



Dr Warren Mundy  
Presiding Commissioner  
Access to Justice Arrangements  
Productivity Commission  
LB2 Collins Street East  
Melbourne VIC 8003

[access.justice@pc.gov.au](mailto:access.justice@pc.gov.au)

30 May 2014

Dear Dr Mundy,

**Re: Access to Justice Arrangements**

**Productivity Commission, Draft Report, April 2014**

### **Introduction**

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (LACs) in Australia.

NLA is responding to the invitation to provide comment on the draft report of the Productivity Commission's (the Commission) Inquiry into Access to Justice Arrangements. We greatly appreciate the opportunity to provide these comments.

NLA appreciates the breadth and extent of the draft report and the work underpinning it.

This response primarily addresses Chapter 21 Reforming legal assistance services which "looks at policy reform options for the legal assistance landscape with a focus on LACs and CLCs", and Chapter 24 Data and evaluation. It then addresses, sequentially, some other aspects of the draft report where it was thought most useful for us to provide comment. Individual LACs will be making submissions and/or giving evidence at Commission hearings primarily in relation to matters particular to respective jurisdictions.

## **Chapter 21: Reforming the legal assistance landscape**

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

**21.2 Is the ‘balance’ right in terms of areas of law?**

DRAFT RECOMMENDATION 21.1

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

INFORMATION REQUEST 21.1

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

Grants of legal assistance for representation in Commonwealth civil law matters<sup>1</sup> are extremely limited due to the need to prioritise existing Commonwealth funding for the Commonwealth family law priorities specified in Schedule A of the National Partnership Agreement on Legal Assistance Services (NPA). These are matters which involve the safety and welfare of children, family violence, and assisting “family members to resolve complex issues relating to the living arrangements, relationships and financial support of their children.”

This is a reason why “of the 30,000 or so Commonwealth - funded grants of aid approved in 2012-13, 94% were for family law matters while only 4% and 2% were for criminal and civil matters respectively.”<sup>2</sup>

NLA believes that the safety and well-being of children and their families must continue to be the priority but would support a proportion of new funding being marked for civil law assistance. LACs would then be in a position to prioritise the use of that funding for civil law matters according to the particular needs presenting in individual jurisdictions/locations. NLA notes the current “funding divide”, and that depending on matter type, civil law can be either Commonwealth or State/Territory based.

LACs provide some civil law legal assistance through their advice and minor assistance programs, including through telephone and face to face<sup>3</sup> services. Some

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<sup>1</sup> Other than family and related law matters

<sup>2</sup> P.585

<sup>3</sup> In person and video

LACs operate state/territory based legal assistance disbursement funds which together with advice and minor assistance programs go a way to helping to close the civil law gap. Some LACS, while constrained by resources, have maintained highly targeted civil law practices.

**21.3 Are legal assistance services in the right locations?**

**21.4 Are assistance services targeting the ‘right’ people?**

DRAFT RECOMMENDATION 21.2

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

DRAFT RECOMMENDATION 21.3

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

In all legal assistance service delivery there should first be an identification of the problem/s, and then an assessment of the extent of the response/s that will be likely to be required to address the problem/s.

Eligibility tests for legal assistance services, and the data collection and recording undertaken as part of eligibility testing<sup>4</sup> should be proportionate to the legal assistance service/s to be provided, be cost effective, and take account of the context in which services are provided, including the location, resources and capacity of the service provider. Providers currently restrict eligibility tests as needs be from time to time in order to meet their budgets.

“The LACs and CLCs eligibility tests only relate to case work services (information and minor assistance is not subject to a means test).<sup>5</sup>”

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<sup>4</sup> See comments on Chapter 24 Data and evaluation

<sup>5</sup> P.638

Whilst “formal” means testing such as that conducted upon receipt of an application for a grant of legal aid is not applied to LAC information and minor assistance, less extensive means testing, such as production of a health care card, is required for some services. To obtain and enter all the information currently required to assess eligibility on means for a grant of legal assistance would take longer than it would to deliver some information and advice services.

In relation to dispute resolution and legal representation services to be provided on a grant of legal assistance by either an in-house LAC lawyer or a private practitioner, NLA notes that the proposed tests, together with an assessment of competing priorities in an environment of limited funds, reflect current eligibility testing at LACs.

“No Australian government has officially endorsed the use of the Henderson Poverty Line, and it is no longer used by most poverty researchers in Australia. Poverty lines based on a proportion of median household incomes are now more common (McLachlan, Gilfillan, and Gordon 2013).

Given the NPA’s stated outcome of targeting services to those experiencing (or at risk of experiencing) social exclusion, a more appropriate measure of disadvantage would be the Social Exclusion Monitor. (The Monitor defines low incomes as less than 60% of median household income and low net worth as less than 60% of median household net worth (Scutella, Wilkins and Horn 2009).”<sup>6</sup>

NLA notes that the Commission considers that the “LACs’ financial eligibility test is probably too tight”.<sup>7</sup> In addition to being too tight, NLA is of the view, and as suggested in the draft report, that current means testing does not reflect the reality of having to purchase services in the private market. Tight eligibility tests are the result of insufficient funds for the purpose.<sup>8</sup> NLA would welcome any assistance to achieve appropriate means testing.

