



21 May 2014

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

Dear Commissioners

### **Draft Report - Access to Justice Arrangements**

The Consumer Action Law Centre (**Consumer Action**) and Consumer Credit Legal Centre NSW (**CCLC**) welcome the opportunity to comment on the Productivity Commission's Draft Report on Access to Justice Arrangements.

### **Summary of the submission**

#### Chapter 5: Understanding and navigating the legal system

- We support **Draft Recommendation 5.1**, that each State and Territory should fund a national referral service with a widely recognised single entry point for legal referral. However, the aim should be to evolve this national number into a multi-disciplinary team.
- We support the use of legal health checks as part of a multifaceted approach (**Information Request 5.1**)
- We welcome efforts to improve the ability of non-legal professionals to identify and refer legal problems (as suggested in **Information request 5.2**), but training may be improved by partnering with the CLCs that will be receiving the referrals on how to make referrals work.
- We suggest co-location of services and systems (like Consumer Action and CCLC's legal and financial counselling services, together with worker advice lines) are more effective than referrals between organisations (**Information request 5.3**);

#### Chapter 6: Information and Redress for Consumers

- We strongly welcome the Productivity Commission's focus on consumer protection in the legal services market.
- **We recommend** that the billable hours method should not be used for billing individuals. Law firms should provide a binding quote for services provided to individuals.
- We support **Recommendations 6.1 to 6.5** with the exception that we strongly contend that individuals should be able to have access to resolution of billing complaints for free.

#### **Consumer Action Law Centre**

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- We strongly support the proposal that legal services regulators should have the power to directly enforce the Australian Consumer Law (**Information Request 6.1**)
- We encourage the Productivity Commission to consider whether broader, consistent consumer protection standards should be applied to the legal profession, including a requirement for legal costs to be fair and reasonable.
- An online resource with information about legal fees should be hosted by a body that is independent and is seen to be established in the interests of consumers. The information provided must be simple enough to be understood by all users (**Information Request 6.2**);
- We endorse the recommendation that complaints handling bodies should have the power to investigate complaints and compel the production of information or documents, as foreshadowed by **Draft Recommendation 6.8.**, but we encourage demarcation between a regulator's compliance and enforcement role and a complaint handling body's role to resolve complaints and disputes.
- **We recommend** that bodies receiving consumer complaints about legal services should be required to report publicly on the outcomes they achieve, such as data on how successful they have been resolving disputes, and success rates for consumers and traders.

#### Chapter 7: A responsive legal profession

- We support **Draft Recommendation 7.1**

#### Chapter 8: Alternative Dispute Resolution

- Compulsory mediation in all disputes of up to \$50,000, as suggested in **Information Request 8.1**, would result in compulsory mediation for the vast majority of civil disputes, not only 'relatively low value' claims. If the Commission makes such a recommendation, it should also make recommendations about the need for oversight and evaluation, including public reporting of outcomes, which ensures mediation is of high quality.

#### Chapter 9: Ombudsmen and other complaint mechanisms

- We support findings by the Commission that industry ombudsmen meet legal need in a way that is fast, effective and free of charge for consumers.
- We broadly support **Draft Recommendation 9.1** that the profile of ombudsman services should be raised, but targeting information so that it reaches people at the point they need it the most will be more effective than blanket exercises to raise awareness.
- We support the proposal in **Draft Recommendation 9.2** to consolidate industry ombudsman schemes in appropriate cases, as long as doing so does not leave consumers without another accessible option, or reduce the level of expertise in dispute resolution.

#### Chapter 10: Tribunals

- **Draft Recommendation 10.1** should be expanded to acknowledge that there are a broader range of scenarios in which legal representation will improve efficiency and access to justice in tribunals.
- **We recommend** that the Commission's Final Report should acknowledge that a key purpose of Tribunals is to provide for quick, accessible, and fair justice outcomes, and that Tribunals should not just become 'courts lite'.

### Chapter 11: Court processes

- The Commission should extend **Draft Recommendation 11.10** (that courts should make more use of court appointed experts) to also apply to Tribunals, particularly for motor vehicle disputes.

### Chapter 13: Costs Awards

- We broadly support **Draft Recommendation 13.2**, and that costs awards in lower courts should have a standard basis that is clear to parties and their advisers at the outset of litigation.
- We support **Draft Recommendation 13.4**, that parties represented pro bono should be entitled to seek an award for costs. For the avoidance of any doubt it should be clarified at law that Community Legal Centres and their clients are similarly entitled to recover costs.
- In response to **Information Request 13.1**, we believe the lawyer acting should be the beneficiary of any cost award.
- We support **Draft Recommendation 13.6**, which recommends courts should grant protective costs orders in appropriate public interest cases, and that courts should formally outline the criteria for granting these orders. However, we recommend the protective costs orders should not just be available against government entities, but against private parties too.

### Chapter 15: Tax Deductibility of Legal Expenses

- We accept the Commission's position that no change be made to existing tax deductibility of legal expenses, but we encourage the Commissioners to reconsider the alternative option of increasing the fees for business users of the court and tribunals to compensate for tax deductibility enjoyed by business but not individuals.

### Chapter 16: Court and Tribunal Fees

- We do not support **Draft Recommendations 16.1 and 16.2**, that the starting assumption when determining court fees should be full cost recovery.
- We strongly support **Draft Recommendation 16.4**, apart from the proposal that fee postponements should be preferred over fee waivers where a party recovers costs or damages—this should not be pursued where paying the fee will still cause hardship;
- We strongly support the use of automatic fee waivers where it has already been demonstrated through a separate process that the applicant is of very low income (**Information Request 16.2**).

### Chapter 18: Private funding for litigation

- Consumer Action and CCLC support **Draft Recommendation 18.1** that Australian governments should remove restrictions on damages-based billing.
- Consumer Action and CCLC also support **Draft Recommendation 18.2** which would impose certain obligations on third party litigation funders.

### Chapter 19: Bridging the Gap

- We support **Recommendations 19.1 and 19.2**, regarding unbundled legal advice.

- Consumer Action and CCLC do not support the introduction of Legal Expenses Insurance (**Information Request 19.1**).
- Although a Legal Expenses Contribution Scheme (**Information Request 19.2**) would provide clear benefits to access to justice we have some concerns about how it would be funded and administered. The best way forward to evaluate a LECS would be a feasibility study.
- Regarding **Information Request 19.3**, while there may be opportunity in alternative not-for-profit legal assistance models, we caution against any argument that self-funded services are the solution to 'the missing middle', or that they can replace the need for government funded services.

### Chapter 21: Reforming the Legal Assistance Landscape

- We understand that the National Association of Community Legal Centres has responded to this chapter in detail. We endorse that response.
- In addition to that response, this submission:
  - Notes the emphasis in the Draft Report on the consistent application of eligibility criteria to ensure limited legal assistance funding is well targeted. However, eligibility criteria is only one part of effectively targeting services;
  - agrees that better service delivery must be informed by needs analysis. However, we submit that this analysis is best done collaboratively with services and done in a way that ensure continuous ongoing reflection on what works well for a service and why and what needs to be improved;
  - and strongly supports the comments in the Draft Report about the value of strategic advocacy and law reform activities by CLCs and LACs. CLCs play a key role in identifying and acting on systemic issues and these activities are an efficient use of limited resources.

### **About the Contributors**

#### Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

#### CCLC

Consumer Credit Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial services and we advocate for law reform and government policy development that benefits consumers in these areas.

## Chapter 5: Understanding and Navigating the System

It is very difficult to understand and navigate the legal system in Australia. This in turn affects access to justice. The draft report correctly recognises this as an issue that needs to be addressed. A key part of navigating the legal system is giving the public access to a national body handling referrals with a well publicised number.

### Draft Recommendation 5.1

We support recommendation 5.1, that each State and Territory should fund a national referral service with a widely recognised single entry point for legal referral.

The national debt hotline is an example of how this kind of service might work. The national debt hotline (1800 007 007) connects a caller to a centre in their state staffed by qualified financial counsellors (and in some states also solicitors) who can then provide financial counselling and/or legal advice and referrals to a financial counsellor located near the caller for more extended assistance. Referrals are also given to other legal and community services as required.

In our view the natural progression for this hotline is to be a one stop shop set up where the caller gets access to financial counselling and legal advice (working in a specialist multi-disciplinary team) in each State and Territory in Australia. Both Consumer Action and CCLC currently have a multi-disciplinary team including financial counsellors and solicitors. In both our organisations the caller does not need to identify the legal problem because the staff identify the legal problem for the caller.

The national debt hotline is a relatively recent innovation, but is already attracting over 120,000 calls per year. A single national number assists promotion through the media, and it has also made it easier to raise awareness of the availability of financial counselling at the point where people are in the greatest need of the service. For example, if a debtor defaults on a credit contract, the creditor cannot enforce their rights under the contract before they provide a standard form notice under section 88 of the National Credit Code. Among other things, this notice includes the following:

**If you are having financial difficulties you can also contact a financial counsellor on 1800 007 007 (free call)**

For information about your options for managing your debts, ring 1 800 007 007 from anywhere in Australia to talk to a free and independent financial counsellor.<sup>1</sup>

A nationwide legal referral line could be publicised in similar ways.

### *The Law Access model*

We support, in principle, the Law Access model in NSW being turned into a national legal referral service model. CCLC received 796 referrals in 2013 from Law Access NSW. Law Access NSW is the 4th highest referrer to CCLC after the Financial Ombudsman Service/Credit Ombudsman Service, word of mouth/internet and creditors.

In our experience, the Law Access model works well with the strengths being:

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<sup>1</sup> Form 12A, *National Consumer Credit Protection Regulations 2010*.

- A single point of contact;
- Well trained staff with referral information;
- The referral information is kept up to date; and
- A website with detailed information.

The weaknesses of Law Access are:

- The advice given is not very practical or well-tailored. It is generally scripted advice. This is not the fault of the solicitors at Law Access, it is merely a reflection that they do not do casework and as a consequence are unable to bring that experience into giving advice. We contend that giving advice is not well suited to a national referral service. We recommend that any national referral service does not provide legal advice, (and clearly states this on all material and during the phone call) or only gives advice where there is no other suitable referral available, such as a local community legal centre, specialist legal centre or legal aid commission office
- There are referral situations where there is no good referral available. For example, no free legal advice is available and the caller cannot afford a private solicitor. This can result in poor referrals to a service who cannot assist and caller dissatisfaction. Staff need to be armed with appropriate information in these areas of law where possible, and be prepared to suggest that callers take advantage of unbundled services from private solicitors where this may be appropriate, including strategies to use to identify what service is necessary and how to ensure they get clarity in relation to price.

