and support officers.

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<sup>65</sup> Collaborative initiatives include funding two ALS Aboriginal Field Officers for civil and family law matters at Coffs Harbour and Walgett, funding two ALS Field Officers at Bathurst and Nowra under the Work and Development Order Service, providing salary support for 3.5 ALS care and protection Legal Officer positions and providing civil law advice clinics at ALS offices in Griffith, Lismore, Nowra, Redfern, Walgett and Wollongong, and family law advice clinics at ALS offices in Parramatta and Redfern.

<sup>66</sup> Review of Legal Aid NSW outreach legal services - Stage 1 report Statistical overview of services 2010-2012, Law and Justice Foundation of NSW, 2013  
[www.lawfoundation.net.au/ljf/site/articleIDs/3495F5A93BBB91BDCA257BD000143795/\\$file/Review\\_of\\_LegalAidNSW\\_outreach\\_Stage1\\_FINAL\\_Web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/3495F5A93BBB91BDCA257BD000143795/$file/Review_of_LegalAidNSW_outreach_Stage1_FINAL_Web.pdf) p.3

<sup>67</sup> January 2011 to June 2013

Field officers are located at the ALS offices in Walgett and Coffs Harbour and at Legal Aid Campbelltown. Work and Development Order ALS Aboriginal field officers located at Bathurst and Nowra support Aboriginal clients experiencing problems with debt, fines, violence and family law issues.

A review of the Aboriginal Field Officer (civil and family) Pilot Program is currently underway, with the final report due mid June 2014. Contributing to the review are Professor Chris Cunneen and Melanie Schwartz, the researchers and authors of *The family and civil law needs of Aboriginal people in New South Wales: Final Report*.<sup>68</sup>

The key finding of the upcoming report is that the Aboriginal Field Officer program has improved the level of engagement with Aboriginal clients and communities, and should be continued, and expanded. The review has found overwhelming evidence that the Aboriginal Field Officer model reduces specific barriers to Aboriginal clients in accessing civil and family law services through 'bridging the gap' between Aboriginal people and legal assistance services, and being 'cultural translators' between lawyers and Aboriginal clients.

While highly supportive of expanding the Aboriginal Field Officer program, Legal Aid NSW would require additional resources to expand this important program.

Implementation of Aboriginal services has also been guided by the recommendations of the *Report into the Civil and Family law needs of Aboriginal People*, Legal Aid NSW collaborative partnerships with the ALS (NSW/ACT) and the work of the Aboriginal Services Unit.

Established in 2006, the Legal Aid NSW Aboriginal Service Unit works to improve and expand the delivery of legal aid services to Aboriginal people. The team of three staff guide the implementation of the Aboriginal Employment and Career Development Strategy, the Aboriginal Staff network and the Aboriginal Justice Committee. A timeline of Aboriginal services is outlined in Annexure C.

Other Legal Aid NSW initiatives to address the complex legal needs and barriers faced by Aboriginal clients include development of a Reconciliation Action Plan, Aboriginal specific publications, assistance to Aboriginal women leaving custody, the Money Counts project and family law projects to increase the participation of Aboriginal people in the family law system. These initiatives are described in more detail below.

The *Legal Aid NSW Reconciliation Action Plan*<sup>69</sup> is a two year strategy to improve access to justice for Aboriginal people in NSW. Goals in the plan include ensuring Aboriginal people can access legal services to protect their rights and seeking changes in the criminal justice system to reduce the over-representation of Aboriginal people through law reform and administrative changes.

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<sup>68</sup> *The family and civil law needs of Aboriginal people in New South Wales – Final Report*, Chris Cunneen and Melanie Schwartz Law Faculty, University of NSW, 2008

<sup>69</sup> [www.legalaid.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0003/15960/Reconciliation-Action-Plan-2013-2015.pdf](http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0003/15960/Reconciliation-Action-Plan-2013-2015.pdf)

Aboriginal specific publications have been developed to address common family and civil law problems, fines, mental health, family breakdown, child support, stopping family violence and working out what's best for the kids.

Legal Aid NSW is providing a legal service to Aboriginal women in custody, primarily at Silverwater Metropolitan Remand and Reception Centre, to address the legal issues preventing these women from obtaining suitable housing on release.

The Legal Aid NSW Money Counts project focuses on consumer issues in remote indigenous communities. Legal Aid NSW has worked closely with the Australian Securities and Investments Commission (ASIC), the Office of Fair Trading and Aboriginal leaders to identify remote vulnerable communities which are being targeted by unscrupulous businesses or scams.<sup>70</sup> This project aims both to warn the community and prevent economic loss, and to build the capacity of the community to identify unlawful business practices in the future.

