



Response to the Draft Report on Access to Justice  
Arrangements by the Productivity Commission  
Released in April 2014

## INTRODUCTION AND ACKNOWLEDGEMENT

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**To: Commissioner Warren Mundy, Productivity Commission**

Thank you for the opportunity to comment on this draft report into Access to Justice Arrangements.

It is a pleasure to note that the Report acknowledges the important role played by the legal assistance sector, and the Legal Aid Commissions in particular, in providing access to justice for many Australians.

The Legal Services Commission of South Australia (LSCSA) supports many of the specific recommendations in the Report and agrees with the Commission that civil law is an area which does not receive the same level of financial assistance as the criminal and family law areas.

The LSCSA's response to the draft paper focusses on the recommendations in Chapters 20 and 21 which concern the legal assistance sector. We also have a number of specific comments on other parts of the Report. Our response follows the format of the Report.

I would like to take this opportunity to correct a **factual error** in the Draft Report at page 563. The Public Service Legal Assistance Scheme is administered by the Legal Services Commission of South Australia, not the Law Society.

  
Gabrielle Z Canny  
Director  
Legal Services Commission of South Australia

28 May 2014

**Chapter 5: Understanding and Navigating the System: Training non-legal workers, Page 169.**

We strongly support the benefits which come from training community workers to identify legal problems as this creates an effective referral network for disadvantaged persons with legal problems. The LSCSA has had a long involvement in providing the course, *Law for Community Workers* as part of TAFE SA's Certificate IV in Legal Services. The course has a very practical focus, developing skills in giving legal information and assisting people to understand legal procedures. It is aimed at community workers or staff in agencies involved in direct client contact.<sup>1</sup>

**Chapter 5: Understanding and Navigating the System: Information Request 5.3, Page 173:**

*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.*

Effective referral and information sharing are not analogous in the legal assistance sector. Effective referral can be established through the development of strong pathways between different providers, as is the case in South Australia between financial counsellors and lawyers of the LSCSA. Larger referral networks can be secured and managed by Memorandums of Understanding between providers if necessary. The NLA could also play a role in the development of national referral networks.

Information sharing is a very limited option for providers in the social assistance and legal assistance sectors because of strong confidentiality requirements. The LSCSA has a confidentiality required mandated in its principal piece of legislation, *The Legal Services Commission Act 1977*. A more appropriate avenue would be that of "knowledge sharing" where agencies make use of each other's expertise through referrals, workshops and clinics.

**Chapter 5: Understanding and Navigating the System: Report Pages: 154 and 155:**

*While the Commission considers that community legal education initiatives can provide an effective mechanism for helping Australians to understand whether their problems have a legal dimension, more needs to be done to understand the reach and effectiveness of community legal education strategies particularly for those initiatives which attract government funding.*

We disagree.

Community education as provided by the LACs has been a long established practice. There is now a considerable body of evidence showing the reach of these strategies as well as information on feedback from organisations representing participants. Demand for legal education services is another measure of the value placed on these services by the community. Researchers working on the Allen's Review surveyed community-based organisations on their experience as clients of the LSCSA and a similar survey could be conducted with recipients of education services.

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<sup>1</sup> [http://www.lsc.sa.gov.au/cb\\_pages/law\\_for\\_cw#In Brief](http://www.lsc.sa.gov.au/cb_pages/law_for_cw#In Brief)