We also strongly advocate that a Law Access model cannot replace specialist services and tailored referral pathways designed to guide people to those services when they need them the most, particularly for consumer legal matters (which the Legal Needs survey has identified as a high area of legal need). The Table below shows the Top 6 referrers to the advice lines at CCLC over the past 5 years. While Law Access is an important referral source, CCLC gets a large *and growing* number of referrals from other sources, such as creditors (including the compulsory default notices), the external dispute resolution services in our areas of law, and relevant government departments.

<b>Referral from</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>Total</b>
Word of mouth or internet/phone directory	532	1119	1462	1362	1244	5719
EDR For Credit and Financial Services	155	422	858	1925	1804	5164
Law Access	540	1,095	1,085	1,014	796	4,530
Creditor	221	644	1,214	1,077	1,278	4,434
Courts & Government Departments <sup>2</sup>	501	609	912	893	811	3,726
Legal Aid	398	667	730	428	287	2510

<sup>2</sup> The biggest single Government referrer is AFSA who regulate bankruptcy, followed by State based consumer affairs/fair trading agencies.

### Information Request 5.1

We support legal health checks as a tool for assisting the public to identify legal problems. It is our experience that many callers to our services do not readily identify their issue as a 'legal' problem. For example, callers to 1800 007 007 are usually calling because they have a 'debt' problem. It is the expertise of staff that answer the calls that identify that a legal problem may have arisen, for example, breaches of responsible lending obligations or a payday lending contract that breaches consumer protection requirements. We contend that legal health checks, especially when developed in a way that doesn't require the individual to identify their problem as 'legal', are well suited to a multi-pronged approach and should include:

- the development of online interactive tools on a well publicised website;
- access to legal health checks through a national phone number;
- government resourcing and kits provided to agencies who have regular face to face contact with disadvantaged clients;
- consultation with established free legal service providers in developing the health checks
- comprehensive training on administering health checks; and
- a recognition that the health checks are a tool to identify problems and no substitute for tailored, practical and useful legal advice.

### Information Request 5.2: Issue identification and referral by non-legal professionals

Information Request 5.2 seeks feedback on the benefits of a proposed training module being developed by the Commonwealth Attorney-General's Department and Department of Human Services. We welcome efforts to improve the ability of non-legal professionals to identify and refer legal problems. But training needs to go beyond identification and referral to understanding the barriers to clients making use of those referrals.

Provided adequate resources are available, community legal centres are well placed to train non-legal workers in how to identify legal issues and make appropriate referrals. Consumer Action provides this kind of training to community workers (particularly financial counsellors) and regulators. Women's Legal Service Victoria, another specialist legal centre, is accustomed to training departmental staff and non-legal service providers in legal issue identification and appropriate service delivery methods which work for different groups with specific sensitivities, for example victims of family violence .

Legal issue identification is not just about nominating which problems are legal in nature, but also being aware of barriers to accessing legal help and assisting clients to get the help they need without overwhelming clients. For this reason, the training referred to by Information Request 5.2 may be too narrowly focused and may benefit from experience of the CLCs that will be receiving the referrals on what techniques work for their clients. For example, some CLCs have experience working with different cultural groups such as the Indigenous community and African community and ways in which legal problems might be hidden unless handled with specific skill sensitivity.

Dr Liz Curran has been training using adult learning approaches for CLC staff (including for Consumer Action staff in November 2013) and for Legal Aid ACT in how to identify legal issues and the barriers to advice seeking. Consumer Action understands that Dr Curran is currently working on an article which examines effective methods of training non-legal workers in legal

issue identification based on her own workshops and evaluation of service community legal education programs.<sup>3</sup>

### Information request 5.3: Working together effectively

Section 5.3 of the Draft Report discusses the benefits of integrated service delivery for disadvantaged Australians and seeks more information 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.

#### *Co-location*

It appears to us that the best way to facilitate referrals is to co-locate services at point of delivery. The Draft Report already gives a number of examples of how this works on pages 172-3. A further example is co-location of financial counsellors and community legal centre solicitors. Consumer Action and CCLC use this model, as do many other Community Legal Centres.

One of the benefits of co-location is that it encourages a sound understanding among one group of caseworkers of what the other group does, and what they can do for clients. This understanding comes as much out of sharing the same space (for example, informal discussions in the lunchroom) as it does from formal mechanisms (like having representatives of the legal practice attend financial counsellor team meetings, and vice versa). This kind of understanding should reduce the amount of incorrect referrals which waste resources and fatigue clients. Co-location also makes it easy for members of each team to access informal advice on points in the other team's expertise.

Co-location also facilitates a situation where financial counsellors and solicitors can work as a team to provide a holistic solution for the client's problems. CCLC uses this model already and it has led to several cases being resolved when the case could not have been resolved effectively without the teamwork. CCLC introduced the model of financial counsellors and solicitors working together on complex cases in direct reaction to problems arising where the legal case would be solved only for the client to end up in bankruptcy or lose their home anyway because the rest of their financial situation required advice.

#### **Case Study**

When Alice and her husband attended their appointment at CCLC both were employed fulltime and each had been with their current employer over 10 years. A few months previously Alice's husband needed to take leave from work of about 2 months (with no pay, to care for family member). They were able to pay the current repayments on all debts but could not catch up all the arrears from the period with no income. They had received default notices from multiple creditors, including their home lender, and their

<sup>3</sup> See also: Buck, A, Pleasence, P & Balmer, N 2008, [Do citizens know how to deal with legal issues? Some empirical insights](#), *Journal of Social Policy*, vol. 37, no. 4, pp. 661–681; Buck, A, Smith, M, Sidaway, J & Scanlan, L 2010b, [Piecing it together: exploring one-stop-shop legal service delivery in community legal advice centres](#), Legal Services Commission, London; Buck, A, Tam, T & Fisher, C 2007, [Putting money advice where the need is: evaluating the potential for advice provision in different outreach locations](#), Research findings, no. 16, Legal Services Research Centre, London.



telephone had been disconnected.

A CCLC solicitor assisted them to lodge a dispute in the Financial Ombudsman Service seeking a variation of the loan on the basis of hardship. However, with so many accounts in arrears, it was not at all clear how much they could pay and whether the situation could be salvaged in the longer term.

Alice and her husband were booked in for an appointment with a CCLC financial counsellor who was able to assess their current financial situation and discuss available options. With the assistance of the financial counsellor, they were able to put forward to a repayment plan to all their creditors, including the local council, banks, telecommunication companies and energy retailers. The proposal was affordable and would lead to all the accounts being up-to-date within approximately 5 months. Alice's telephone was reconnected immediately. The repayment plans offered were accepted by all the creditors. The financial ombudsman dispute was settled on the basis that the clients would make payments in accordance with the repayment proposal. They were able to retain their home and essential services.

### **Case Study**

Our clients were a couple who approached us when, having proposed a Debt Agreement under the Bankruptcy Act to deal with unmanageable unsecured debt, found themselves at serious risk of Bankruptcy and the consequential loss of their home.

They had proposed the Debt Agreement on the advice of a for profit debt advisory service without sufficient explanation of the risks and consequences. The wife in particular only had one debt and did not appear to be a suitable candidate for a Debt Agreement. The debt collector who was chasing that debt appeared to think so too because they responded to the Debt Agreement proposal by presenting and serving a Creditor's Petition in the Federal Circuit Court.

Both clients suffered from serious stress and health problems. The husband had incurred most of his debts by running up credit cards for living and medical expenses when he suffered a heart attack and need hospitalisation on several occasions.

CCLC discovered that both clients had likely partial defences to a number of their debts, including the one that was the subject of the Creditor's Petition. A CCLC solicitor and financial counsellor then worked together to achieve the following over many months:

- Stopping the bankruptcy proceedings
- Getting the original credit provider to buy back the wife's debt from the debt collector and settle it for a lower amount with reasonable repayments and no interest
- Terminating the Debt Agreement
- Making settlements with 4 other unsecured creditors, including a permanent release from the debt in some cases
- An arrangement to get the mortgage back on track

- A refund of the debt advisory services fee
- An arrangement in place to repay a Centrelink debt.

Without this assistance these older clients would have been homeless in their middle age while facing serious health issues. Instead they are still in their own home and have a manageable repayment schedule for the remainder of their debts.

The report *Consumer Credit Legal Services in Australia*<sup>4</sup> supported the co-location of financial counselling and legal services in consumer credit legal services. The report recommended specialist consumer credit legal services be available in every state and Territory in Australia. We contend that the Government should adopt the recommendations of the report and embark on a strategy of integrating credit legal services and financial counselling across Australia.

Good systems can also provide assistance without co-location. For example, Consumer Action and CCLC both run a worker advice line which allows external financial counsellors (and other community workers) to access advice from a lawyer on points raised in their casework which are outside of their expertise. This is far more efficient use of resources than a referral only process. It will prevent the need for cases to be referred (where the advice allows the financial counsellor to manage the case themselves) and means that the legal information can benefit multiple clients of the financial counsellor in future.

However, a substantial evaluation of service delivery models undertaken in 2005 suggests that as far as possible this should be community driven and a top down or centralised approach will not be the best way forward. The Social Policy Research Centre has found that:

Involving service providers, consumers and others likely to be immediately involved in any integration initiatives appears to be a widespread practice in those projects which were most successful in achieving their aims. This is because the ultimate success of any venture of this kind depends very much on the commitment and good will of those directly affected. If integration is to depend on the imposition of rigid rules or strict financial control measures, the transaction costs are likely to be high in relation to any benefits obtained. Those who need to be involved at some stage include both management and service staff of organisations, and, where appropriate their representative organisations such as trade unions and service associations.<sup>5</sup>

## Chapter 6: Information and Redress for Consumers

Consumer Action and CCLC strongly welcome the Productivity Commission's focus on consumer protection in the legal services market. There are some differences between the various types of businesses that have dealings with consumers—in particular, members of the legal profession have significant obligations that other service providers do not have, such as duties to the Court. However, from the consumer perspective, there are gaps in the protections available to consumers in their dealing with the legal profession compared to other service

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<sup>4</sup> Renouf G & Porteous, P *Consumer Credit Legal Services in Australia*, unpublished report to ASIC, 2011.