In relation to the suggestion of aligning eligibility criteria for civil law cases for LACs and CLCs, NLA thinks it is important to take account of the fact that the services and the service delivery context of LACs and CLCs are often not the same. In particular it is noted that the word “case” imports different levels of service in different contexts both within and across providers. In attempting to develop common data sets, legal assistance service providers have been with the Commonwealth Attorney-General’s Department on the development of a data set and supporting definitions which

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<sup>6</sup> P.644

<sup>7</sup> P.647

<sup>8</sup> P. 662 NLA is not able to comment on the assertion contained in submission 96 that the means test is “set at 50-70% of the HPL in most jurisdictions” without more information. There are definitional issues & calculations of some complexity involved. The various indicators used in making these calculations are however well below appropriate standards around the country.

included “legal representation” and various “discrete task” services rather than “case”.

Depending on the extent of the alignment and the point/s at which eligibility is set, NLA is of the view that to align eligibility criteria of the CLCs with those of the LACs, could remove important safety net/s for people, e.g. a small business/self-employed person who receives advice from a volunteer community-minded private practitioner at an evening advice session held at and organised by a CLC.

It is also suggested that any “red tape” requirements in relation to eligibility testing may also have the potential to cause a down turn in the number of private practitioners prepared to undertake legal assistance work including by volunteering at CLCs. “Remuneration matters including the low hourly rate, and issues with the number of hours allocated under the stage of matter (lump sum) payment structure were the key reasons for disengagement from legal aid among all firms. Red tape associated with processing a grant of legal aid was also seen as a key reason for disengagement. This was particularly evident among firms that used to provide legal aid but now do not.”<sup>9</sup>

## **21.5 Is the service delivery model the right one?**

### INFORMATION REQUEST 21.2

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

LACs have statutory responsibilities for the provision of legal assistance and to manage respective legal aid funds efficiently and effectively.

Issues associated with low legal aid fee rates are acknowledged to include a resultant loss of private practitioners prepared to do legal aid work, especially in the regional locations, and the “juniorisation” of those undertaking the work. Juniorisation is considered to reduce the efficiency for the justice system and has the potential to produce quality issues for legal assistance clients.

The value of fees has been eroded by increased costs associated with service provision. Lump sum fees, which are an effective mechanism for managing grants of legal aid, have also been impacted because of increased complexities in the law and

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<sup>9</sup> P.iv Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, March 2007, tns social research.

the time it takes practitioners to discharge related responsibilities. For example, family violence reforms in family law have extended professional and practice responsibilities. To help emerge, and respond appropriately, to child safety and family violence issues these reforms must be supported but they come at a cost. A particular illustration is the collaboration between the Federal Circuit Court and Families SA in a project being piloted in South Australia. This project seeks to facilitate the early identification of risk in parenting matters when allegations of violence or abuse are raised. The Court has introduced a requirement for a Notice of Risk to be filed with every Application or Response in proceedings seeking parenting orders. The practitioner prepares and files the Notice with other documents and the Court then forwards the Notice to Families SA which prepares a report in relation to risk issues and the Department's involvement for the information of the Court. Extra time is required to take instructions on and to complete the form, and to receive and read the ensuing report and to respond to it accordingly.

“Some evidence suggests that partners typically charge more than \$600 per hour, while associates charge around \$400 per hour (figure 3.1).”<sup>10</sup>

It is suggested that approaches to the question about the cost of adjusting legal aid fee rates could include:

- Modelling a percentage split on other rates paid.

Legal aid fees were initially modelled on 80% of court fee scales, with 20% of the scale fee considered to have been forgone by the practitioner for the public good.

One approach might be to model different percentage splits e.g. on court fee scales where they continue to exist, market rates to the extent that they can be identified (see above), and/or rates paid by the Commonwealth for legal services purchased by the Commonwealth.

- Pricing the cost if existing fees were increased by each of, for example, 33%, 66%, 100% etc. across the country given current levels of service delivery.

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<sup>10</sup> P.111

## 21.6 Does the distribution of funds need changing?

### DRAFT RECOMMENDATION 21.4

#### *The Commonwealth Government should:*

- *discontinue the current historically-based Community Legal Services Program (CLSP) funding model*
- *employ the same model used to allocate legal aid commissions funds to allocate funding for the CLSP to state and territory jurisdictions*
- *divert the Commonwealth's CLSP funding contribution into the National Partnership Agreement on Legal Assistance Services and require state and territory governments to transparently allocate CLSP funds to identified areas of 'highest need' within their jurisdictions. Measures of need should be based on regular and systematic analyses in conjunction with consultation at the local level.*

### INFORMATION REQUEST 21.3

*The Commission seeks feedback on how Community Legal Centre (CLC) funds should be distributed across providers while at the same time ensuring providers are of sufficient scale and the benefits of the historic community support of CLCs are not lost. Competitive tendering might be one possible method for allocating funds. The Commission seeks feedback on the costs and benefits of such a process and how they compare with the costs and benefits of alternative methods of allocating CLC funding.*

NLA supports accountable and transparent processes for the management of public money.