Since November 2014, the Money Counts lawyers have provided 240 advice and 200 minor assistance services in culturally appropriate locations where people feel comfortable. In the Lake Cargelligo/Murrin Bridge region, 10% of the Aboriginal community were assisted over two outreach visits. Key issues included debts, paying for funerals, problems paying energy bills, rental of household goods, small loans and fines.

The Money Counts lawyers have established strong partnerships with other service providers including the ALS, CLCs, commercial law firms, financial counsellors, No Interest Loan Scheme providers, ombudsmen and State Debt Recovery. These partnerships have been key to resolving the range of money worries experienced by a client. In addition, these partnerships have facilitated bulk resolution of issues. For example the Money Counts team have established a referral process with the NSW Energy and Water Ombudsman.

The Legal Aid NSW family law section is undertaking a number of initiatives underway to improve its mediation services for Aboriginal families. In addition to providing cultural awareness training for family dispute resolution practitioners, Legal Aid NSW aims to provide lawyer assisted family disputes resolution conferences in a more culturally responsive way. Another project is building referral pathways with Aboriginal community organisations for Aboriginal clients with family law problems.

Legal Aid NSW notes that legal services can face difficulties when attempting to provide a broad range of legal services. These difficulties include attracting specialist lawyers, managing conflict and practice management. Partnerships between legal assistance providers are one way of overcoming these difficulties.

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<sup>70</sup> Money counts team are providing legal advice and community legal education in Dareton, Condobolin, Mt Druitt, Murrin Bridge, Lake Cargelligo, Taree and Nambucca Valley.

## Data and Evaluation

### *Improving data collection and evaluation*

#### ***Draft recommendation 24.1***

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).

To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:

- adopting common definitions, measures and collection protocols
- linking databases and investing in de-identification of new data sets
- developing, where practicable, outcomes based data standards as a better measure of service effectiveness.

Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.

#### ***Draft recommendation 24.2***

As part of draft recommendation 24.1, existing data systems should be overhauled so that providers can track outcomes for intensive users of legal assistance services over time.

Legal Aid NSW supports in principle Draft Recommendations 24.1 and 24.2 subject to appropriate funding being provided to implement them. In addition to the opportunity cost on service delivery, additional data requirements have significant resource implications arising from the cost of system changes, and costs of capturing, updating and verifying data currently not collected.

Legal Aid NSW endorses the Productivity Commission's statements about 'fatigue' among those collecting and reporting data:

It is important that requests for data are carefully targeted so that benefits of its use are apparent to those that provide and collect information. Before imposing additional data requirements, existing data need to be fully assessed and used so that data collection fatigue is not compounded. Efforts need to be made to identify and reduce 'redundant data' requirements. This process should be undertaken in consultation with providers and institutions. This should help allay concerns raised by some participants about imposing additional costs on providers and institutions that are already data weary and resource constrained. (p.757)

Legal Aid NSW submits that data capture must be proportional to the service being provided. The same level of data should not be collected for every service. In addition, data collection must also be relevant, efficient and put to good use. Collecting data that is never used is wasteful of both time and resources and therefore highly inefficient.

***Draft recommendation 24.3***

The Commission recommends that the LAW Survey, or a survey of similar scope and detail, be undertaken on a regular basis at least every 5 years. The results of, and underlying data from such surveys should be made publicly available.

Legal Aid NSW supports in principle a regular legal need survey. However, this survey should be funded by government<sup>71</sup> and not be restricted to a telephone survey. Given the increasingly low incidence of landline telephones among disadvantaged people, Legal Aid NSW believes a telephone based general population survey will under-represent disadvantaged groups.

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<sup>71</sup> Legal Aid Commissions provided a substantial portion of the funding for the initial LAW Survey.

### Summary of Recommendations supported by Legal Aid NSW

No.	Recommendation	Qualified by
5.1	<p>All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.</p> <p>Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.</p>	
8.1	<p>Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.</p>	
8.2	<p>All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.</p>	
8.4	<p>Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.</p>	
8.6	<p>Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain</p>	See p.21

	standards that enable professionals to be independently accredited.	
12.2	Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.	
13.4	Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. The amount to be recovered should be a fixed amount set out in court scales.	
13.6	Courts should grant protective costs orders (PCOs) to parties involved in matters of public interest against government. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.	
13.7	Subject to an initial favourable assessment of the merits of a matter, public interest litigation funds should pay for costs awarded against public interest litigants involved in disputes with other private parties.  These funds would be resourced by cost awards from those cases where the public interest litigant was successful. Access to the fund should be determined by formally outlined criteria, with cases evaluated by a panel of qualified legal experts. The criteria should be based on those used by courts to determine if a party is eligible for a protective costs order in a dispute with government.	
16.4	The Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals granting fee relief on a discretionary basis in exceptional circumstances.  Fee guidelines should ensure that courts and tribunals use fee postponements — rather than waivers — as a means of fee relief if an eligible party is successful in recovering costs or damages in a case.  Fee guidelines in courts and tribunals should also grant automatic fee relief to:	

