
Productivity Commission Draft Report into Access to Justice Arrangements

Productivity Commission

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Executive Summary

The following submission is in response to the Draft Report of the Productivity Commission's Inquiry into access to justice arrangements.

Access to justice has a range of meanings to different people, but it can be most easily understood as the effective capacity of people to achieve just resolution of their legal problems.

There are a range of mechanisms and processes through which this can be achieved. Only a very small proportion of legal disputes are determined by the courts, with the vast majority being resolved through informal processes, such as private settlement, alternative dispute resolution, via ombudsmen and other government or industry bodies, or legal advice.

However, while from one perspective the courts may seem to play a small role in the justice system, they are central to all aspects of that system. The courts remain the key institution through which the Rule of Law is upheld and the nation's systems of government, commerce and civil society are maintained. The right of effective access to the courts is also important, as the actual threat of litigation gives strength to all forms of alternative dispute resolution processes. Impeding that right of access therefore undermines all other aspects of the civil justice system and also compromises the respect for the system of justice that underpins the stability of civil society.

Australia is an egalitarian society, which values fair and equal treatment before the law. This means that access to the courts and legal assistance should not depend on an individual's capacity to pay. High court fees and restrictive legal assistance funding guidelines are inimical to this concept.

Further, it is virtually meaningless to conduct an inquiry into access to civil justice in isolation from the criminal justice system. Decisions and shocks occurring in one system affect the other. Changes to criminal laws, increases in law enforcement funding or rises in unemployment may impact on demand for criminal law assistance, reducing the small pool available for civil law assistance; and increasing demand for court services, thereby increasing the overall cost of running the courts.

The Law Council's response to the Draft Findings, Recommendations and Requests set out in the Draft Report are broadly summarised, as follows:

Professional regulation

1. The Law Council does not support any further professional regulation of legal practitioners and submits further regulation will, in all likelihood, add to legal costs rather than constrain them.
2. Professional regulation of lawyers is a state and territory responsibility and has been the subject of extensive consideration, reform and unification through successive attempts to establish a nationally consistent regulatory framework. Additional regulation applied to various parts of the profession through Commonwealth intervention amounts to dual regulation, which increases compliance costs for practitioners and has dubious practical benefits for consumers.
3. Complaints about legal fees and costs represent a very small proportion of overall complaints made against practitioners and there is no evidence presented which

suggests that legal services regulators do not have adequate enforcement powers. This does not support the Productivity Commission's proposals that further regulation in this area is required.

4. The Law Council does not consider that academic requirements for admission to practice require significant change. These are regularly reviewed by the Legal Admissions Consultative Committee (LACC), which aims to identify key disciplines for legal practitioners for entry level to practise.
5. The Law Council does not support removal of sector-specific requirements for approval of professional indemnity insurance products. This is likely to increase costs, without any perceivable benefit for consumers or practitioners.

Limited licences and 'lay advocates'

6. The Law Council does not support allowing unqualified persons to practice law. The Law Council would oppose any proposal to permit this unless it was conditioned on supervision by a legal practitioner and met a variety of disciplinary, regulatory and insurance conditions to ensure appropriate safeguards for clients and the community.

Limited scope retainers

7. The Law Council supports the practice of limited scope representation (or 'unbundled legal services') but raises a number of issues which must be addressed to facilitate its uptake.

Alternative dispute resolution (ADR)

8. The Law Council supports increased uptake and facilitation of ADR in appropriate cases. However, this can only be successful if parties have a real and effective right to seek judicial determination and the benefit of legal representation.

Court processes

9. The Law Council does not consider abolition of formal pleadings will assist in increasing the efficiency of court proceedings and suggests that it may have the opposite effect.
10. Discovery is an important process, enabling parties to narrow the matters in dispute and to ensure the parties to litigation understand the various elements of the other party's(ies') case. Any recommendations reached by the Productivity Commission should have this in mind, given there is little evidence that discovery is misused in the vast majority of cases.