*"The budgets for legal assistance are not set on the basis of identified legal need and/or who should be entitled to what assistance."*<sup>11</sup>

NLA suggests that further investigation into the applicability of the funding allocation model both generally and particularly, is warranted.

NLA accepts the principles of allocative efficiency, and appreciates that some CLCs are not in places where they would ideally be placed now. We also understand however that as part of the Review of the National Partnership Agreement on Legal Assistance Services ACIL Allen Consulting found that 80% of CLC clients in 2011/12 earned less than \$26,000.

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<sup>11</sup> P.637

In all the circumstances, the suggestion of a competitive tender as a response is not supported by NLA. The design, issuing, management, and assessment of the tender process are likely to be expensive. Resources of existing service providers are also likely to be consumed in responding to the tender. NLA would prefer a negotiated approach involving co-design of service placement and delivery including to address those areas where a real issue of location has been identified. This would help retain beneficial community connections including volunteer contributions from practitioners at after-hours legal advice sessions and management committee members. NLA suggests that a collaborative approach such as that used in WA to conduct the CLC Review in 2003, and then in updating the WA Review in 2009, could be used as a model for allocating funds under the CCLSP.

#### INFORMATION REQUEST 21.4

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

#### DRAFT FINDING 21.2

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

The LAW Survey provides the best picture that we have of the extent of the civil legal needs of disadvantaged people living in Australia.

Appendix B of the draft report “provides some greater detail around the informal dispute resolution mechanisms” that the Commission suggests “could be used to satisfy unmet legal need.”<sup>12</sup> Whilst NLA supports an approach which is based on solutions proportionate to problems, NLA is concerned that the place of legal advice has been underestimated. In relation to the information under the heading ‘family problems’ NLA has some particular concerns that the nature and the extent of problems, and how those problems should be addressed, may be being significantly oversimplified. In relation to child support, it is not uncommon for the Department of Human Services - Child Support (“DHS-CS”) to refer matters to the LACs when they identify that legal advice in relation to child support issues and related family/law arrangements is required. The staff of DHS - CS and LACs regularly discuss issues arising both informally, and formally through mechanisms like national and local stakeholder engagement meetings, and the practitioner hotline. It is suggested that the Ombudsman is less likely to be an avenue of appeal for child support issues, and

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<sup>12</sup> P.813



more likely to be an avenue in the event of complaint/concerns raised with the administration of the scheme. Depending on the issues, appeals are more likely to be through the DHS- CS internal objections process in relation to, for example, a change of assessment objection, and then any further review would occur through the SSAT<sup>13</sup>. Care decisions generally follow the same process but can also be reviewed by the AAT. In relation to separation and the suggestion about FDR accommodating “many of these other problem types”, we have serious concerns about FDR occurring in family law matters without the benefit of the parties having received some legal advice. Power imbalances, and a lack of understanding about entitlements, and the inter-relationship between care of children, child support, and property division are common. In some cases FDR will not be appropriate at all.

In relation to the question of the cost of meeting civil law need, it is relevant that prior to 1997/1998 LACs operated significant civil law programs. LACs were unable to continue these programs when the Commonwealth reduced funding to LACs by 15.6 % or \$33.16 million per annum. NLA suggests that it would be useful for the draft report to include the 1996/1997 baseline and the history of the funding of civil law at LACs.

It is envisaged that the cost of meeting the civil law legal needs in Australia would be significant. Priorities (which may differ) around the country and proportionate service responses would need to be identified with questions of eligibility addressed. A range of graduated responses such as advice services, “duty services” at courts and tribunals, dispute resolution services, and grants of aid could all assist to keep cost down. Relevant to the question of cost would be any efficiencies achieved by providing the service, such as the cost associated with reduced court time.

## **21.8 How well do the governance arrangements work?**

### **DRAFT RECOMMENDATION 21.5**

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

NLA would seek that legal assistance service providers were consulted in relation to the matters of national core priorities, priority clients, and aligned eligibility tests.

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<sup>13</sup> Appeals to the family law courts are then available only on a question of law.

## **Chapter 24: Data and evidence & Appendix J Building the evidence base**

### DRAFT RECOMMENDATION 24.1

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

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

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

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

“The Commission considers that the suite of data outlined in appendix J should form the basis for future data collection.”<sup>14</sup>

NLA is supportive of data collected for the purposes of informing and improving service delivery, for reporting to funders, and for comparison across providers where appropriate. LACs analyse data collected and reported by us for these purposes.