<sup>5</sup> Fine, M, Pancharatnam, K & Thomson, C 2005, [Coordinated and integrated human services delivery models: final report, SPRC](#) report, no. 1/05, Social Policy Research Centre, University of NSW, Sydney, p 42.

providers. Regardless of the type of service involved, regulation that includes in its purpose the protection of consumers should provide for:

- clear and enforceable consumer protection standards, including information and disclosure requirements, obligations not to mislead or deceive, and standards around acting in a fair and reasonable manner;
- an independent regulator with appropriate powers; and
- access to effective complaint handling and dispute resolution.

### Billing

Billing is a major impediment for consumers in seeking access to justice. Even with disclosure, estimates and access to a complaint mechanism, hourly billing can add up to a completely unaffordable bill very quickly. For ordinary working Australians around the average wage with no accumulated savings there is no way that a private solicitor is affordable.

CCLC receives a lot of calls from clients who have accumulated legal bills they simply cannot afford to repay. Those clients are threatened with bankruptcy and/ or the forced sale of assets. More importantly, the question has to be asked whether the person would have proceeded with the matter if they knew they would face a bill they could not afford to pay and the consequences of that. Any response by the Commission to issues around billing needs to consider this problem.

We contend that the billable hours method should not be used for individuals with legal matters and that law firms must provide a binding quote for all legal services provided. While we agree that billable hours are required from some cases we do not believe that the majority of those cases involve individuals.

#### **Recommendation**

The billable hours method should not be used for billing individuals. Law firms should provide a binding quote for services provided to individuals.

### Consumer protection standards

The Draft Report's recommendations on billing correctly identify a key market failure in the relationship between consumers and suppliers of legal services, that is, an imbalance of information about the nature and quality of services provided.

In responding to this market failure, the Draft Report makes a number of recommendations to improve consumer information and understanding, including:

- requiring legal practitioners to take reasonable steps to ensure clients understand billing information, including potential adverse costs (Draft Recommendation 6.1)
- for states and territories to adopt a uniform rules for the protection of consumers through billing requirements (Draft Recommendation 6.2); and
- for states and territories to develop a centralised online resource reporting on typical range of fees for a variety of types of legal matters, to help consumer understanding of legal fees (Draft Recommendation 6.3)

We welcome these draft recommendations, but encourage the Productivity Commission to consider further reforms that could more effectively deal with power imbalance it has identified. The Commission states that regulation should be targeted at the issue of information imbalance'.<sup>6</sup> While we agree that information imbalances should be remedied, information alone will not deal fully with the market failure. For example, in our initial submission we recommended that legal profession standards (professional conduct and standard rules) should be reviewed for consistency with general consumer protection standards (the Australian Consumer Law), to improve efficiency of regulation.

The Draft Report acknowledges that the Australian Consumer Law applies to lawyers and seeks information (at Information Request 6.1) about whether legal services regulators should have the power to directly enforce the Australian Consumer Law. We strongly support this—while we are aware that there are memorandums of understanding between ACL regulators and legal profession complaint handling bodies/regulators, having direct responsibility to enforce the ACL standards would be efficient, as one regulator could deal with the entirety of consumer protection standards.

Moreover, a consumer could be assured that by making a complaint to a legal complaint handling body, their entire complaint would be dealt with. Under the *Legal Profession Act 2004* (Vic), should a consumer take a civil legal services complaint to the Tribunal (for example, because the Legal Services Commissioner has been unable to deal with it), then they would be unable to raise matters concurrently about the ACL.<sup>7</sup> This has practical implications for the consumer complainant, as that they may not benefit from the cost protections available for general consumer law complaints at the Tribunal.<sup>8</sup> We note that this position has been improved under Victorian law due to the new Legal Profession Uniform Law which provides the Legal Services Commissioner with binding power to resolve consumer matters.<sup>9</sup>

Moreover, we encourage the Productivity Commission to consider whether broader, consistent consumer protection standards should be applied to the legal profession, in recognition of the need to set high standards to deal with the imbalance between the parties. As noted in the Draft Report, the Legal Profession Uniform Law includes a requirement for legal costs to be fair and reasonable.<sup>10</sup> Given the power imbalance between the parties, we think such a standard is appropriate—it is insufficient to rely on disclosure alone to protect consumers (we describe disclosure in more depth below).

#### Regulation and enforcement, and complaint-handling

In places, the Draft Report conflates the concepts of independent regulation (including enforcement), and consumer complaint handling (or dispute resolution). Currently, the institutional design for regulation of the legal profession perpetuates confusion of the concepts of consumer dispute resolution and concept matters—for example, the Legal Services Commission in Victoria is responsible for both dispute resolution, and enforcement of conduct standards (although the Legal Services Board is responsible for the development and approval of standards).

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<sup>6</sup> At p 188.

<sup>7</sup> Section 4.3.2 (1)(c), *Legal Profession Act 2004* (Vic).

<sup>8</sup> *S A MacGregor Pty Ltd v Kouskousis (Legal Practice)* [2012] VCAT 839 (20 June 2012)

<sup>9</sup> Section 290.

<sup>10</sup> Section 170.

What consumers want from dispute resolution is a fast and efficient resolution of their problem. The position of the consumer in conduct matters is very different—these are regulatory processes and the consumer's role is limited to providing the source material in a process that goes far beyond their individual problem.

While consumer complaints are a key source of information for regulators, we do not believe that the regulatory and complaints handling role need to be within the one body. We think the system needs to be designed around the needs of consumers and the long established principles of dispute resolution should apply to consumer matters—it should be accessible, independent, fair, efficient, effective, and accountable.<sup>11</sup> Among other things, these principles require that complaints handling:

- be provided at no cost to the consumer;
- be independent of the industry/profession;
- provide appropriate remedies sufficient to deal with the vast majority of consumer complaints/disputes in the relevant industry;
- make decisions that are binding on the industry participants and non-reviewable;
- have obligations to provide information to the relevant regulator/s about general industry issues and particularly systemic issues arising from dispute handling (but not be directly involved in a regulatory or disciplinary role).

While still placing the responsibility for complaints handling and discipline within the same body, the new Legal Profession Uniform Law has the prospect of demarcating between these functions more clearly. For example, for consumer complaints, the Commissioner will have the power to mediate, facilitate settlement agreements and make binding determinations (discipline matters can be taken to the Tribunal). This is welcome, and we would encourage the Productivity Commission to recommend the application of industry dispute-resolution benchmarks to complaints handling functions in the legal services sector. As part of this, we endorse the recommendation that complaints handling bodies should have the power to investigate complaints and compel the production of information or documents, as foreshadowed by recommendation 6.8 of the Draft Report.

As outlined above, we think the effectiveness of legal complaint handling bodies could be significantly improved by providing them with a power to make a binding determination (as the Legal Profession Uniform Law does), and applying the industry dispute resolution benchmarks. An aspect of these benchmarks is for an independent review to be undertaken regularly. In other industries, these reviews play an important accountability role and helps assess whether the complaint handling body is providing effective outcomes for complainants.

Complaint handling bodies should also be required to report publicly on outcomes achieved. Currently, the Legal Services Commissioner releases statistics in its annual report about complaints received, but little is reported except whether the Commissioner was able to resolve the dispute or not. Public reporting on substantive outcomes achieved, not only through determinations, but through mediation and settlement agreements (at a macro level, not to

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<sup>11</sup> These factors reflect the *Benchmarks for Industry-Based Consumer Dispute Resolution Schemes*, released by Chris Ellison, 1997.

identify parties), would improve accountability of the complaint handling bodies and help in determining effectiveness.

**Recommendation**

Bodies receiving consumer complaints about legal services should be required to report publicly on the outcomes they achieve, such as data on how successful they have been resolving disputes, and success rates for consumers and traders.

Enforcement—systemic issues

The Draft Report recommends that, should overcharging be found, complaints bodies should have the power to access existing files relating to quantum of bills. This is welcome and may facilitate redress to consumers who have not complained about over-charging. Surveys of consumers have demonstrated that commonly consumers do not complain even if they have been over-charged or experience detriment—for example, a survey by Consumer Affairs Victoria revealed that only 4% of consumer detriment is reported to it and smaller percentages to ombudsman.<sup>12</sup>

This type of investigation, however, is more akin to investigation by a regulator charged with enforcement responsibility. We encourage the Productivity Commission to also review whether regulators in the legal services market have sufficient power to investigate not only individual practitioners, but firms and corporate practices. The compliance audit functions under the Legal Profession Uniform Law are an example of an effective power which would enable a regulator to respond proactively to issues identified by a complaints handling body.