Duties on parties

11. The Law Council submits that, while pre-action obligations are effective in some areas, they are not appropriate for many proceedings. Targeted pre-action procedures are generally more effective in reducing costs.

Legal costs

12. Legal costs are difficult to accurately estimate at the commencement of many proceedings. There are already extensive disclosure requirements and duties with respect to containing costs under legal profession rules and regulations.

Court and tribunal fees

13. The Law Council opposes the Productivity Commission's recommendation that court fees be charged on a cost-recovery basis. Implementing a 'user-pays' system will significantly undermine access to justice and the Rule of Law, by making the courts all but inaccessible to a majority of people.
14. The Law Council considers that court fees in most jurisdictions are already too high and beyond the capacity of many people to pay. This should be addressed through reductions in existing fees, expansion of exemption categories for litigants and substantially increased expenditure on the courts, which are a core institution in Australia's systems of government, commerce and civil society.

Private funding for litigation

15. The Law Council is continuing to consider the recommendation that restrictions on damages-based billing be lifted. The Law Council will endeavour to advise of its position before the completion of this Inquiry.
16. The Law Council supports application of financial services regulation to litigation funders, but recommends that this be done carefully, with a view to ensuring barriers to entry do not unduly inhibit the development of competition.

Legal assistance funding

17. Substantial additional funding for legal assistance services is necessary to enable expansion of eligibility for legal assistance beyond present levels and to prevent further restrictions being applied. As recognised by the Commission, the current means tests have the effect that many people living under the poverty line are ineligible for legal assistance.
18. The Law Council does not consider demarcating funding for criminal and civil legal assistance will be effective without substantial, additional funding for legal aid commissions.
19. The Law Council strongly supports the recommendation that the NPA be renegotiated with agreed national objectives in mind. Further, the Law Council recommends that legal assistance peak bodies be parties to the agreement and have a formal advisory role in development and implementation of the NPA.
20. The NPA should also be linked to a justice impact assessment process, agreed to by all parties to the agreement, requiring governments to consider the impact of new legislative proposals and policy initiatives on the justice system. A further process must be linked to the agreement to ensure contingency planning in the event of natural disasters or other events outside government control.

Pro bono legal assistance

21. Pro bono legal assistance is a celebrated part of professional practice and should be incentivised and encouraged. However, pro bono can never replace the need for governments to adequately fund legal assistance services.
22. The Law Council notes that reporting requirements may present an obstacle to smaller, regional and rural firms tendering for government legal work if too complicated. Targets should also be flexible, in order to provide incentives to rural and regional firms to tender for government work.

Introduction

1. The Law Council is pleased to provide the following submission in response to the Productivity Commission's Draft Report on Access to Justice Arrangements ("the Draft Report"). This submission follows a detailed submission provided on 13 November 2013 in response to the Productivity Commission's Issues Paper on Access to Justice Arrangements, and a further supplementary submission on 15 May 2014.
2. As outlined in **Attachment A**, the Law Council is the national peak body for the Australian legal profession, effectively representing around 60,000 Australian lawyers through the law societies and bar associations of the states and territories, and the Large Law Firm Group Ltd (collectively referred to as the "Constituent Bodies" of the Law Council).
3. The Law Council is grateful for the extensive contributions to this submission from its Constituent Bodies, specialist Sections, Advisory Committees and, in particular, to the expert members of the national Working Group formed by the Law Council Board of Directors to respond to this important inquiry. Contributors to this submission include the Law Society of the Australian Capital Territory, Law Society of New South Wales, Law Institute of Victoria, Law Society of Western Australia, Law Society of the Northern Territory, Law Society of South Australia and Bar Association of New South Wales. It is noted that a number of those bodies have also made separate submissions to the Productivity Commission on jurisdictional or other issues.
4. The opening paragraphs of Chapter 1 of the Draft Report make the following pertinent observations:

"A well-functioning civil justice system underpins social cohesion and economic activity. It is critical for managing disputes between individuals, families, businesses and governments."
5. Underlying this statement in the Draft Report and the paragraphs which follow is the understanding that, while an important element of the justice system is to ensure the just determination of *private/individual* rights and entitlements according to law, the civil justice system, like the criminal justice system, is a *public* good with considerable and essential public benefits. The corollary of this is that, like all public goods, access to and the protection of the justice system must be enjoyed equally by all members of the public, not simply by those who can afford to pay.¹
6. It is also important to recognise that access to justice is not simply about resolution of disputes – it is about *just* resolution. Justice, whether it is sought through formal or informal dispute resolution mechanisms, will only be assured if it is provided within the 'shadow of the law'. That is, less-formal mechanisms for resolving civil disputes, whether through ombudsmen, mediation, arbitration, conciliation or tribunals, are likely to only be effective and facilitate just outcomes if they are backed up by the real threat of litigation as a last resort.
7. Each of these views strongly militates against the notion that the courts are merely agencies of government, left to compete with other branches of the bureaucracy for finite resources. The courts are the central pillar of the third arm of government in

¹ Thus article 10 of the Universal Declaration of Human Rights: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Australia's constitutional democracy. Courts uphold the rule of law and maintain our system of good-government, trade, investment, commerce, personal and contractual relationships and many other aspects of our society and personal lives.

8. Requiring courts to be self-funding will make the courts inaccessible to most, except the very wealthy, disadvantaged Australians (who are granted a fee waiver or exemption) and those willing to risk significant sums of money to litigate their case, often unrepresented. It will mean those engaged in bitter family disputes, serious commercial disputes, challenges to administrative decisions, workplace disputes, etc. will have an extremely strong disincentive to enforce their rights through the courts. This may be despite the fact that there is no alternative but to litigate. Such a disincentive correspondingly damages the effectiveness of all other dispute resolution processes.
9. Further, access to justice also encapsulates notions of equality – equal and fair access based on the principle that justice is not a commodity for sale, it is a citizens' right. Legal aid commissions (LACs), community legal centres (CLCs), Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS) were established in recognition of this principle – as said by the Hon Lionel Murphy QC: *"...one of the basic causes of inequality of citizens before the law is the absence of adequate and comprehensive legal aid arrangements throughout Australia."*²
10. Since the movement to establish the Australian Legal Aid Office in 1973, legal assistance services have been the primary institutions through which disadvantaged and low-income Australians can access legal assistance. They are also the primary providers of community legal education and referral. However, tightening eligibility guidelines and the withdrawal of services for a range of dispute categories, have limited availability of legal aid to only the most disadvantaged Australians. This is a direct result of a failure by governments to provide sufficient funding for legal assistance services.
11. The yawning gap in legal assistance services and the high cost of litigating through the courts is not a matter of tinkering with service provision or finding 'new efficiencies'. Nor can it be addressed by increasing pro bono or mandating alternative dispute resolution (ADR) in every dispute. It is not a matter for increased professional regulation of lawyers – already the most heavily regulated profession in the country. And it is certainly not going to be assisted by legitimising the practice of law by non-lawyers.
12. It is an unavoidable fact that if the justice system is to be accessible by the public, all levels of government must begin working toward national objectives on access to justice and provide sufficient funding to meet those objectives. Rationalisation of court procedures, pre-action protocols, targeted ADR, amalgamation of tribunals and other measures can improve the efficiency of the system and should be supported. However, the inaccessibility of the justice system can only be addressed if it is recognised that justice is a public good, with public benefits, and it is funded accordingly.
13. The Law Council looks forward to discussing these matters further at the Productivity Commission's forthcoming public hearings.

² See http://www.justinian.com.au/storage/pdf/Murphy_Legal_Aid_1973.pdf

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14. Finally, Law Council has appended two documents to this submission, being comments by the Law Council's Business Law Section's Corporations Law Committee (Attachment B) which is referred to in the response to Chapter 18; and the Australian Consumer Law Committee of the Law Council's Legal Practice Section (Attachment C).