“Before imposing additional data requirements, existing data need to be fully assessed and used so that data collection fatigue is not compounded. Efforts need to be made to identify and reduce “redundant data” requirements. This process should be undertaken in consultation with providers and institutions. This would help allay concerns raised by some participants about imposing additional costs on providers and institutions that are already data weary and resource constrained.”<sup>15</sup>

NLA welcomes the suggestion that additional data items not be imposed before existing data is fully assessed and used, and that the process should be undertaken in consultation with providers and institutions. NLA also welcomes the recognition of the relationship between data collection and cost.

Between 2011 and 2013, the National Legal Assistance Data Collection Working Group, comprising representatives of NLA, the National Aboriginal and Torres Strait Islander Legal Services, the Family Violence Prevention Legal Services, the National Association of Community Legal Centres and the Commonwealth Attorney-General’s

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<sup>14</sup> P.762

<sup>15</sup> P.757

Department worked on the development of a national legal assistance data collection set.

NLA is supportive of national legal assistance data collection, although developing one data set with associated definitions, counting rules, and weightings is not an easy task. Systems which enable the capture, recording, and reporting of new data sets also need to be developed and implemented, and there are significant resource issues associated with the adjustment of electronic<sup>16</sup> and other systems associated with data collection, recording and reporting. The capacity to resource proposed changes is a relevant factor in decision making about proposed data collection.

Other practical and related issues include ensuring data collection is proportionate to service delivery and that any data presentations are properly contextualised to prevent inappropriate data comparisons being made to the potential disadvantage of the client base.

What is often referred to as “the count of 1” helps to illustrate one of the data comparability challenges:

Example – service type – “legal representation”<sup>17</sup>

A matter involving “legal representation” could settle at negotiation or dispute resolution stage very quickly or over time, or it might not settle, and entail multiple court appearances including a fully defended final hearing before resolution. Final defended hearings also vary in their length and the complexity of the issues involved.

If the data item is “legal representation”, and it is suggested that a “legal representation” data item does accurately reflect the service activity, then each of the above scenarios is a “count of 1”, i.e. on the face of the data no distinction is made between the respective complexity and resources required to resolve the issues. To achieve a distinction, weightings for complexity as well as mechanisms to identify activities along the pathway to disposition and the point of disposition are likely to be required. Depending on the degree of specific detail required this can be expected to entail development of more or less extensive data pick lists/codes and associated further definitional work. The more detail that is required, the more data entry options, systems adjustment, and data entry training that is required. Inevitably the more data items and the more data entry options provided for each data item, the more room for data entry error, and “fatigued” service providers.

The “data collection fatigue” referred to in the draft report is attributed to reporting requirements which are burdensome and “a perception that data is collected for

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<sup>16</sup> Such as eligibility, case-management, and finance systems

<sup>17</sup> The National Legal Assistance Data Collection Working Group preferred the data item “legal assistance” and various proposed discrete task services to “case” as a data item, given the confusion contributed to by the word “case”. This example assumes a settled definition of “legal representation” and does not address the data which might reasonably be expected to be collected to some extent in relation to client demographics, service location, law type, matter type/s and the outcome in relation to the potentially numerous matter types.

data's sake". The draft report also suggests that there is "lack of awareness of how data will be used."<sup>18</sup> NLA suggests that another cause of fatigue is the ongoing disjuncture between theoretical and practical understandings of the extent to which data can be collected and recorded, and the uses to which that data can be put.

To alleviate "data fatigue", it is important that legal assistance service providers with practical and operational experience are directly engaged in formulating any data proposals and that the following questions are addressed:

- Is there a demonstrable benefit to the community and/or service users to be achieved from the data? Can that benefit be clearly articulated?
- Is the data capable of being interrogated, cross-referenced, and/or analysed in a way and for the purpose envisaged, i.e. to achieve the benefit?
- Is there an impact on the individual from whom the data is to be collected?
- Is the data collection proportionate to the service to be delivered?
- Is the data collection proportionate to its usefulness?
- Is the data to be collected capable of being accurately collected/compared? If not, why not?
- What is the cost associated with the data collection? Are there systems adjustment and training cost issues? Is the data cost effective to collect?
- How would the data best be collected? Over time, snap-shot/s?
- Definitions and counting rules?

NLA suggests that it would also be helpful to recognise that there is a distinction to be made between "core data sets" which should be collected by legal assistance providers as a matter of course, and more expansive data collection which would be better obtained by survey, or as "snapshots" in or over time.

"Outcomes based data" potentially encompasses a range of vastly different data, some of which might be more readily obtainable (e.g. settlement rates published by LACs in relation to LAC dispute resolution), and others which will require the development, capture, recording, cross-referencing and analysis of multiple data to achieve results. "Outcomes data" could also require the administering of controlled questions about the client's situation and/or experience over time. Such exercises are usually more labour intensive and costly.