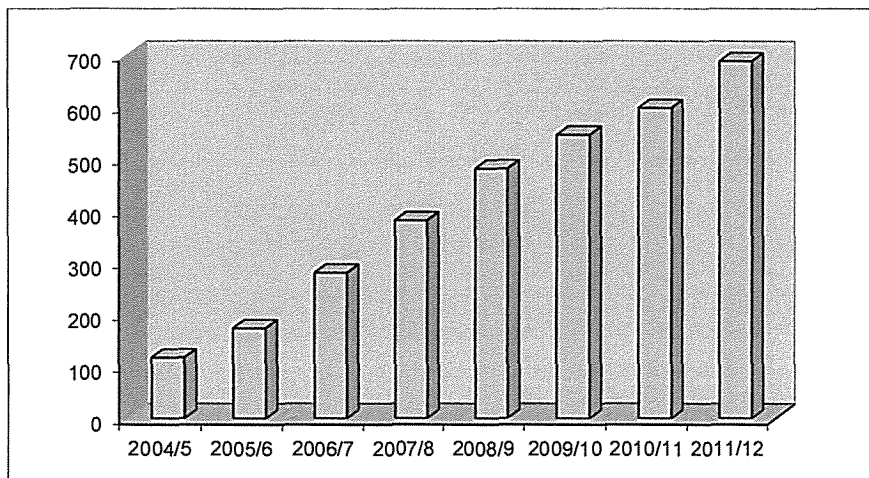
In the financial year 2011/12 for example, the LSCSA's education program reached 11,000 people in face to face education sessions. We were awarded the Diversity and the Law Award, at the National Migration and Settlement Awards, for our work in raising awareness of legal rights and responsibilities amongst asylum seekers, refugees and migrants.

Our advice services see the benefit of community legal education when clients approach the advice service after attending an education session with personal legal matters relevant to information provided at the session. A newspaper article or training session is invariably followed by a spike in demand for legal advice services on the topic covered.

**Chapter 8: Alternative Dispute Resolution: Key Points: Page 249**

*Evidence on the efficiency and effectiveness of ADR is patchy and would benefit from a standardised set of indicators. This should be developed as part of a broader approach to data collection in the civil justice system.*

We support the recommendation for a standard set of indicators in ADR for civil law matters. We suggest that the established and successful practices in Family Dispute Resolution (FDR) can provide an appropriate model. There is ample evidence of the success of FDR. In the financial year 2011/2012, 706 FDR conferences were arranged, with 689 proceeding to conference. Of those conferences, 527 were fully or partially resolved, with 162 matters not resolved. The settlement rate for full and partial settlement was 76.5%. (LSCSA Annual Report 2011/12).



Case Study: Rise in demand for FDR services over 8 years: LSCSA Annual Report 2011/12.

**Chapter 14: Self-Represented Litigants: Adelaide Magistrates Court Advice Service, Page 446**

The LSCSA provides a legal information and advice service for civil claimants at the Magistrates Court Monday to Friday. This is an advice only service which assists self-represented litigants who are before the court that day. More complex matters are provided with a warm referral and an appointment with the LSCSA's face to face advisory services based in each of its eight offices.

The LSCSA provides duty lawyer services at the Family Court each day of the week which assists self-represented litigants with family law matters. LSCSA also provides a duty solicitor service at all Criminal Magistrates Courts around South Australia. Below is a table showing the number of duty lawyer services provided by the LSCSA for the financial year 2012-13.<sup>2</sup> Please note that the duty lawyer service in the civil jurisdiction of the Adelaide Magistrates Court did not commence until June 2013. Since 3 June 2013 to date, over 1690 litigants have received advice and information at the service.

South Australian Magistrates Courts Criminal (including the Youth Court)	12,921
Family Court, South Australian Registry	2,069
<b>Total Services 2012/13</b>	<b>14,990</b>

Magistrates Court Legal Advice Services are provided by the three South Australian universities. The University of South Australia's Law School provides an advisory service at the Port Adelaide Magistrates Court on Fridays and from its Campus West premises Monday to Thursday. Adelaide University and Flinders University Law Schools provide an advisory service three days a week at the Adelaide Magistrates Court.

**Chapter 5: Understanding and Navigating the System: Report Page 163 and 166**

**Chapter 21: Reforming Legal Assistance Services: Report Page 616:**

*There is value in all legal assistance providers adopting a more strategic and co-ordinated approach, including a single entry point in each jurisdiction, to reduce duplication.*

LSCSA supports the adoption of a common type or model of entry point for all providers in each of the Australian jurisdiction. In South Australia, the LSCSA has a single entry point for all enquiries through its **Telephone Advice Line (TAL) system**. The same model is likely to be adopted by Victorian legal aid and is superior to the LawAccess system. The TAL system connects callers to an adviser who can discuss their legal problems immediately, without the need for the client to wait for a call back. There is no additional layer between the client and the adviser. All LSCSA advisers are either legal practitioners or experienced specialist paralegals with backgrounds in community support and social work. The legal adviser performs any necessary triage function but is also able to give advice, and to book the caller in for a face to face appointment either with themselves or another adviser. The TAL model minimises the number of times the client needs to tell his or her story and facilitates speedy resolution of urgent matters.