More broadly, we would expect an effective regulator to:

- be independent from the industry or profession;
- have a range of regulatory tools available which can be used to enforce non-compliance (for example prosecutions and enforceable undertakings), prevent problems arising and to monitor and promote industry best practice;
- require businesses/licensees/practitioners to act fairly, honestly and efficiently;
- be able to investigate concerns arising from consumer complaints – either complaints received directly from consumers or issues arising from complaints made to another body (but the regulator should not necessarily be involved in dispute resolution itself);
- monitor the industry (using a range of methods and sources) for emerging problems, conduct that could potentially lead to breaches of the law or other obligations; and
- be able to investigate and act on systemic issues (including through own motion investigations);
- be able to obtain compensation for all affected consumers (to the extent which these cannot be adequately addressed through the dispute resolution body). For example, under the Australian Consumer Law, regulators may seek particular remedies such as

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<sup>12</sup> Consumer Affairs Victoria, Consumer detriment in Victoria: a survey of its nature, costs and implications, October 2006, available at: <http://www.consumer.vic.gov.au/library/publications/resources-and-education/research/consumer-detriment-in-victoria-a-survey-of-its-nature-costs-and-implications-2006.pdf>.

refunds or contract variations to remedy a breach of the law in certain circumstances without first establishing the identity of each individual consumer.<sup>13</sup>

### Disclosure

The Draft Report comments positively on using disclosure as a key mechanism to protect consumers of legal services, particularly when it comes to costs of legal services. We support effective disclosure, but also note that disclosure does not come without other costs. If disclosure is just providing consumers with more and complex information, then it can be costly and ineffective in protecting consumers.<sup>14</sup>

The Productivity Commission should consider recommending that any disclosure regime to be consumer-tested before being adopted. Consumer-testing allows for better understanding of consumer incentives and preferences when interpreting disclosure. As stated by a UK report, if consumer does not react in the way government or business intended then the failure lies with the information's design or method of communication not the consumer'.<sup>15</sup>

It is vital that disclosure is meaningful, and presented in a way in which an average consumer would understand. It is important also to ensure that the disclosure is presented in a way which ensures that consumers are truly able to make an informed choice—rather than in a legalistic way that simply protects the legal practitioner. In other contexts, we have identified some issues that need to be considered in developing effective disclosure documents and regimes:

- format—the need for attractive presentation, and guidance tools should there be decisions within the product or service that need to be made;
- simplicity in content—disclosure should be designed for all", that is, designing for users with low levels of document and financial literacy, thereby producing disclosure that all users can understand; and
- context—effective disclosure needs to consider the broader context within which the decision is made; for legal services, this might include the fact that it is rare for a consumer to seek to use a lawyer.

The Legal Profession Uniform Law requires disclosure about costs if they are expected to be above \$750. The framework also allows for short form disclosure where matters are expected to cost up to \$3,000. For many individuals who rarely use a lawyer, \$3,000 is not a low amount. Further, we understand a significant proportion of costs complaints received by the Legal Services Commissioner in Victoria relate to costs below that amount. A bill of between \$1,000 and \$3,000 could come as a shock to inexperienced clients, who may have little understanding about of legal charges. For most consumers, seeing a lawyer is an uncommon experience, and any initial discussion will be focused on their legal matter rather than the cost. Given this, there

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<sup>13</sup> Sections 239-241, Australian Consumer Law.

<sup>14</sup> Note that this is not just compliance costs that are passed on to consumers. Research has shown that poor disclosure not only fails to help consumers, it can harm them. Disclosure of commissions actually increased trust in brokers when it should have led customers to be more critical about the advice: JM Lacko & JK Peppariardo, The Effect of Mortgage Broker Compensation Disclosures on Consumers & Competition: A controlled experiment', Bureau of Economics Staff Report, 2004 Federal Trade Commission, 2004.

<sup>15</sup> National Consumer Council and Better Regulation Executive, Warning: Too Much Information can Harm', interim report, July 2007, available at <http://www.berr.gov.uk/files/file44367.pdf>.

is a particular need for disclosure to be consumer-tested, and designed to ensure lawyers and clients have a conversation about likely costs at the outset.

It is also important to acknowledge that there are some problems that disclosure alone cannot fix—very complex decisions might be an example. In this instance, there may need to be additional guidance tools that assist with the decision-making. In that vein, we welcome the Draft Report's recommendation for online resources with consumer information about legal fees as well as information about service quality. Information about likely costs in particular can act as a benchmark, which consumers can use to drive more effective competition.

The Draft Report seeks views (in Information Request 6.2) on the hosting of, and information used to support, such a tool. It would be very important for such a tool to be independent of the industry, and ideally it could be hosted by a consumer advocacy body. In its report, Affordable Justice, RMIT's Centre for Innovative Justice recommended the establishment of a Consumer Legal Advocate.<sup>16</sup> We support this recommendation and believe it should be established as an independent body. Such a body would be well-placed to host such a legal fee information tool, as it would be independent, credible and seen to be established in the interests of consumers. To be effective, such a tool must be simple enough for everyday consumers to glean some simple information at a glance (i.e. star ratings) but could be combined with more detailed information. It would be important that any service quality information particularly was independent and was not easily gamed—a problem that has arisen with private service quality tools in other industries.<sup>17</sup>

## **Chapter 7: A responsive legal profession**

### Draft Recommendation 7.1

We support Draft Recommendation 7.1. Both CCLC and Consumer Action employ recently admitted solicitors and provide practical legal training placements. A review is necessary to ensure that these arrangements are delivering well trained solicitors into the legal profession.

## **Chapter 8: Alternative Dispute Resolution**

The Draft report expresses a view that there may be merit in greatly extending requirements for compulsory mediation. At page 260 of the Draft Report, the Commission considers that

private parties and the wider community may benefit from compulsory mediation for contested disputes of relatively low value, where this is not already occurring. This reflects the principle that the method of dispute resolution should be proportionate to the value or importance of the matter in dispute.

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<sup>16</sup> Centre for Innovative Justice, Affordable Justice, RMIT, available at: <http://mams.rmit.edu.au/qr7u4uejwols1.pdf>

<sup>17</sup> The ACCC has released industry guidance in response to problems with the integrity of online review sites: <http://www.accc.gov.au/publications/online-reviews-a-guide-for-business-review-platforms>.



The same view is the subject of 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).

As the Draft Report acknowledges, there are many situations where ADR is not appropriate.<sup>18</sup> Our experience is that, where ADR processes are inappropriate it is usually because they are not capable of correcting for power imbalances between parties which frequently exist in consumer-trader disputes.<sup>19</sup>

Power imbalance will arise in consumer-trader disputes for many reasons, for example:

- traders will usually have a better understanding of their rights under the law, and are more likely to have received legal advice on their position (even if representation is not permitted at the hearing);
- a trader may be a 'repeat player', and the business' representative at the hearing may be an in-house lawyer with litigation experience;
- where there is a large amount of money or an essential asset (such as a car) at stake for the consumer, they will be under pressure to accept a low offer; and
- the trader may be aggressive or intimidating at, or in the lead-up to, the hearing which can make the process extremely stressful for the consumer.

We are very wary of the Commission's suggestion in Information Request 8.1 that 'mediation compulsory for contested disputes of relatively low value (that is, up to \$50 000)'. This proposal would not target 'relatively low value disputes', it would actually catch most civil disputes. Over three-quarters of Civil Complaints issued or filed in the Magistrates Court of Victoria in 2012-13 were claiming an amount of \$10,000 or less (40,098 out of 52,442)<sup>20</sup>. Eighty-Three per cent of claims heard by the Civil Division of the Victorian Civil and Administrative Tribunal in 2012-13 were for an amount less than \$10,000 (7,660 of 9,205).<sup>21</sup> Note that VCAT's 'small claims' jurisdiction is for cases where \$10,000 or less is in dispute.

Further, the amount in dispute is not a good indicator of the real value of the dispute to a litigant. Disputes worth well under even \$10,000 can have an enormous impact:

- A creditor can apply to bankrupt a debtor for a debt (or debts) of \$5000.<sup>22</sup> When the threshold was previously \$2000, it was not uncommon for debtors to lose their family home after being bankrupted for well under \$5000;<sup>23</sup>
- A \$2000 car might be the most valuable asset some of our clients will ever own, and a dispute over whether a consumer is entitled to a refund of that amount for a faulty car might mean the difference between that consumer losing or keeping their job

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<sup>18</sup> Page 256

<sup>19</sup> Consumer Action made a similar argument in their initial submission to this inquiry, see pp 15-17.

<sup>20</sup> Magistrates Court of Victoria Annual Report 2012-13, p 86.

<sup>21</sup> VCAT 2012-13 Annual Report, p 23.

<sup>22</sup> Bankruptcy Act 1966, section 44.

<sup>23</sup> Jan Pentland's *Homes at risk: using bankruptcy to collect small debts* (November 2007), includes a number of case studies of bankruptcy being used inappropriately to collect small debts. Eastern Access Community Health. Accessible via [www.financialcounselingaustralia.org.au](http://www.financialcounselingaustralia.org.au).

- A default of only \$150 can be listed on a consumer's credit file and is retained on the file for five years. A default listing can be expected to prevent most people accessing mainstream credit during that five year period.

All of this means that compulsory mediation for disputes of a value under \$50,000 (or even \$10,000) would apply to a large number of cases where there is an enormous amount at stake for litigants. While many may prefer mediation rather than litigation, where there are significant power imbalances this should be at the election of the weaker party. Further, it is important that if disputes are subject to compulsory ADR there is appropriate oversight of to ensure that the processes and decision making is of high quality, and the decision makers have necessary specialist knowledge and are capable of accounting for power imbalances between the parties.

It is also necessary to evaluate ADR processes to measure whether just outcomes are being achieved.<sup>24</sup> The Commission has suggested in section 8.5 of the Draft Report that evidence be gathered on 'participant satisfaction and perceptions of fairness'. However, to give a genuine indicator of fairness, evaluation needs to go beyond participant perceptions and measure the outcomes themselves. This could be achieved by taking a sample of ADR outcomes from a particular jurisdiction and comparing them to outcomes of similar disputes settled through other channels. There should also be a requirement for organisations using compulsory ADR to report publicly on what outcomes they are achieving. This will indicate whether ADR is achieving just outcomes as often as other dispute resolution options, and will also indicate which disputes are handled better by ADR.

Consumer Action's original submission to this inquiry included the following case studies to illustrate the impact of poor quality mediation.

#### **Case study**

In 2011, one of our solicitors attended a court ordered mediation in a matter where our client was defending a small civil claim against a trader. Our client's sole source of income is from a Centrelink pension and his only asset, a car, is of very little value.

The two mediators told him that the plaintiff would be able to 'take' his car. They were unaware that vehicles valued at less than \$6,850 cannot be seized and when our solicitor explained why (the *Bankruptcy Act 1966* (Cth) protects essential, low value household goods from being seized), expressed surprise and at first some doubt. Our solicitor, on putting an offer, instructed the mediators to let the plaintiff know that our client's income was from Centrelink and that therefore a court would not make an instalment order (per section 12 of the *Victorian Judgement Debt Recovery Act 1984*). This too was questioned and it was clear that the mediators did not understand debtors' rights in relation to judgment debt recovery. After speaking with the plaintiff, the mediators returned and stated that the plaintiff had nothing to lose by pursuing the matter whereas they in fact risked incurring costs which they will not recover.