Performance indicator 1 in the NPA required reporting on "successful legal aid service outcomes". The first of these was specified in the NPA as "less than 20% of legal aid grant recipients return seeking a grant of aid for the same type of matter within a 24 month period" and the NPA did not contain requisite definitions. The other "successful outcomes" referred to in Performance Indicator 1 of the NPA were not identified or defined prior to the signing of the NPA. Definitions, and additional reporting therefore had to be hurriedly retro-fitted on the basis of existing data sets. The capacity to glean anything beyond what was already known was therefore minimal, and the reporting of data could not be said to be cost-effective.

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<sup>18</sup> E.g. P.749

It is suggested that whatever the data sought to be obtained, carefully planned design and appropriate resourcing of the design, collection, recording and reporting is essential.

In relation to Appendix J and the data response it proposes, it is respectfully suggested that the costs involved to achieve some of what is proposed are likely to be extraordinary, and have the potential to compound data fatigue if they are not approached in a manner that takes account of all relevant factors as described above. Concerns specific to the “legal assistance landscape” aspects of Appendix J, are attached to this submission.

#### DRAFT RECOMMENDATION 24.2

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

As suggested above, an overhaul of legal assistance data systems will be expensive. The requirement for ongoing capture and recording data over time also entails expense in terms of staff training and time.

NLA suggests that further consideration is warranted in relation to what should be tracked, why it should be tracked, how/when it should be tracked, and who should be tracking it.

#### INFORMATION REQUEST 24.1

*The Commission seeks feedback on where a data clearinghouse for data on legal services should be located. Such a clearinghouse needs to be able to coordinate data collection from multiple civil justice stakeholders and disseminate the information in a timely fashion. It should also have some expertise in linking, using and presenting data, especially administrative data. Ideally, the clearinghouse should also have experience in liaising with legal service providers and different levels of government, have an understanding of the operation of the civil justice system and understand the principles behind benchmarking.*

This information request assumes that a data clearing house for data on legal services would be beneficial. Whilst this may well be so, NLA is concerned that there are currently insufficient funds for critical legal assistance services delivery with existing data already demonstrating the need for further funding.

In a situation where funding to legal assistance service providers has recently been reduced the question appears to be whether allocating money for the establishment of a clearing house at this time is warranted.

**DRAFT RECOMMENDATION 24.3**

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

The Law Survey has been a valuable research exercise. LACs contributed to its significant cost. The survey has contributed to the evidence base that it had been suggested to NLA would be necessary if further funding for legal assistance services was to be forthcoming. The data obtained is consistent with that achieved in other jurisdictions by similar surveys and supports the assertions based on experience and made over many years by legal assistance service providers.

If Government considers it desirable to commission further similar surveys, NLA notes:

- Development and implementation of the existing survey extended over a 5 year period
- A landline telephone based survey is unlikely to provide a complete picture of legal need across the country, many people do not have access to landlines or even mobile phones.
- NLA would not want the research to come at the cost of front line service delivery.

**Chapter 5: Understanding and navigating the system****DRAFT RECOMMENDATION 5.1**

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

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

NLA is supportive of a main provider of telephone and web - based legal information services with the capacity to provide basic advice for more straightforward matters in each State and Territory.

We understand that the draft report is not suggesting that a single contact point should be the only way into accessing legal assistance, and agree that there is likely to be scope for some change.

In any rationalising, it will be important for account to be taken of the precise nature of the existing services, i.e. information/advice, service infrastructure, the continuum of related services offered by the provider which might be required by the “caller”, and the geographic sub-markets in which the services operate in the individual states and territories.

Care will need to be taken to ensure that an extra layer of service is not being created for some callers, and that well recognised services with a proven service delivery history are not dismantled in the interests of uniformity which may do no more than result in a lowest common denominator approach. For example it may be appropriate for a legal advice telephone service of a provider specialising in a particular area/s of law operated by people with expertise in that area of law and who provide a continuum of service to continue to exist alongside the main provider.

In relation to the suggestion that “efforts should be made to reduce costs by encouraging greater co-operation between the jurisdictions” NLA has well established networks of people across the country who share information, knowledge, skills and experience, and who collaborate on national projects, including in relation to community legal education materials as appropriate.

#### INFORMATION REQUEST 5.2

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

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

#### INFORMATION REQUEST 5.3

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

NLA suggests that the question about how best to facilitate effective referrals for legal assistance will depend on both the human service delivery and legal assistance organisations potentially involved, and their respective locations and resources. It is likely that a number of different approaches will be helpful.