General Comments and Preliminary Matters

Definition of Access to Justice

15. The Productivity Commission has adopted as its definition of Access to Justice “making it easier for people to resolve their disputes”. The Law Council regards this as insufficient.
16. Access to justice involves the determination and vindication of citizens’ legal rights, ultimately by the courts as the independent “third arm of government”. The definition does not encompass these aspects of “justice”.
17. The Productivity Commission has acknowledged this at various stages in the Draft Report. It is touched on (*inter alia*) at pages 3, 7, 15, 16, 22, and discussed in Chapter 1 (page 77), to some extent in Chapter 2 (page 87), and in Chapter 11 (page 327). These discussions focus on the social role of the civil justice system, not its place in the Australian political structure. Further, these discussions have not translated into the final definition.
18. Nor does the report focus on the law as a major part of the intellectual heritage of our society. It is not merely a tool or facility for the ‘quelling’ of civil disputes. It represents an accumulation of decisions (both by parliaments and by courts) about the extent of citizens’ rights and the role of the state in moderating the exercise of rights.
19. To not acknowledge the social and political functions of the civil justice system is a significant short-coming in the Draft Report, which has adversely affected a number of the Commissions conclusions and recommendations.
20. In its previous submission on 13 November 2013, the Law Council stated that:

“the concept [of access to justice] is most clearly articulated as concerning the link between a person’s formal right to seek justice and the person’s effective access to the legal system or legal remedies.”³
21. It is clear that, with all the good will in the world, parliaments can define the circumstances in which people are permitted to access the courts, tribunals and other dispute resolution mechanisms as widely as possible. However, there remain a range of factors which effectively impede those seeking justice, many of which are within the power of parliaments or the courts to rectify. Adequate funding for legal institutions, respecting the independence of the judiciary and the courts, investing in interpreters, court staff, registry services, information and communication technology, unrepresented litigant assistance programs, community legal education, etc., are all matters which should be at the apex of this inquiry.
22. Instead, a primary focus identified by the Commission is “constraining cost”, which is a very different line of inquiry to “access to justice”. Cost is a perennial focus of governments, which are in no small measure the most prolific users of the court system, and it unfortunately diminishes a key institution of our democracy to the status of a small government agency, within the portfolio of another.

³ See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2763%20-%20Inquiry%20into%20the%20Access%20to%20Justice%20Arrangements.pdf>, page 27.

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23. The Law Council submits that access to the courts, as the institution through which civil rights and obligations are determined, is as important as the existence of the right or obligation itself. Without the means of enforcement, the right or obligation itself is virtually meaningless. Similarly, the existence of mechanisms to reach resolution without effective access to the court renders those processes impotent and correspondingly increases the risk of injustice.
24. The Law Council suggests that the Commission have regard to the central tenet of the justice system, which is to uphold the rule of law. "Making it easier for people to resolve their disputes" certainly sounds like a worthy aspiration. However, the justice system is concerned with *just* resolution, not resolution only for the sake of resolution. If a person is forced into an unfair settlement because they cannot afford to enforce their rights through the courts or is unable to access legal assistance, when their opponent is wealthy and well-represented, the rule of law has been compromised – we do not have a system of justice but, rather, a system of injustice.
25. Although the right to judicial determination is equal and universal, it is also important to recognise that the need to access the civil courts and tribunals is normally a last resort for most clients and for their lawyers. It is usually only the most intransigent or complex matters that make it to a hearing in the court.
26. In most jurisdictions, a large percentage of matters never get to the point of having proceedings issued. As the Draft Report acknowledges, most are resolved 'in the shadow of the law', through negotiations between parties via their lawyers or by other means. The threat of litigation, if the parties fail to agree, provides the context and builds momentum for a resolution 'out of court'. However, access to judicial determination ensures disputes are resolved fairly, according to law.