	<ul style="list-style-type: none"> <li>parties represented by a state or territory legal aid commission</li> <li>clients of approved community legal centres and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief.</li> </ul> <p>Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.</p>	
17.1	<p>Courts should extend their use of telephone conferences and online technologies for the purpose of procedural or uncontentious hearings where appropriate, and examine whether there should be a presumption in favour of telephone hearings or use of online court facilities (where available) for certain types of matters or litigants.</p>	
18.1	<p>Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.</p> <p>The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.</p>	
19.1	<p>The Commonwealth and state and territory governments, in collaboration with the legal profession and regulators, should develop a single set of rules that explicitly deal with unbundled legal services, for adoption across all Australian jurisdictions. These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address:</p> <ul style="list-style-type: none"> <li>how to define the scope of retainers</li> <li>the liability of legal practitioners</li> <li>inclusion and removal of legal practitioners from the court record</li> </ul> <p>disclosure and communication with clients, including obtaining their informed consent to the arrangement.</p>	
21.1	<p>Commonwealth and state and territory government legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure that demand for criminal</p>	See p.38-39



	assistance does not affect the availability of funding for civil matters.	
21.2	The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the National Partnership Agreement on Legal Assistance Services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.	
21.3	The Commonwealth and state and territory governments should use the National Partnership Agreement on Legal Assistance Services to align eligibility criteria for civil law cases for legal aid commissions and community legal centres. The financial eligibility test for grants of legal aid should be linked to some established measure of disadvantage.	p.41
21.5	The Commonwealth and the state and territory governments should renegotiate the National Partnership Agreement on Legal Assistance Services (following the current one expiring) and seek agreement on national core priorities, priority clients, and aligned eligibility tests across legal assistance providers.	
22.2	The Commonwealth Government should allocate funding for both Aboriginal and Torres Strait Islander legal services and family violence prevention legal services in accordance with differences in need and service costs across geographic areas.	
24.1	<p>All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).</p> <p>To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:</p> <ul style="list-style-type: none"> <li>• adopting common definitions, measures and collection protocols</li> <li>• linking databases and investing in de-identification of new data sets</li> </ul>	See p.52-53, subject to resources.

	<ul style="list-style-type: none"> <li>• developing, where practicable, outcomes based data standards as a better measure of service effectiveness.</li> </ul> <p>Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.</p>	
24.2	As part of draft recommendation 24.1, existing data systems should be overhauled so that providers can track outcomes for intensive users of legal assistance services over time.	See p.52-53, subject to resources
24.3	The Commission recommends that the LAW Survey, or a survey of similar scope and detail, be undertaken on a regular basis at least every 5 years. The results of, and underlying data from such surveys should be made publicly available.	See p.53

## Australia and New Zealand Ombudsman Association

### Benchmarks and underlying principles

#### Accessibility

*The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.*

This principle is particularly important for socially and economically disadvantaged members of the community. Accessibility includes free lodgement of complaint, processes that are easy to navigate and flexibility in making the complaint, such as accepting complaints by telephone, call back services and free interpreters.

#### Independent

*The decision-making process and administration of the schemes are independent from scheme members.*

#### Fairness

*The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.*

Fairness in procedure includes having staff who understand the complainant's rights and are trained to appropriately minimise power imbalances. For example, having early discussions with parties about strengths and weaknesses of dispute and making appropriate referral for legal advice.

Fairness in outcomes relates to both the determinations made and ensuring that parties do not unknowingly agree to terms that are against their interest. For example, schemes should not encourage complainants to settle in terms that are clearly against their interest. In these instance schemes should refer complainants for legal advice before settlement.

#### Accountability

*The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting systemic industry problems.*

Schemes must be accountable and transparent in their processes and decisions, and subject to periodic independent review. For example, the Financial Ombudsman Service was reviewed in 2013.<sup>72</sup>

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<sup>72</sup> [www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf](http://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf)

## **Efficiency**

*The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing performance.*

Schemes should have efficient processes such as the Telecommunication Industry Ombudsman's assisted referral of matters to mediation to streamline dispute handling. However, schemes need to ensure that parties are disadvantaged in the forum. For example, a focus of closing files without considering the true reasons for delay can lead to complaints being disadvantaged.

## **Effectiveness**

*The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.*

Schemes should be effective in achieving outcomes including making determinations binding if the consumer agrees, and effective in identifying and recording systemic issues while allowing individual cases to remain confidential.