## **Chapter 6: Information and redress for consumers**

### **INFORMATION REQUEST 6.3**

*The Commission is seeking views on the appropriate ‘hosts’ for central online resources with information about legal fees — should they be hosted by each jurisdiction’s Attorney-General’s department, legal services commissioner (or equivalent) or legal aid commission? Could this resource exist alongside a ‘directory’ listing of firms who are willing to advertise their prices through, say, a law society website?*

*How could information on quality of service elements best be gathered and reported? Are there international examples that would be applicable in Australia? Where should such ratings be reported — should they be ‘hosted’ by governments, professional associations or independent providers?*

It is suggested that this information request is related to draft recommendation 5.1, establishing a widely recognised single point of contact. A main point of contact identified by each State and Territory might ultimately be the best host for information about fees.

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

### **INFORMATION REQUEST 7.4**

*How should money from ‘public purposes’ funds be most efficiently used?*

Money from public purpose funds (PPF) currently supports the delivery of legal assistance services, and this use is considered appropriate.

<http://www.nationallegalaid.org/home/finance/>

It is noted that PPF are declining, and that the decline in funds will have a significant impact on the service delivery capacity of some LACs.



## **Chapter 8: Alternative dispute resolution**

NLA suggests that the contents of Chapter 8 could better reflect the requirements and provisions of the Family Law Act 1975 in relation to Family Dispute Resolution (FDR), including in relation to certification requirements, and the existing accreditation requirements for FDRPs.

NLA is pleased that LAC FDR is referred to positively in the draft report. NLA suggests however that draft report could more accurately reflect the extent and efficacy of all LAC DR programs, including in relation to settlement rates, screening and risk assessments, and strategies for managing power imbalance<sup>19</sup>. For 2011-2012 the national average full/partial settlement rate for LAC DR programs was 77%, with Victoria Legal Aid, and the Legal Aid Commission of Tasmania achieving 83%. These settlement rates are considered especially significant as they are achieved in family law matters which are priorities under the NPA involving complex issues, and often highly conflicted parties in acute circumstances.

“Family dispute resolution services in LACs were found to deliver benefits that outweighed costs for all jurisdictions except Victoria and the Northern Territory between 2004-2005 and 2007-2008 (table 8.1). It also found that this model for FDR was effective in avoiding high costs of litigation, enabled management of more complex legal and support needs, and was effective in identifying family violence and child abuse early in the process (KPMG 2008).”<sup>20</sup>

To contextualise the information from the KPMG report included above, NLA suggests that it would be appropriate to include a note that the FDR programs of each of Victoria Legal Aid and the Northern Territory Legal Aid Commission were the most recently established LAC programs, FDR was not then mandated, and client numbers had not reached present volumes.

It is also relevant that in 2009 when PriceWaterhouseCoopers undertook an analysis of the economic value of legal aid in relation to Commonwealth funded matters with a focus on family law it was concluded:

“Governments have a responsibility to provide access to justice, including access to legal assistance, as part of the provision of basic human rights.

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<sup>19</sup> P.270 – All LACs use practices such as those LANSW practices described in the draft report.

<sup>20</sup> P.255

Beyond this responsibility there is strong economic justification for the provision of legal aid on multiple levels:

- Direct legal assistance in relation to court and dispute resolution services for Family Law matters has a net positive efficiency benefit for the justice system. These benefits outweigh the costs of providing these services, ranging from a return of \$1.60 to \$2.25 for every dollar spent.” etc.<sup>21</sup>

“In some areas, current data reporting requirements could be better targeted to give a clearer picture of ADR activities. For example, legal assistance service providers should be required to provide information on the provision of ADR services as part of their reporting requirements for public funding.”<sup>22</sup>

NLA has some concerns that the above paragraph as currently worded could lead to an incorrect inference that LACs are not already reporting on the volumes of dispute resolution services that they provide.

#### INFORMATION REQUEST 8.1

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

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

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

Funding permitting, LACs could readily expand their dispute resolution conferencing programs in matters involving family law property disputes.

Prior to being able to file an application in court for family law property law orders, a certificate that the parties have attempted/are exempt from attempting FDR should be filed as is currently the case in relation to children’s matters.

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<sup>21</sup> P.ix Economic value of legal aid, Analysis in relation to Commonwealth funded matters with a focus on family law, National Legal Aid, 2009

<sup>22</sup> p. 273

Family law property dispute resolution should only be undertaken by lawyers, and there should be a process for accreditation of those dispute resolution practitioners in much the same way as there is currently a process for the accreditation of family law dispute resolution practitioners (FDRPs). Existing FDRPs who are lawyers with family law property knowledge and experience are a ready work force, and capable of resolving all associated family law matters and are currently used by some LACs to resolve both parenting and property matters through dispute resolution.

Parties should be able to access accredited service providers of their choice, and where eligible for legal aid should be entitled to the service from an LAC.

NLA is of the view that any accreditation must address adequate screening for, and understanding about, the dynamics of family violence which also apply frequently in property law matters.