Access to Justice and the Rule of Law

27. It is noted there is academic debate about exactly what is encompassed by the principle of the Rule of Law.⁴ At a practical level:
28. The Rule of Law is most readily understood as a political and philosophical principle, regulating part of the relationship between state and citizen, and between citizen and citizen. It is a principle carrying with it a number of implications:
- (a) As between state and citizen, the state and its officials are limited by law. This has at least two aspects. At the most basic level, a government and its officials must obey the law. But in addition, there is general agreement that there are restrictions on a government making laws. For present purposes, that can be expressed as a proposition that laws must be for the public good.
 - (b) As between citizen and citizen, the law applies equally.
 - (c) The law is public, impartial, clear, predictable and enforceable.⁵
29. There is an additional critical aspect. Law is not only about restrictions. Implicitly, and occasionally explicitly, it recognises that citizens have entitlements. The Rule of Law

⁴ For an overview, see Tamanha *On the Rule of Law*, Cambridge University Press 2004, Adobe Digital Edition.

⁵ One could add, fair, and reasonable - see, e.g., *The Rule of Law* (6th Sir David Williams Lecture), The Rt. Hon Lord Bingham of Cornhill KG, 2006, http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php

is an acknowledgment that the state is obliged to act in the interests of its citizens, to craft the law accordingly, to provide a means to hold governments and citizens accountable to each other and to uphold individual legal rights.⁶

30. Implementing the Rule of Law requires an independent judicial system. The judicial system is an arm of government, but its independence is recognised by the doctrine of the Separation of Powers. It provides a counterbalance to the exercise of executive power, and is a forum to hold government to account. It is also a forum to declare and clarify the law, to enforce the law, and to resolve disputes between citizens according to the law. Thus (to paraphrase Tamanha):

The judiciary are the special guardians of the law, and in the ideal, become "*the law personified*"... "*unbiased, free of passion, prejudice and arbitrariness, loyal to the law alone.*"⁷

31. The judicial system in turn relies on individuals and entities to invoke its jurisdiction and powers. The process of identifying, advocating for, and in that sense vindicating individual rights in a complex and layered system of law is the task of an independent legal profession. The legal profession becomes the counterpart to, and essential precondition for, judicial integrity. The existence in England of "*a centuries-old legal tradition, with its own system of education and body of knowledge,*" was critical to developing a robust balance between the sovereignty of a king and, subsequently, Parliament, and the practical implementation of law in the public interest. Law became "*an established, regularised institutional presence substantially shaped by [an] increasingly autonomous legal profession.*"⁸ The conception of the legal profession as an essential part of the administration of justice can be seen in the United Nations *Basic Principles on the Role of Lawyers*, albeit in the context of criminal law.⁹ Judges, and lawyers, are essential elements in implementing the Rule of Law.
32. The legal profession requires skill, knowledge and independence, to advocate effectively. Lawyers identify their clients' legal rights and entitlements, and help them through the processes to realise those rights and entitlements. They are the interpreters and the interface between the law and the public. Because the system is adversarial, and often involves conflicts between individuals and the Executive Government, independence to advocate for a client's interests within the law is critical. Concepts such as the self-regulation of the legal profession by reference to its ethical and fiduciary obligations are the result of a practical and principled recognition of the critical social and individual role the profession must fulfil. Attempts to reduce the legal profession to "providers of legal services", in competition with lay providers of similar services, fundamentally misunderstand the importance of an independent legal profession.
33. These views of the role of lawyers are not universal, and the legal profession is not above trenchant criticism.¹⁰ Nonetheless, it is beyond argument that the primary duty of lawyers is 'to the Court' – a public duty expressed in the identification, advocacy

⁶ This is to be contrasted with rule by law: Thus: "*Chinese leaders want rule by law, not rule of law. ... The difference ... is that under the rule of law, law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law can serve as a mere tool for a government that suppresses in a legalistic fashion.*" Li Shuguang, quoted in Tamanha *op cit* 4, at p.3

⁷ Tamanha *op cit* 4 at p.123

⁸ Tamanha *op cit* 4 at p.29

⁹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

¹⁰ See for example Gordon, Robert W., "*The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*" (2010). Faculty Scholarship Series. Paper 1397.

http://digitalcommons.law.yale.edu/fss_papers/1397

and vindication of the legal rights of clients,¹¹ and that access to justice requires access to independent, professional, ethical and fiduciary legal services.