A strong referral network enables our staff to direct callers to service providers if they need other or additional help with problems.

**Chapter 21: Reforming Legal Assistance Services: Report Page 617:**

*There is limited evidence on the effectiveness of duty lawyers.*

We disagree.

<sup>2</sup> Legal Services Commission of South Australia, Annual Report, 2012-13, pp. 82 & 86

Statistics from the South Australian Court's Administration Authority (CAA) show that out of 76,526 appearances in the State Magistrates Court during 2012-2013, 6,764 appearances were represented by duty solicitors. CAA figures also show that during the same reporting year, 1,446 appearances in the Youth Court were represented by LSCSA duty solicitors. These representation services are part of a total of 12,921 services, including advice services, provided by duty lawyers in the State Magistrates and Youth Court.

For example, the proven effectiveness of the Criminal Law Duty Solicitor Service in South Australia is longstanding and obvious. Duty solicitors provide an overall cost benefit to the criminal justice sector as a whole. A represented custody client stands a much better chance of securing bail than someone who is unrepresented. This has a knock on effect throughout the system. If a client secures bail through competent duty solicitor representation there will be a significant cost saving to the prison system as the cost of housing a remand prisoner is about \$200 per day. Effective advocacy by Duty Solicitors on bail applications for an unrepresented accused plays a vital role in keeping remand rates down.

Unrepresented litigants in all areas require far more judicial attention than represented litigants simply because Judges and Magistrates are obliged to spend more time explaining rights and procedures to them. This delays court lists and not infrequently result in higher adjournment rates. The Duty Solicitor Service is a vital interface in preventing this wastage of valuable court time.

Many people attend court unrepresented, but with the assistance of the Duty Solicitor Service they will frequently leave court with their matter finalised or with clearer direction about the nature of the litigation they face and where to find and apply for the professional assistance they require if a matter has to be adjourned.

Judges and Magistrates strongly support the duty lawyer system and regularly call duty lawyers into court when they perceive that a matter can be assisted by the lawyer's presence. A survey of judicial officers in courts where duty lawyer services are provided would reveal the extent to which they value this service.

In the 2012/13 financial year, 2069 unrepresented clients were assisted by duty lawyers at the Federal Court Adelaide registry, an increase in over a third in the past four years. In addition, the LSCSA provides a "hotline" phone to its advisors from a room in the Family Court in Adelaide.

In the financial year 2008/09, the LSCSA commissioned a comprehensive Client Survey. The Survey showed that clients of the LSCSA Duty Lawyer Service rated the service very highly on the satisfaction scale, averaging 8.1 out of 10.<sup>3</sup> The most common suggestion for improvement from members of the public using the service was that more duty solicitors were needed as some found it hard to make an appointment before the hearing came on.

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<sup>3</sup> T. Lucas, Harrison Research, Legal Services Commission Client Survey 200 – 2009, Duty Lawyer Service Final Report, p. 16.

In 2012, the Law and Justice Foundation of New South Wales conducted an evaluation of the Legal Aid New South Wales' *Family Law Early Intervention Unit Duty Lawyer Service* <sup>4</sup>. The report commented:

*"In the stakeholder interviews, the judiciary and court staff described how the work of the duty lawyer can improve the quality of outcomes for the clients and help maintain the integrity of family law processes. The judiciary, in particular, noted the value of independent legal advice on improving client outcomes, not least because duty lawyers can advise litigants about a greater range of options that may be available to progress a matter."*<sup>5</sup>

Below is a case study, illustrating the effectiveness of the LSCSA's Duty Solicitor Service in the Family Court, South Australian Registry.