#### **Case study**

Our client of Sudanese background had a dispute with a motor car trader in relation to a second hand vehicle with a number of defects. Our client had tried to resolve the matter directly with the

<sup>24</sup> Mary Anne Noone (2011), 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance', *Monash University Law Review* Vol 37, Number 1; Noone M.A. & Akin Ojelabi L., (2013) *Justice Quality and Accountability in Mediation Practice: a Report* La Trobe University Melbourne Australia [arrow.latrobe.edu.au:8080/vital/access/manager/Repository/latrobe:34707](http://arrow.latrobe.edu.au:8080/vital/access/manager/Repository/latrobe:34707)

trader to no avail, so made an application to VCAT seeking a refund of the \$15,000 paid or the vehicle to be repaired.

The VCAT heard evidence from both parties on the first day of the hearing, including an expert mechanic providing evidence on behalf of our client. The hearing also involved an interpreter. Despite this hearing and the expectation that the member would use the evidence to make a decision, the matter went to mediation on the second day after suggestions by the VCAT member that this is the type of matter that should be resolved by the parties.

The mediator, who appeared not to have reviewed the claim or evidence, made a number of troubling representations to our client, including that our client would only be entitled to a \$2,000 refund, that VCAT almost never made orders in relation to second hand vehicles, and that it was in our client's interests to accept any offer made. By this stage our client was exhausted, and was almost willing to consent to any outcome. Taking our solicitor's advice, our client did push on and seek an order from VCAT. The final order was in the consumer's favour, being a much better outcome than that which was considered possible at mediation.

Cost is also an issue in access to ADR. While court appointed ADR is free we are often advised by counsel to use paid ADR because of the improved quality. The problems we have observed with court appointed ADR are:

- The mediator has little specialist experience on the relevant law
- The mediator is often not an ADR specialist
- The client may get intimidated by the mediator being a person who works at the Court

CCLC recently acted for a client in the Supreme Court where the mediation costs (at negotiated reduced costs) cost our client \$2,200. This is a significant cost for a disadvantaged low income person. However, with quality ADR the matter settled to the benefit of our client.

#### **Recommendation**

If the Commission recommends that certain disputes should be subject to compulsory mediation, it should also recommend that the compulsory processes:

- must be subject to a level of oversight that ensures decision-making is of a high quality and decision-makers have adequate specialist knowledge; and
- be evaluated to test whether they are producing just outcomes, not just participant satisfaction. This will require a study comparing outcomes of ADR to outcomes achieved in similar disputes in different forums; and
- be subject to public reporting, in a similar way that is required for industry ombudsman schemes.

## **Chapter 9: Ombudsmen and other complaint mechanisms**

### Overall comments:

Overall we are very supportive of findings by the Productivity Commission that Ombudsmen provide a mechanism to meet legal need that is fast, effective and free of charge for consumers. We also agree with Commission that industry ombudsmen are more effective than government ombudsmen because they have incentives to resolve disputes efficiently.

We also submit that industry ombudsmen are more effective than government ombudsmen because of the level of involvement of consumer advocates at every level of the dispute resolution process. At least this has been our experience in the financial services and credit industry. Australia can boast on of the most successful ombudsmen systems in the world because consumer advocates support and enhance these schemes at various stages. First, ombudsmen schemes have access to robust consumer directors which are usually sourced from the professional consumer advice sector. Consumer directors provide a critical balance of interests to the Board of Directors of an industry ombudsman scheme, ensuring that dispute resolution procedures and terms of reference are not overly beneficial to industry members.

Second, advocates provide invaluable consumer input during ombudsmen independent reviews. Without consumer advocates most substantive submissions would come from industry representatives. Individual consumers will also have valuable input to these processes based on discrete complaints, but they do not have the broad understanding of the whole system that professional advocates develop over assisting in multiple disputes, and are not in a position to identify systemic consumer problems. Finally, consumer advocates represent individual consumers during the ombudsmen dispute resolution process and they advise consumers that are considering lodging a dispute. In this way consumer advocates informally influence the outcomes of ombudsmen decisions by crafting submissions and advising consumers about settlement offers and conciliations.

#### Draft Recommendation 9.1

As robust supporters of ombudsman services in Australia we generally support the recommendation that the profile of these services should be raised, however we have several comments in response to the recommended means of doing so.

In response to the draft recommendation that there be 'More prominent publishing of which ombudsmen are available and what matters they deals with', we query whether it is worth spending a lot of resources up front to inform individuals about various ombudsmen schemes before they need them. We submit it would be more effective to ensure information is available to individuals about ombudsmen services when they have a problem that could benefit from dispute resolution.<sup>25</sup> For example, under the new *National Consumer Credit Protection Act 2009* all default notices in relation to consumer credit contracts that are sent out to a debtor must contain information about an approved external dispute resolution (EDR) scheme and where the consumer can go to receive financial counselling assistance.<sup>26</sup> Prominent publishing of information about ombudsmen services on government websites or in brochures could help raise the profile of these services, but we think it is much more important that people have access to this information at the critical point when they actually have a problem.

In response to the recommendation that “*service providers to inform consumers about avenues for dispute resolution*” we again point to the successful implementation of the *NCCP* regime

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<sup>25</sup> Public Legal Education and Support Task Force (PLEAS Task Force) 2007, [Developing capable citizens: the role of public legal education](#), PLEAS Task Force, London; Public Legal Education Network (Plenet) 2009, [Public legal education: improving lives, empowering communities](#), Plenet, London; Public Legal Education Network (Plenet) n.d., [Public legal education: principles and guidance](#), Plenet, London.

<sup>26</sup> See s 158 of *National Consumer Credit Protection Act 2009 (NCCP)*; s 88 of *National Credit Code (Schedule 1 of NCCP Act)*; s 86 *NCCP Regulations 2010* and Prescribed Forms 11 & 12 of Schedule 1 in *NCCP Regulations 2010*

which requires financial service providers to give consumers information about EDR services when they first sign up for consumer credit (in the *Credit Guide*, s 158 of NCCP Act 2009) and again when they receive a *Default Notice* (s 86 NCCP Regulations 2010). The General Insurance Code of Practice also requires notification about EDR at important points in their consumer interaction, including when rejecting a claim. This type of targeted promotion should be expanded to all other industry areas where opportunities for timely notification are available.

Finally, we support the recommendation that *“Information being made available to providers of referral and legal assistance services.”* Consumer advocates submit that some of the larger ombudsmen schemes (like FOS and COSL) currently engage well with specialist organisations (like CCLC and Consumer Action), but they are less engaged with generalist legal centres, rural community organisations or related service providers like financial counsellors. We are also concerned that ombudsmen schemes do not do enough to promote themselves among vulnerable communities. Promotional materials in other languages would be very useful for advocates working with new migrants. Additionally, simpler explanations of what dispute resolution services can do that don't rely on words like ombudsman would do a lot to raise awareness of these services. Consumer advocates submit that the word ombudsman is not well-understood in all communities, especially among non-western migrants.

#### Information Request 9.1

Consumer advocates cannot comment on the costs of government ombudsmen, but we submit that the cost of undertaking systemic reviews for industry ombudsmen is appropriately born by their industry members. We submit that this is not only appropriate but so far these reviews have delivered very good results.

#### Draft Recommendation 9.2

We support consolidating ombudsmen schemes wherever cost efficiencies can be found, especially where there are similar industry types and there are few complaints. However, we caution that should an ombudsmen scheme be eliminated, consumers must have access to alternate dispute resolution arrangements, especially where there are substantial power imbalances between parties. We also caution that over-consolidation can lead to a loss of invaluable expertise in specialist areas of dispute resolution.

#### Recommendation 9.4

Consumer advocates strongly support industry co-payment in government ombudsmen schemes. We also support government agency contribution. Our only concern in response to this recommendation is that ombudsmen must remain independent. If industry or government contributions render the decision making process anything less than totally independent, then alternative funding arrangements must be implemented.

## **Chapter 10: Tribunals**

The Draft Report states that Tribunals seek to meet statutory requirements to deliver quick, economical and inexpensive justice through a number of means. We strongly support this objective, but it is our experience that Tribunals have become more like courts over time. The Commission quotes Justice Bell who conducted a review of VCAT in 2009, noting that the tribunal had become too formal and subject to creeping legalism. Despite Justice Bell's review

and its recommendations, it is Consumer Action's experience that VCAT has become less rather than more accessible since that time. For example:

- in 2013, application fees increased significantly, with a basic civil claim application fee increasing three fold (for disputes greater than \$500);
- the process for applying for fee waiver has become more complex (see further below); and
- in 2014, VCAT introduced new processes for civil claim applications, including requirements to serve the other party with documents rather than provide VCAT with full documents supporting civil claim applications.

It is our view that increasing fees and introducing new and more complex processes for civil claim applications will serve to reduce access to justice. While these changes may result in reduced burden on the Tribunal, it is our view that they will put off claimants and mean that some meritorious claims will not proceed, and access to justice is denied.

We submit that for Tribunals to achieve their goal of offering quick, timely and informal justice, they should consider adopting some of the processes of industry EDR schemes, including considering whether some disputes can be resolved on the papers (meaning claimants do not have to attend a hearing), and accountability measures, including public reporting, independent evaluation and monitoring.

**Recommendation**

The Commission's Final Report should acknowledge that a key purpose of Tribunals is to provide for quick, accessible, and fair justice outcomes, and that Tribunals should not just become 'courts lite'.

Legal representation

Draft Recommendation 10.1 argues that

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.

This recommendation is informed by reasoning on pages 316-317 that legal representation should not be the norm in Tribunals, but there are circumstances where it is required to ensure fairness for the client, such as in hearings relating to 'adult guardianship and administration and mental health issues'.

We broadly agree with this reasoning. However, there will be situations in which fairness will be enhanced by allowing legal representation beyond the examples given above (which relate to clients who may lack capacity to speak for themselves). These situations include many consumer-trader disputes where there is an unacceptable imbalance of power that can be corrected by allowing legal representation. This is particularly the case where the trader's representative has legal experience. This is in effect legal representation and consideration should be given in granting the consumer access to representation on that basis. We have

discussed other examples of how these power imbalances might arise in our response to Chapter 8 of the Draft Report, above.