NLA also proposes a “duty mediation service” located at the family law courts which could be provided by LACs, and which would be available in relation to children’s issues and also potentially property law matters. It is envisaged that this service would assist in reducing the demand upon family law courts and the delays sometimes experienced by the people accessing the courts. The service could be implemented regardless of whether accreditation for dispute resolution for family law property matters was introduced but otherwise would be complementary to it. The duty mediation service would also be available for late litigation stage conferences, as provided for example, by LANSW, LAQ and the LSCSA, upon referral from the courts. The possibility of seeking a financial contribution from those who could afford to pay for the service could be addressed, perhaps using a contributions model such as that employed by LAQ for their Arbitration program on a user pays basis.

Whilst funding would be required, it is envisaged that the services would provide direct savings by reason of reduction of court time, and other direct and indirect financial benefits by reason of early resolution.<sup>23</sup>

#### DRAFT RECOMMENDATION 8.3

***Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.***

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<sup>23</sup> NLA proposal to AGD 31 Aug 2012

LACs actively promote dispute resolution services and prioritise these in their service delivery models. Dispute resolution is promoted in LAC publications. Details are reported in annual reports, and statistics are provided to the Commonwealth Attorney-General's Department.

#### DRAFT RECOMMENDATION 8.4

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

All LACs have screening, intake, and referral processes to ensure accurate targeting of matters to appropriate FDR and other services.

#### DRAFT RECOMMENDATION 8.6

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

All FDRPs<sup>24</sup> who wish to be able to issue certificates under the Family Law Act are required to be registered with the Commonwealth Attorney-General's Department and to have met certain accreditation standards.

Currently<sup>25</sup>, to become a FDRP you must meet the accreditation standards in the "Family Law (Family Dispute Resolution Practitioners) Regulations 2008.

The costs associated with accreditation are in the range of \$4000 - \$10,000 per person plus "time out of the office". NLA is concerned about an ageing workforce and service provision into the future.

NLA therefore suggests that it would be appropriate to undertake some examination of the potential cost of implementing this draft recommendation, and the related issue of workforce supply.

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<sup>24</sup> both lawyers and social scientists

<sup>25</sup> Requirements have changed over time

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

### DRAFT RECOMMENDATION 9.1

***Governments and industry should raise the profile of ombudsman services in Australia. This should include:***

- ***more prominent publishing of which ombudsmen are available and what matters they deal with***
- ***the requirement on service providers to inform consumers about avenues for dispute resolution***
- ***information being made available to providers of referral and legal assistance services.***

LAC information and advice services have good referral data bases which are well maintained. NLA is encouraging of other providers making available any further or different information that it would be considered useful for LACs to have.

## **Chapter 14: Self-represented litigants**

### INFORMATION REQUEST 14.1

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

NLA suggests that duty lawyer services are an effective and efficient way of assisting self-representing litigants to understand their rights and obligations at law. As stated in the draft report;

“Hunter, Giddings, and Chrzanowski (2003) noted that interactive services such as legal advice sessions, telephone or in person advice, assistance with documents and letters, and duty lawyers, were the services most frequently used by SRLs.”<sup>26</sup>

Hunter et al concluded “It is clear that these services perform an important role for those litigants who are otherwise ineligible for legal aid and self-representing as a result”.<sup>27</sup>

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<sup>26</sup> P.445

<sup>27</sup> P. iv

The Family Law Duty Lawyer Service was developed by NLA, the Commonwealth Attorney-General's Department and the family law courts. The services are protocol based. Whilst the National Protocol is dated and it is suggested requires review, it continues to be a basis for service and sets out principles including with regard to prioritisation, conflict of interest, relationship between Judicial Officers and Duty Lawyers, and the obligations of duty lawyers. The provision is generally for one appearance and at the discretion of the duty lawyer reflecting that:

- it is not considered appropriate to continue to provide assistance to self-representing litigants at the expense of making grants of aid to those who would be eligible
- the court environment is a pressured one, there are competing demands and time is limited
- matters are often complicated and more comprehensive assistance than that which can properly be provided by a duty lawyer service is often required
- some self-representing litigants are persistent, and applications may be brought which are without merit.

It is noted that the assistance by duty lawyers is sometimes more extensive by reason of the person being assisted being ineligible on means, but clearly not having the capacity to engage a private lawyer, or to continue unassisted.

As reflected in the draft report LACs also provide duty lawyer services in non-family law Commonwealth and State civil (and criminal) jurisdictions.

In relation to the suggestion of user contributions for “unbundled services for SRLS who can afford it”<sup>28</sup> issues of proportionality of the level of testing, the environment in which the service is delivered, the cost of administering and collecting any user contribution, and efficiencies accruing to the court system as a result of services, should be considered.

### INFORMATION REQUEST 14.3

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

NLA believes that provisions that deal with conflicts of interest need to be refined so as not to prevent people benefitting from legal assistance services in situations

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<sup>28</sup> P.450

where conflict is not a real issue. For example, conflict rules amended for duty lawyer purposes where there was no actual conflict of interest could be expected to assist the courts and achieve efficiencies.