#### **Case Study: Duty Lawyers in the Family Court, South Australian Registry**

A family arrived at Adelaide Airport to leave for a holiday overseas but they were unable to board their flight because the children's names were on the Airport Watch List. They contacted the LSC duty lawyers at the Family Court and required urgent assistance. In 2007 the parties had separated, the mother went to Newcastle and she applied for orders placing the children's names on the Airport Watch List. Not long after the orders were made the parties reconciled. They did nothing about the existing court orders. Through the Adelaide Registry, our duty lawyers immediately sought to obtain these orders urgently from Newcastle. LSCSA duty lawyers prepared consent Minutes of Order including Notations explaining that the parties had reconciled and orders discharging the existing orders, that the subject children be permitted to leave the Commonwealth of Australia and the children's names be removed from the Airport Watch List. The client family were able to immediately return to the airport to join their pre-arranged flight.

#### **Chapter 21: Reforming Legal Assistance Services: Report Page 625:**

*The Productivity Commission considers that advocating for legislative changes and changes to government policy should be a core activity of LACs and CLCs, particularly peak bodies and larger CLCs.*

The LSCSA supports the role of LACs in providing input to assist governments at all levels to determine priorities for legal assistance, and to comment on proposed changes to legislation and government services. The LSCSA does not believe that it is the role of LACs to lobby political parties to promote particular causes.

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<sup>4</sup> Forrell and Cain, *An Evaluation of Legal Aid NSW's Family Law Early Intervention Unit Duty Lawyer Service*  
<http://www.lawfoundation.net.au/ljf/app/&id=6F12DS0216DF69D8CA257B1200071FF7>

<sup>5</sup> Ibid page 26

As a provider of legal services to disadvantaged South Australians, the Legal Services Commission has a strong understanding of the range of legal and social issues faced by this particular client group. This places the Commission in a unique position to participate in forums aimed at informing legislative, policy and systemic changes, at state and national level, to enhance access to justice for disadvantaged or vulnerable groups.

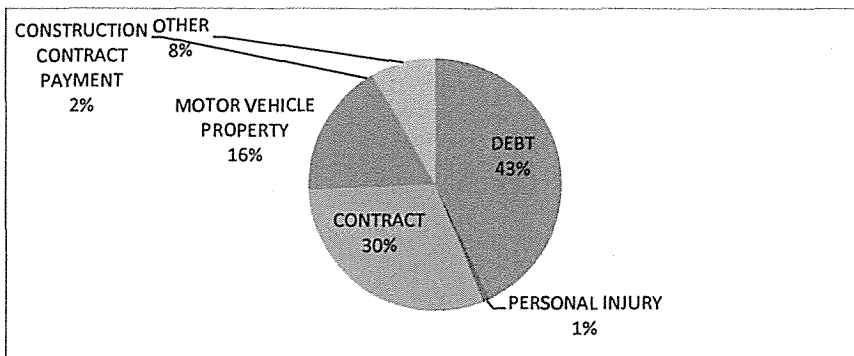
**Chapter 21: Reforming Legal Assistance Services: Report Page 630:**

*Australia's most disadvantaged people increasingly need assistance with civil matters.*

We agree.

The solution lies not only in properly targeted additional funding for the legal assistance sector but in reform of the civil justice system. The LSCSA has recently opened a pilot Information and Advisory Service at Adelaide Magistrates Court. The service provides advice and information support for self-represented litigants. The Service does not represent clients in Court, but an adviser may occasionally sit in the Court, to hear together with an unrepresented litigant, an explanation proffered by a Registrar or a Magistrate in order to facilitate subsequent advice. Since 3 June 2013, to date over 1690 litigants have received advice and information at the centre.

Below is a diagram showing the areas where advice has been sought. The service appears to have quietly embedded itself into the fabric of the court with magistrates now frequently holding matters in the list to allow unrepresented litigants to get on the spot immediate advice regarding their matter.