Guidelines could also acknowledge that, there may be benefits in allowing legal representation for both sides in cases which have a significant public interest.

Tribunal guidelines on the availability of legal representation should be open to allowing representation in this broader range of scenarios.

**Recommendation:**

Draft Recommendation 10.1 should be expanded to acknowledge that there are a broader range of scenarios in which legal representation will improve efficiency and access to justice in tribunals.

## Chapter 11: Court Processes

### Expert Evidence - Court Appointed Experts

We support Recommendation 11.10, which encourages greater use of court appointed experts in appropriate cases. We believe this recommendation could also be extended to tribunals, and should in particular apply to motor vehicle disputes.

Motor vehicle disputes (usually a dispute between a consumer and a car dealer or mechanic) will often involve highly technical questions regarding the state of the vehicle, whether faults can be repaired, and if so, the cost of repair. Neither consumers nor decision-makers typically have this technical expertise so consumers will usually have to obtain a report from a third party specialist. The cost of these reports can exceed \$1000 and will be out of reach for many of our clients.

It is worth considering whether it would reduce costs overall if Tribunals had access to in-house expertise to assist in disputes which almost always require expert assessment such as motor vehicle disputes. A working example is the New Zealand Motor Vehicle Disputes Tribunal. Decisions in this tribunal are made by an adjudicator who is assisted by a 'Technical Assessor' drawn from a panel of people with technical expertise. During the hearing, the tribunal and expert assessor may examine parts of vehicles or even test drive vehicles.<sup>27</sup>

**Recommendation**

The Commission should extend Recommendation 11.10 regarding court appointed experts to also apply to Tribunals, particularly for motor vehicle disputes

## Chapter 13: Costs awards

### Draft Recommendation 13.2: Certainty in costs awards

We support Draft Recommendation 13.2 and efforts to bring more certainty to costs awards, particularly in lower level courts. As stated in Consumer Action's initial submission, the prospect

<sup>27</sup> <http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal/hearing-process>

of adverse costs awards can act as a deterrent for our clients in pursuing legal action. However, while more certainty can help, for our low-income and means clients, any level of adverse costs awards will act as a disincentive, particularly where an adverse costs order risks losing a home.

Draft Recommendation 13.4: pro bono and CLC costawards

We commend the Commission's recommendation that parties represented pro bono should be entitled to seek an award for costs (Draft Recommendation 13.4). We express our strong support for that position, and note, as the Commission does, that this recommendation was also made by the New South Wales Law Reform Commission's 2012 costs review<sup>28</sup>.

For the avoidance of any doubt it should be clarified at law that Community Legal Centres and their clients are similarly entitled to recover costs.

**Recommendation**

In response to Draft Recommendation 13.4, we recommend that it should be clarified at law that Community Legal Centres and their clients are entitled to recover costs

Information request 13.1: distribution of pro bono costs

Information Request 13.1 seeks feedback on the most appropriate means of distributing costs awarded to pro bono parties. The Draft Report seeks guidance on three potential parties which might benefit from costs awarded in a pro bono matter:

- 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.<sup>29</sup>

In our view, the first of these is the preferred option. In taking this position, it is necessary to first address a concern canvassed by the Commission—that costs recovery by pro bono lawyers:

- risks conflating pro bono work with contingency billing; and
- this may corrupt the social incentive for lawyers to undertake pro bono work, as their motives for undertaking such work may now be perceived as pecuniary, rather than charitable.<sup>30</sup>

In our view, these concerns are unfounded in practice. As the Commission notes in Chapter 23 of its Draft Report, Australian lawyers and barristers undertake pro bono work in large numbers, with services running to tens of millions of dollars annually. Most large, medium (and indeed many smaller) firms have a sophisticated and comprehensive pro bono practice and culture. The Bar has a particularly strong commitment to pro bono. The reasons for lawyers practicing pro bono are many, and are well documented in the Draft Report. Lawyers, their clients and the bench well understand the charitable impulse for this work.

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<sup>28</sup> New South Wales Law Reform Commission, *Report 137 Security for costs and associated orders*, December 2012, pp57-58

<sup>29</sup> Draft Report p 417

<sup>30</sup> Draft Report pp 415 - 416



In our experience (between our organizations we make around 50 pro-bono referrals per year) we do not consider that costs recovery constitutes a risk to the 'social capital' of pro bono. Costs, whilst always welcome, are simply not the incentive for the significant numbers of lawyers who undertake pro bono. In any event, as we stated in our earlier submission, we fail to see the mischief if a few lawyers are motivated to join the cause because of the potential to recover costs.

Further, costs recovery would be a small incentive at best: lawyers acting pro bono will only ever recover if a matter goes to hearing (that is, it does not settle beforehand), and even then, costs will be limited to what is left after disbursements, and without additional recourse to the client or any award of compensation (in contrast to contingency costs, where the opposite is mostly the case). In sum, we consider pro bono would not be corrupted by the potential for minor costs recovery in limited cases.

In our view, it should be lawyers acting in pro bono matters that should benefit from any cost award.

The principal benefit of this is that it is the most direct way to return capacity to those lawyers willing to undertake litigation pro bono (litigation being the most time and cost intensive form of pro bono). This is particularly the case for barristers, who, as sole practitioners, incur a significant opportunity cost in taking litigation files pro bono.

Allowing pro bono lawyers to recover costs will also create consistency across the various pro bono referral schemes. Currently, lawyers who provide pro bono assistance to parties involved in litigation under Legal Assistance Schemes in the Federal Court, Federal Magistrates Court and the Supreme Court of NSW, for example, have a legislative entitlement to receive those costs which may be recovered by the assisted litigant under a costs order.<sup>31</sup> There is no logical basis for placing some pro bono lawyers in a less favourable position than others.

Consumer Action also notes that litigants acting pro bono *are* currently entitled to a costs order in their favour, provided they have an appropriate costs agreement in place. Mandating pro bono costs in favour of another party would therefore reverse an existing right.

We do not support pro bono awards being distributed to the legal centre or clearing house involved. Notably, a great deal of pro bono is organised other than through those agencies, including, for example, the significant proportion of the work major firms undertake pro bono for those not-for-profits which they support.

We also do not see merit in a general fund to support pro bono, like the UK prescribed charities model. It is notable that when the UK model was introduced, their pro bono culture was not as established as that in Australia (and arguably isn't still), particularly amongst solicitors. There was therefore more impetus to develop a fund to advance pro bono agencies in the UK. Such a fund has overheads, however, and it is far from established that the returns and costs justify the model. We do not support this in our market and understand it is not seriously contemplated or

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<sup>31</sup> See *Federal Court Rules 2011* (Cth), r 4.19; *Federal Magistrates Court Rules 2001* (Cth), r 12.07 and *Uniform Civil Procedure Rules 2005* (NSW) r 7.41.

supported by practitioners (in the main), or pro bono clearing houses, or legal professional bodies.

**Recommendation**

In response to Information Request 13.1, we recommend that costs awarded in favour of a party represented pro bono should be receivable by the legal professionals acting pro bono in the matter.

Draft Recommendation 13.6: Protective costs orders

We commend Draft Recommendation 13.6, which recommends courts should grant protective costs orders (PCOs) in appropriate public interest cases, and crucially, that courts should formally recognise and outline the criteria for granting a PCO.

However, we submit that PCOs should not be limited to actions against government. With respect, the risk that private parties would face an inequitable exposure to bear the full costs of a successful case in order to generate public interest' is not borne out in practice.<sup>32</sup> That is because a central criterion for granting PCOs is the impact such an order would have on a counterparty, and in particular, a private party.<sup>33</sup>

The long line of jurisprudence in which a PCO or no cost' order has been considered against non-government parties shows that PCOs will not be granted where the impact would be oppressive or disproportionate.<sup>34</sup> The problem is not that private parties will be saddled with PCOs, but rather that no PCOs are being granted at all.

Removing the potential to grant a PCO against a private party infringes on the competence and discretion of courts to make appropriate orders in the circumstances, and would reverse the development of PCO jurisprudence in principal common law jurisdictions.<sup>35</sup>

It would also frustrate important meritorious public interest litigation. For example, Justice Connect's further submission to the New South Wales Law Reform Commission's 2012 Costs Review cites four recent cases in which Victorian Community Legal Centres brought important public interest cases against private entities, where the potential for adverse costs was a significant issue that may have prevented, or did prevent, public interest litigation from proceeding.<sup>36</sup>

Private parties, and corporations in particular, derive substantial gain from enterprises which might potentially be subject to a PCO. Defending their position is a tax deductible expense of their business. With so much of public life subject to private sector control (including utilities,

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<sup>32</sup> Draft Report p 421

<sup>33</sup> See: Justice Connect, *Protective Costs Orders in Public Interest Litigation: Jurisprudence Review 2013*, available at: <http://www.justiceconnect.org.au/what-we-do/law-and-policy-reform/removal-barriers-accessing-courts-and-tribunals>

<sup>34</sup> Justice Connect, *Protective Costs Orders in Public Interest Litigation*

<sup>35</sup> Justice Connect, *Protective Costs Orders in Public Interest Litigation*

<sup>36</sup> Justice Connect, *Submission to the New South Wales Law Reform Commission: Consultation Paper*

transport, health, planning and other incidence of public private partnerships) it is critical that PCOs not be limited to government.

Concomitant with that position is our concern about the efficacy of Draft Recommendation 13.7, which proposes the establishment of a public interest litigation fund (**PILF**). Whilst such a fund would be welcome, it is hard to see it ever being funded by government.

Nor are we confident of the Commission's suggestion that a PILF could secure funds from cost awards in those cases where a public interest litigant was successful. It is not clear to us how those cases would be identified. Would someone be assessing all cases for a public interest dimension, and quarantining costs awarded where the public interest litigant was successful? Or would costs only be quarantined in those cases where a PCO had first been granted? But what if the successful public interest litigant had a costs agreement in place?

Leaving aside these hurdles, in our experience, there are simply far too few public interest cases that proceed to judgment, where the applicant is successful, and where costs would significantly exceed disbursements.

For those reasons, we submit that the public interest and rule of law favours a balanced PCO regime, available against both private and public parties.