Conflict is particularly a problem in regional locations where there are not as many lawyers. This problem will be exacerbated if one party is alert to the capacity to conflict any available forms of assistance, including limited legal assistance options, out.

NLA suggests that changes to Solicitors Conduct Rules are likely to be insufficient and that legislative change will be required.

## **Chapter 19: Bridging the gap**

### **19.4 Legal Expenses Contribution Scheme**

#### INFORMATION REQUEST 19.2

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

The Draft Report states that “similar arrangements” to a LECS “currently operate within some LACs”<sup>29</sup>, and that

“One of the advantages of the LACs administering a LECS is that as large purchasers of legal services they could use their buying power to purchase services at favourable rates for those clients who did not wish to use their own lawyer”.<sup>30</sup>

“Some of the benefits of the proposed LECS are that it would:

- apply to civil law matters that are currently only “thinly covered’ by LACs (LACs priority areas of law are criminal and family law matters, chapter 20)
- Allow a longer period for applicants to make contributions payments (by spreading payments over a longer period of time the immediate financial burden is reduced)

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<sup>29</sup> P.568

<sup>30</sup> P.569

- Improve equity (by providing another avenue for those who miss out on government funded legal assistance to pursue cases of merit that do not involve monetary claims).

These benefits would not come without costs, indeed it is unlikely that any LECS program would be self-funding. There is also the question of where to draw the line in relation to eligibility.”<sup>31</sup>

NLA is of the view that the LECS proposal is akin to the national scheme of grants of legal assistance operated by LACs.<sup>32</sup> Grants of legal assistance could be said to provide interest free loans for legal services purchased at rates that are highly unlikely to be available privately.

When a grant of legal assistance is made by an LAC, LAC clients are often required to make an up-front contribution of a fixed sum. Clients will also be expected to make a full/partial contribution to the cost of the grant to the extent that they have the capacity to do so. Contributions will be pursued over time to the extent that it is cost effective to do so. Contributions are usually realised on the sale of the home over which an equitable charge has been taken. This often occurs many years after the grant was made but provides the first opportunity the client has to cover the cost of the legal assistance.

Certain civil law matters, including those other than family law and related matters, are specified as a priority in the NPA. If funding permits, grants of aid can be made in civil law matters as they are for other matters. It is the limited funding and competing priorities test which results in more non family and related civil law services not being funded, e.g. matters involving people’s safety have priority over consumer complaints. To the extent that grants of legal assistance are made in civil law matters they are also subject to appropriate contribution (LECS like) from the client.

If a LECS were to be established, in relation to the question about where to draw the line for eligibility, and as is the case for grants of legal assistance, it will be important to factor in the applicant’s income, and the anticipated cost and duration of the particular case. An issue is at what rate the anticipated cost of the case is calculated, with this having significant funding ramifications.

Rather than setting up a LECS, it is suggested that an appropriate use for any available funding would be to expand existing eligibility for grants of legal aid. This

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<sup>31</sup> P.568

<sup>32</sup> As provided for by the National Partnership Agreement on Legal Assistance Services, Schedule B “PRINCIPLES FOR ASSESSING ELIGIBILITY FOR A GRANT OF LEGAL AID”, sets out the basis for assessing financial eligibility for a grant of legal aid by legal aid commissions.



would appear to be a more cost effective approach which would avoid risk to the consumer. If funding were to be available some modelling might appropriately be undertaken by government/s in consultation with representatives of NLA.

### **Miscellaneous**

Contextualisation/accuracy/consistency of reference could be undertaken including in relation to the following wherever appearing in the draft report:

- Civil law – consistency throughout the report about what is encompassed by the term, noting that this also currently varies from provider to provider.
- Family law– currency/accuracy of terminology used to describe problems & related legal issues. (e.g. “contested divorce proceeding”<sup>33</sup> might be better referred to as “contested family law matters”, “child custody dispute”<sup>34</sup> might be better described as “disputes about a child’s living arrangements etc)
- Legal assistance – there appears to be a blurring in some parts of the draft report in relation to what is non/legal work<sup>35</sup>.

### **Conclusion**

We thank you for the opportunity to make these comments.

Please do not hesitate to contact us if you require any further information from us.

Yours sincerely,

George Turnbull  
Chair

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<sup>33</sup> p.555

<sup>34</sup> p.177

<sup>35</sup> E.gs. Chapter 19 suggests that general counselling is a form of unbundled legal assistance. Whilst some legal assistance service providers might offer general counselling, it is suggested that it would be helpful to describe this counselling in a way that did not suggest it was a form of legal assistance, or if it is being suggested that it is in fact a form of legal assistance, then for the service to be defined so that there is a common understanding of what it entails. At P.163, the current wording of the first paragraph might be understood to be suggesting that clerical staff of LANSW are responsible for providing legal advice which is not the case.