**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 Productivity 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.*

The specific demarcation of funds would be currently problematic for the LSCSA as the National Partnership Agreement currently sets the funding priorities for legal assistance and the LSCSA expends all available funds on these priorities. Consequently, an injection of additional funding would be required if priorities for civil law were introduced.

LSCSA already provides extensive legal advice (but not representation) on civil law matters, including a dedicated resource to provide advice and minor assistance for consumer credit law problems as well as Duty Lawyer services at the Magistrates Court and Administrative Appeals Tribunal. Funding for legal advice services is drawn from a mix of Commonwealth and State funds depending on the area of law.

#### **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.*

The current legal aid criteria consider the legal merits of the matter, the means of the applicant and, in the case of family law, whether children are affected, or in the case of criminal law, whether there is a real risk of incarceration. The defining feature of current eligibility tests is that they can be **objectively** assessed and are focussed on the cost of access to justice for the client. Current legal aid guidelines in South Australia do allow us to consider any “special circumstances” of an applicant in deciding whether to grant aid.

#### **Chapter 21: Reforming Legal Assistance Services: Report Page 648:**

*Where clients can afford to contribute to their case costs they should do so.*

This is already the situation for clients of the Legal Services Commission of South Australia.

In South Australia legal aid is not free. A client can be required to pay some or all of the cost of a case and must pay his or her lawyer a contribution to legal aid costs at the start of the grant of legal aid. The contribution will be at least \$30, but it can be much more than this, depending on the client’s circumstances. A client can be asked to pay further contributions as the case progresses.

If the client or any person financially associated with the client has any interest in real estate, then legal aid takes the form of a loan. The Commission can register a charge over the real estate. The charge stays registered over the real estate until it is sold, transferred, re-financed, or further mortgaged at which point the money must be paid back to the Commission. The charge will apply

once legal fees exceed \$2 200. This amount is adjusted annually in line with CPI. In the financial year 2012-2013, the LSCSA collected a total of \$950,000 from statutory charges and contributions.<sup>6</sup>

#### **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?*

In South Australia, legal aid rates currently stand at about one-third the amount of private solicitor rates. Legal aid rates are determined by available funds and the responsible management of public monies. Increasing legal aid rates would require either a large injection of funds to the LSCSA or a reduction in services. Restricting the fees charged by private solicitors would not necessarily increase the number willing to undertake legal aid work but may have the affect of making private lawyers more affordable for income earners. Private practitioners undertake legal aid work for many reasons, for example, to assist a current client who has no capacity to pay privately, to encourage new clients to the firm, as 'bread and butter' work for junior practitioners, to expose practitioners to new areas of law such as criminal law where private payers are scarce, or to build up a speciality practice based on high volumes of legal aid cases. In this last category, for example, one Adelaide law firm has a turn-over of over \$1 million a year in legal aid work.

#### **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.*

We generally agree, and note that the major 'core' priority, that of legal assistance for disadvantaged Australians, is already reflected in the Commonwealth funding guidelines. As the Commonwealth and States presently fund different areas of law, and each jurisdiction has different priorities based on local demographic, geographic and socio-economic factors, it may difficult to identify further common issues beyond the funding guidelines. For example, the issue of geographic remoteness and access to justice is of significance in South Australia, Queensland, Northern Territory and Western Australia. It is of less relevance in Victoria, ACT, Tasmania and New South Wales.

The alignment of eligibility tests across legal assistance providers would be of little benefit in South Australia and may be counter-productive as the different providers offer discrete forms of assistance with little overlap. Indeed, CLCs in South Australia offer services specifically to members of the public who have failed to qualify for legal aid because they cannot meet the eligibility guidelines.

According to the website for the South Australian Council of Community Legal Services:

<sup>6</sup> Legal Services Commission of South Australia, Annual Report 2012-13, p.25.

“Ongoing assistance and /or court representation is only available for people who are unable to afford a private solicitor, who do not qualify for legal aid and whose situation has legal merit.”

*([http://www.saccls.org.au/cb\\_pages/services.php#who](http://www.saccls.org.au/cb_pages/services.php#who))*