**Recommendation**

In response to Draft Recommendation 13.6, we recommend that a balanced Protective Costs Orders regime should be available as against private as well as public entities.

## **Chapter 15: Tax Deductibility of Legal Expenses**

Consumer Action and CCLC note the draft recommendation that no change be made to tax deductibility of legal expenses. The Draft Report considers a number of options relating to inequities caused by tax deductibility, but suggests that there are alternative and superior ways of addressing the imbalance that can exist in disputes between individuals and businesses. The Commission has not, however, considered the remedy put forward in Consumer Action's initial submission—to increase the fees for business users of the court and tribunal system to compensate for tax deductibility enjoyed by business but not consumers in accessing the justice system. We encourage the Commission to reconsider this recommendation.

## **Chapter 16: Court and Tribunal Fees**

### Recommendations 16.1 and 16.2 - Cost recovery in courts

We do not support recommendations 16.1 and 16.2.

At page 477, the Draft Report argued that

There is a strong case for increasing civil court fees in most Australian courts. This case is underpinned by a simple principle. *Full cost recovery should be the default*: courts should fully

recover the cost of a dispute through fees, except where there is a justified basis for deviating from this principle.

This position is reflected in Recommendations 16.1 and 16.2.

This default position sees access to courts as a private transaction—a litigant pays an application fee and receives a service in return. On this analysis, the fee should reflect the value of the service provided because if it set at a lower point, there is incentive to over-consumer the service, depleting limited public funds.

This transactional view of access to courts is in our view incorrect. Ensuring access to courts creates benefits for individual litigants, but it also creates benefits to the whole community. In consumer affairs, the availability of dispute resolution means it is less likely that unscrupulous traders can profit from poor conduct and attract customers from honest firms. More broadly, the existence of an accessible civil justice system gives confidence to consumers and traders alike that they may borrow, invest and enter contracts.

We accept that there is a limited amount of funding that can be provided to run courts and tribunals, and that some level of co-payment is warranted in almost all cases. But to begin with the presumption that litigants should pay the full cost of courts is to ignore the clear public benefit that flows from having a well functioning justice system.

We note that the Commission takes a somewhat different approach regarding fees in tribunals, assuming that full cost recovery will be inappropriate in many cases and may only be appropriate in complex and commercial matters.<sup>37</sup> Nonetheless, our objections to a default position of full cost recovery for even commercial matters apply all the more to Tribunals, which are designed not only to provide a cheap alternative for litigants, but reduce strain on the court system. Accessibility, rather than cost recovery should be the primary consideration when determining fees for tribunals.

#### Recommendation 16.4 - Fee waivers

We strongly support the recommendations that:

- there should be transparent criteria to determine eligibility for waivers, reductions or postponement of fees in courts and tribunals on the basis of financial hardship;
- guidelines should grant automatic fee relief to parties represented by a Legal Aid Commission or other schemes that have already assessed financial hardship; and
- if courts adopt fully cost-reflective fees, partial fee waivers and maximum fee contributions should be available for litigants on lower incomes who are not eligible for a full waiver.

We are not opposed to the use of fee postponement rather than waiver where a litigant, if successful will be able to pay fees out of damages or costs awarded. However, it should not be assumed that all successful litigants will still be able to pay fees without hardship even after an award of fees. Discretion needs to be retained to waive fees which were postponed.

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<sup>37</sup> Page 488, Recommendation 16.3

### Information request 16.2

We strongly support the use of automatic fee waivers where it has already been demonstrated through a separate process that the applicant is of very low income. Recipients of full rate pensions or allowances, and holders of Commonwealth concession and health care cards (apart from the Commonwealth Seniors Health Card) fit this category.

An automatic waiver for specified groups of applicants avoids duplication and also removes a barrier to justice. CCLC's experience is that callers to our service find fee waiver applications very difficult to complete and often complete them incorrectly. Further, prior to changes being made to the Federal Court fee jurisdiction to include CLC's in the automatic waiver category, CCLC opted to run a matters in the States Courts because of the onerousness of the fee exemption requirements and the need to continuously establish entitlement at each stage of the process.

In cases where fee waivers are expected to be automatically applied, there should not be any requirement for further information aside from presenting the health care card or a relevant Centrelink statement. For example VCAT's current waiver process, at least on paper, provides automatic exemptions to certain categories of people receiving Centrelink benefits, but still requires applicants to fill in a form and provide 'additional information' supporting their claim. It is not clear whether the additional information required regards the legal merits of the case, further proof of financial hardship or something else. Nor is it clear whether VCAT retains discretion to reject waiver applications if the applicant provides the wrong information at this point. The 'additional information' requirement takes a process which should be simple and transparent into one that is duplicative and opaque.

## **Chapter 18: Private Funding for Litigation**

### Recommendation 18.1

Consumer Action and CCLC support draft recommendation 18.1 that Australian governments should remove restrictions on damages-based billing. As stated in Consumer Action's initial submission, private funding of litigation (including through class actions) can be an efficient way to improve access to justice and can reduce reliance on public funding for litigation (whether through regulator action or legal assistance services). We agree with the Commission's view that damages based billing does not in practice create a different set of risks to conditional billing.<sup>38</sup>

The Commission recommends consumer interests should be protected by comprehensive disclosure requirements. While we agree that effective disclosure is necessary, we submit that there is need for additional protection beyond disclosure. In our response to chapter 6, we submitted that for a number of reasons, disclosure alone is unlikely to protect consumers. This is particularly the case where the purpose of disclosure is to cure a conflict of interest. Research suggests that that disclosure of conflicts of interest (in this case, commissions received by mortgage brokers) actually increased trust in the broker when it should have led consumers to be more critical about the advice—that is, the disclosure had a perverse effect.<sup>39</sup> It is this

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<sup>38</sup> At p 531.

<sup>39</sup> James M. Lacko and Janis K. Pappalardo, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment*, Federal Trade Commission Bureau of

research finding, together with some widespread failures in financial advice driven by conflicts of interest, that led to the recent Future of Financial Advice Reforms in that sector. One option to be considered would be for legal regulators to have robust powers of auditing to ensure that lawyers act in the interests of their clients.

The Commission seeks evidence on appropriate percentage limits for conditional and damages-based fees. We do not have a fixed view on the appropriate level, but suggest that governments undertake widespread consultation about this issue. We submit that a significant proportion of compensation awards should be paid to claimants, and that sharing of court and settlement awards in such matters should be “fair and reasonable”.

With respect to class actions, we refer the Commission to the intervention by the Australian and Securities Investment Commission (ASIC) in the settlement of the Storm class action.<sup>40</sup> ASIC intervened due to its concerns about fairness of the settlement arrangements (the concern was less about fairness between lawyers and claimants, but between different classes of claimants and particularly the impact of premiums paid to claimants that funded the litigation). We suggest that the Commission consider whether there is role for an independent regulator or other impartial expert to provide input into what is a fair and reasonable sharing of compensation awards, both between different classes of claimants, and between funders of litigation and claimants. Such involvement may improve community confidence in private funding of litigation.

#### Draft Recommendation 18.2

Consumer Action and CCLC also support draft recommendation 18.2: that third party litigation funding companies should be required to be licensed, meet capital adequacy requirements, and meet appropriate ethical and professional standards. In the large consumer markets (like banking, energy or telecommunications), consumer detriment may be small per customer limiting the likelihood that detriment will be recovered individually. Third party class action litigation can remedy this form of consumer detriment and also contribute to fairness and efficiency in our competitive consumer markets. A strong consumer protection framework can contribute to consumer confidence in third party litigation funding.

### **Chapter 19: Bridging the Gap**

#### The missing middle

Both Consumer Action and CCLC provide telephone advice (including legal advice and financial counselling) to the public. If a person calls and the advice is within the area we work in that person will get advice. Both Consumer Action and CCLC are specialist services so the advice provided is often difficult to access from a private legal practitioner as there are almost no lawyers in private practice that specialise in consumer credit and debt issues.

There is no doubt that the missing middle is a user of the advice services of Consumer Action and CCLC. These individuals have little other option but to access whatever free legal services are available as their only chance to get advice as private lawyers are unaffordable.

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Economics Staff Report, February 2004, available at:

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.167.5067&rep=rep1&type=pdf>.

<sup>40</sup> Australian Securities and Investments Commission v Richards [2013] FCAFC 89

We contend that access to free telephone legal advice is an access to justice issue for all Australians. We contend that it needs to be recognised that access to free legal advice services such as Consumer Action and CCLC provides:

- access to legal advice for many Australians that cannot afford a solicitor but would not meet the casework intake criteria of Legal Aid or other CLCs;
- information and legal advice (and instructions) to empower individuals to solve their own problems without the need of a private solicitor;
- information and advice on how to navigate the legal system and how to use other free services to assist them;
- referrals based on experience on how other services work;
- a whole of problem approach instead of just focussing on the legal part of the problem;
- independent and fearless advice on whether a dispute is simply not worth running and the reasons; and
- advice based on ongoing casework experience that is practical.

In our view, there needs to be more work on services for the “missing middle” to provide efficient but easy access to advice, but this however should not come at the cost of services to those on low incomes or people experiencing disadvantage. We contend that CLCs and Legal Aid can play a key part in developing further services in those areas.

It is also worth noting that requiring any process to filter out callers on the basis of their means is unworkable and inefficient because:

- time is required to conduct this sort of assessment
- the caller can just lie (cannot be verified anyway)
- the time taken to assess income could have been used to give simple advice and/or a referral.

We contend that, overall, phone legal advice services are an efficient and productive way of facilitating access to justice for individuals in Australia. This type of service is required for not only low income people but the missing middle. Last year CCLC and Consumer Action answered over 35,000 calls between our two services. This represents an efficient and productive way to access justice.

### Unbundling legal services

We support Recommendations 19.1 and 19.2.

Both Consumer Action and CCLC offer unbundled legal services to clients in the form of what can be referred to as 'minor case assistance' or 'extended advice'. This can involve: drafting letters, drafting court documents, or lodging a matter with a dispute resolution scheme or Tribunal. This is often a very useful way to deliver extra services to individuals seeking to navigate the legal system. That said, the minor case assistance offered is provided after a general assessment of the client's legal problem and legal advice.