# ABORIGINAL SERVICES

# OUR STORY

**Legal Aid**  
NEW SOUTH WALES

**In 2014, 5.8% of staff are Aboriginal, surpassing the State Government benchmark of 2.6%.**

**2003**

- Civil Law Review first raises unmet civil law needs for Aboriginal communities

**2001**

- Statement of Cooperation with the Coalition of Aboriginal Legal Services (COALS)
- New mediation program for Aboriginal families
- 8 Aboriginal clerical staff join Legal Aid

**2000**

- Women's Domestic Violence Court Advocacy Services employ Aboriginal specialist workers

**2002**

- First Aboriginal and Torres Strait Islander Justice Plan and Aboriginal Employment and Career Development Strategy
- Aboriginal awareness training for staff – the first wave

**2005**

- New Aboriginal Justice Committee advises the CEO

**Today, over 10% of our clients are Aboriginal compared with less than 4% in 2002 (based on case and inhouse duty services).**

**2006**

- Aboriginal Services Unit commences
- Memorandum of Understanding with Aboriginal Legal Service (NSW/ACT)
- Making our Services Work for Aboriginal People is published
- First Aboriginal Planning Day and Aboriginal Service Delivery Plan
- Taking part in Good Service Forums in Sydney and regional NSW—up to 6 times per year

**2007**

- Aboriginal Staff Network commences
- Lawyers attend care circles
- Launch of Aboriginal Client Service Strategy for Civil Law Services
- Statement of Cooperation with the Aboriginal Legal Service (NSW/ACT)
- Care and protection service commences at Mt Druitt
- Report commissioned into Civil and Family Law Needs of Aboriginal People in NSW by Professor Cunneen
- First attendance at NAIDOC Week celebrations and Yabun Festival — including guest speakers, films and bush tucker

**2009**

- The Adventures of Super Cuz radio plays on the law for young people followed by legal workshops in NSW public schools
- Stolen Wages – assisted over 1,100 people to register claims and conducted a statewide education program to promote the claims deadline
- Caring for kids – information for grandparents published

**2010**

- New domestic violence resources for Aboriginal women
- Learn about the law workshops for older Aboriginal people

**2011**

- Aboriginal Field Officers employed
- Civil law outreach program commences
- First Ella 7's rugby tournament & Goodooga Family Fair – now annual events for Legal Aid NSW
- Koori men's workshops about the law
- Statement of Commitment with the Aboriginal Legal Service (NSW/ACT)
- Launch of Civil law – what's that? – training Aboriginal justice workers
- New suite of resources for Aboriginal communities as well as promotional banners, tablecloths and commissioned artwork
- Regional Outreach Clinic Program runs training for private lawyers
- Aboriginal Services and Employment Partnership Plan 2011-2013 finalised
- Start attending Saltwater Women's Camp in Taree

**2012**

- Legal Aid NSW funds two Work and Development Order Aboriginal Field Officers at Nowra and Bathurst
- Co-host family law conference "Our children...our journey...our way"
- Fix your fines campaign – 21 Fines Days held in towns with high Aboriginal populations
- National Reconciliation Week 27 May to 3 June — Legal Aid NSW launches a Reconciliation Action Plan 2013-2015 and submits it to Reconciliation Australia
- 100 private lawyers attend Aboriginal cultural competency training
- New brochures – Making a Will and Acting early in family law

**Looking to the future**

**2014**

- Aboriginal Employment and Career Development Strategy 2014-2015
- Chairperson's Scholarship provides financial help to staff with study/career development
- Reconciliation Champions Network provides further ownership of the Reconciliation Action Plan
- Statement of Commitment with the Aboriginal Legal Service (NSW/ACT)
- WDO Field Officer appointed for Sydney metro, Central Coast and Hunter

**2013**

- 25% of all WDOs are for Aboriginal clients
- 10% of outreach clinics are located in Aboriginal services, mainly Aboriginal Legal Services
- Legal Aid NSW Reconciliation Action Plan launched
- Statement of Commitment with the Aboriginal Legal Service (NSW/ACT)
- Law Week: Legal Aid NSW and 20 agencies provide 500 services to Aboriginal clients in Bourke and Brewarrina
- 29% of Cooperative Legal Service Delivery projects addressed the legal needs of Aboriginal communities
- 22% of Regional Outreach Clinic Program clients are Aboriginal
- Money Counts: assists Aboriginal people with consumer law issues
- New mediation program commences
- Aboriginal and Torres Strait Islander Kids in care is published
- New DVD – A deadly way to clear your fine debt – in partnership with the Aboriginal Legal Service (NSW/ACT)

**Since 2008, almost 500 Legal Aid staff and partner agencies have completed Aboriginal cultural awareness training.**