In general, we support unbundling with the proviso that there must be model rules developed to ensure clients are protected. The risk with unbundled legal services is that the client is not receiving overall advice about their legal situation before accessing the discrete legal service. In

those circumstances, there is a high risk that the discrete legal service may be useless or inappropriate.

Currently, there are also issues around the operation of conflict of interest rules which can make unbundling difficult and create further issues around access to justice. Simon Rice of ANU has argued that lawyers are capable of using their judgment to consider whether there is a real conflict of interest risk.<sup>41</sup>

Any model rules for unbundled legal services need to specifically deal with the risks identified above.

#### Information Request 19.1: Legal Expenses Insurance (LEI)

Consumer Action and CCLC do not support the introduction of LEI. The issues of unpredictable and unexpected legal expenses are better managed with fixed price quotes for legal assistance.

Our concerns with LEI are that:

- it may be difficult to make a claim;
- it may be subject to a number of exclusions and not be comprehensive enough for the client needs; and
- it is an extra expense for a body of clients who are probably already struggling to meet essential expenses.

We also contend that if there is a demand for this type of service it would be on the market.

#### Information Request 19.2: Legal Expenses Contribution Scheme

Although LECS would provide clear benefits to access to justice we have some concerns about how it would be funded and administered. The best way forward to evaluate a LECS would be a feasibility study.

We strongly contend that a LECS model is no substitute for a properly funded not for profit legal advice sector. In fact, we would argue that the need for a LECS decreases depending on the funding of free legal advice.

#### Legal Assistance models involving the not for profit sector – the Salvos Legal Model

The Commission seeks feedback on alternative not-for-profit provision of legal services, such as the Salvos Legal Model (Information Request 19.3). While there may be opportunity in these models, we caution against any argument that self-funded services are the solution to providing legal help to the many people who cannot afford legal fees, or that they can replace the need for government funded services. These models rely on the willingness of paying clients to subsidise free legal assistance, and we believe there will always be only a limited amount of fee-paying clients who are willing to do this. Further, there is no empirical evidence that demonstrates that these models offer the most efficient service delivery. We also note that these services can be ad hoc and selective in cases that they take on, meaning there are gaps in service to many clients. In addition, self-funded services do not appear to undertake systemic advocacy and community legal education, which can prevent legal problems from arising. Community legal centres do offer efficient service, through offering integrated services, as well as leveraging volunteer and other

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<sup>41</sup> Unpublished paper to NACLC National Conference, 2012.



pro bono resources. We recommend that existing self-funding not-for-profit legal services be independently evaluated so there is better data about their value and impact.

## **Chapter 21: Reforming Legal Assistance Services**

We have had discussions with the National Association of Community Legal Centres (**NACLC**) about their proposed submission in response to Chapter 21 of the Draft Report. We endorse that position and intend that our comments below will be read as complementing that position. In particular, we share the NACLC's concerns that the recommendations in the Draft Report fail to recognise that Community Legal Centres and Legal Aid Commissions perform different, and complementary roles.

The Draft Report expresses the view that the CLC funding model needs to be changed to align with the LAC model. This is based on concern that there is (or that there is risk of) CLCs directing resources inefficiently because of:

- 'lax' or inconsistent eligibility criteria; and
- placement of CLCs which is not well aligned to locations of greatest disadvantage.

We would like to be clear that we agree that it is important to ensure the extremely limited CLC funding resources are targeted at the clients who need them the most. However, we do not agree that the solutions identified by the Commission in recommendation 21.3 and 21.4 (competitive tendering for CLC funding and tightening eligibility criteria) are the right solutions.

### Determining eligibility

On the use of eligibility criteria, our main point in response to the Draft Report is that eligibility criteria is only one part of effectively targeting services. We note that no legal assistance services (including Legal Aid Commissions) apply strict eligibility criteria for those seeking initial information and advice. As we have explained above, to do so would be inefficient.

Rather than apply inflexible eligibility criteria, both of our services use well considered, detailed and documented processes to ensure that we focus resources efficiently. For example, Consumer Action provides assistance to people calling our consumer advice line with reference to the following service levels:

- triage (3-15 minutes)
- call back (up to 45 minutes)
- ongoing assistance (longer than 45 minutes, but without direct advocacy)
- case work (direct advocacy)
- follow-up

These service levels (developed following an independent review of our intake process in 2012) allow us to minimise the amount of time we spend with people we cannot assist and to maximise the resources to disadvantaged consumers to assist them to achieve meaningful outcomes, and those who present with public interest issues.

The 'triage' stage goes well beyond assessing eligibility against income criteria. During this stage, a solicitor quickly identifies whether the consumer resides in Victoria and is enquiring about a consumer issue, and for callers who do not meet those threshold tests, we aim to end

the call within a few minutes. Where callers meet these thresholds, the solicitor will provide limited information, advice and referrals, where this is appropriate. In the event that more assistance is required, the solicitor may arrange for relevant documents to be sent in by the client, and arrange for a call back.

During the call back stage and in subsequent stages (should they be required) the focus is on providing information, advice and assistance to consumers which will empower them to resolve their dispute in the best possible manner. At each stage there are processes to ensure that resources are reserved for the people who need them the most. For example, the 'ongoing assistance' stage (any assistance in excess of 45 minutes) can only be reached with the approval of the Director of Legal Practice after a discussion on the extent of the work to be performed. No matter is taken on for case work unless approved by a weekly case intake meeting which assesses the value of directing resources to the matter against a variety of indicators including:

- the position of the client (for example, whether they are disadvantaged or vulnerable, or whether they are capable of advocating for themselves with more limited assistance);
- what is at stake for the client (for example, a client at risk of losing their family home will be more likely to receive assistance);
- the legal merit of the case, and what can realistically be achieved;
- whether the matter would be better assisted by another service;
- whether taking on the matter would have a broader impact.

Combined with good processes for reducing demand for our services—such as good self help kits and providing support to financial counsellors rather than having the financial counsellor refer the client to us—this makes for an efficient and sophisticated method of targeting resources where they are needed.

#### The connection between funding, measuring effectiveness and measuring legal need

We agree that the funding of legal assistance, measuring effectiveness and identifying legal need are and ought to be integrally connected. However, in our view leaving the determination of funding models largely to government can be a very risky approach—it can itself lead to inefficiencies whilst also seeing effective bottom-up service delivery models being lost.

We agree that better service delivery must be informed by needs analysis. However, we submit that this analysis is best done close to communities and done in a way that ensure continuous ongoing reflection on what works well for a service and why and what needs to be improved.<sup>42</sup>

Those who deliver services on the ground and understand the complexity and impacts are best placed to evaluate and identify need and tailor service to most effectively and efficiently deliver

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<sup>42</sup>The benefits and ways in which this process can be undertaken are identified in a recent conference paper at International Legal Aid (A Crockett and L Curran [Session 3 Paper 1 - A Practical Model For Demonstrating & Ensuring Quality Legal Aid Services: A Case Study In Applied Research](#) The Hague June 2013); Dr Liz Curran and Legal Aid ACT, 'We Can see there's light at the end of the Tunnel Now', 2011 [http://www.legalaidact.org.au/pdf/Light at the end of the Tunnel Legal Aid Services Quality and Outcomes.pdf](http://www.legalaidact.org.au/pdf/Light%20at%20the%20end%20of%20the%20Tunnel%20Legal%20Aid%20Services%20Quality%20and%20Outcomes.pdf).

such services.<sup>43</sup> The danger in governments being left to determine funding of services in a vacuum is that they may be remote from the factors that impact on service delivery and community impact. This can lead to programs being under-funded or unfunded due to an absence of understanding of local complexities. Rather than leave funding and priority determination to government in isolation it would be better for government to partner with those who deliver services. In addition, support training and resourcing of services to ensure needs identification by services at the coal face so that this information can be used to inform service delivery would ensure appropriate targeting of enabling services to evaluate and work out priorities. This can then inform the settings and context for funding decisions.<sup>4445</sup>

#### The importance of policy and law reform activities in CLCs

Finally, Consumer Action and CCLC both strongly support the Productivity Commission's comments about strategic advocacy and law reform activities by CLCs and LACs. We want to emphasise that not only do we believe that CLCs play a key role in identifying and acting on systemic issues (and have a long track record of doing so for the benefit of consumers as detailed in our original submissions to this inquiry) but these activities are an efficient use of limited resources.

As the Draft Report says:

Strategic advocacy can benefit those people affected by a particular systemic issue, but, by clarifying the law, it can also benefit the community more broadly and improve access to justice (known as positive spill-overs or externalities). Advocacy can also be an efficient use of limited resources. It can be an important part of a strategy for maximising the impact of LAC and CLC work.

Unfortunately, as of Monday 19 May 2014 it has been confirmed that all Commonwealth funding agreements for legal assistance services will no longer fund strategic policy advocacy or law reform activities. The Productivity Commission's Draft Report submits there is "a need for a more systematic approach to funding advocacy services and ensuring that the benefits of advocacy services outweigh the costs of providing such services." Defunding these activities in their entirety is not the answer to this problem, and it is a devastating blow to CLCs that consider these activities a core part of their identity and critical to facilitating access to justice for as many individuals as possible.

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<sup>43</sup> L Curran and Legal Aid ACT, 'We Can See Now there's Light at the End of the Tunnel' Legal Aid ACT: Demonstrating and Ensuring Quality Service to Clients, Legal Aid ACT, 2012  
[http://www.legalaidact.org.au/pdf/Light\\_at\\_the\\_end\\_of\\_the\\_Tunnel\\_Legal\\_Aid\\_Services\\_Quality\\_and\\_Outcomes.pdf](http://www.legalaidact.org.au/pdf/Light_at_the_end_of_the_Tunnel_Legal_Aid_Services_Quality_and_Outcomes.pdf).

<sup>44</sup> 'Encouraging Good Practice in Measuring Effectiveness in the Legal Service Sector', May 2013  
<http://www.law.anu.edu.au/legalworkshop-gdip/publications>  
<http://consumeraction.org.au/report-encouraging-good-practice-in-measuring-effectiveness-in-the-legal-service-sector>

<sup>45</sup> A Crockett and L Curran, Conference Paper International Legal Aid Group Conference, A Practical Model for Measuring Effectiveness, The Hague, June 2013.

Yours sincerely

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