The Economic Value of Justice

34. A number of aspects of the Productivity Commission's inquiry treat the question of access to justice from an economic perspective. This is a useful and necessary approach, however it gives insufficient weight to the social role of the justice system, and the parts that its various participants play. It focuses on short-term economic costs and ignores the longer-term economic consequences to the community of a failure to provide access to just resolution of disputes for large sections of the community. In particular, the Draft Report places a distorted emphasis on the 'private benefit' of the justice system, with the result that its recommendations are weighted toward a 'user-pays' model.
35. At the same time, the Commission appears to undervalue the fundamental importance of the justice system in facilitating economic growth, productivity, investment, commercial transactions, contractual arrangements and the conduct of business and good government. Those who enforce their rights or seek court determinations regarding their rights may be perceived to garner a personal or individual benefit, but there are broader societal benefits, both economic and social, which belies the overt focus on the individual in the Draft Report.
36. As a result, there is insufficient emphasis on the fundamental requirement that citizens have access to authoritative bodies which adjudicate on their legal rights and which are independent from government, commercial interest, and other citizens.
37. A lot flows from this omission, including a failure to consider (beyond mentioning) the critical role of the Court to hold the Executive Government to account, and the failure to consider the duties and public responsibilities of the legal profession. Instead the discussion reduces the legal system to a means of private dispute resolution, with an emphasis on short-term economic efficiency gains.

¹¹ It is a lawyer's duty to advocate for a client's rights, but that can lead to injustice. Ultimately, it is for the judiciary to rule on the extent of a client's legal rights, but with the inevitable uncertainty or indeterminacy of the law, there is a real risk of over-claiming and recovering.

Chapter 2: Exploring legal needs

DRAFT FINDING 2.1

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

DRAFT FINDING 2.2

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

38. The Law Council considers Draft Findings 2.1 and 2.2 are somewhat tendentious.
39. The basis for finding that around 17 per cent of the population had some form of unmet legal need is not well-explained. The Legal Australia-Wide (LAW) Survey¹² reveals that legal problems are widespread, affecting a significant number of Australians. Each year an estimated 8,513,000 people aged 15 years and over in Australia experience a legal problem – approximately half of Australia’s population aged over 15 years (49.7%). It is also estimated that 3,736,000 people aged 15 years and over in Australia experience three or more legal problems – 21.8% of Australia’s population aged over 15 years. The most common legal problems include consumer (21%), crime (14%), housing (12%) and government (11%).
40. The Law Council considers that persons experiencing three or more legal problems are highly likely to equate these problems as a whole to have a significant impact on their lives. It is misleading to suggest that a single legal problem must be “substantial” before it is considered worth addressing. Moreover, there is no clear explanation of what “substantial” means in this context. General reference is made on page 100 to the impact on wellbeing resulting from addressing the problem, but then it appears to be inferred that this impact can only be observed if the problem is considered “substantial”.
41. The Law Council considers that, by this apparent attempt to limit the concept of unmet need, by introducing the hitherto undefined notion of “substantial”, there is a significant risk that the Productivity Commission is understating the nature of the problem. It also ignores a central finding of the LAW Survey that unresolved legal problems (including those considered slight or less important) can and often do exacerbate into much more significant problems later on, particularly in the cases of debt, business disputes, credit and consumer matters, crime, housing and other issues.
42. Accordingly, the Law Council recommends that the Commission give greater weight to the actual findings of the LAW Survey rather than interpret or read the data down. Even if the Commission’s approach is accepted, on its own estimates 23.6 percent of the population experienced unmet need (Figure 2.4, Draft Report page 102). Therefore, it is difficult to understand the basis for the Productivity Commission’s finding that only 17.1 per cent of the population experienced unmet legal need.

¹² (2012), *Report of the Legal-Australia-Wide Survey*, New South Wales Law and Justice Foundation. See <http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>

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43. Notwithstanding the Law Council's concerns about the accuracy of the Productivity Commission's estimate of unmet legal need (which, in turn, affects the assessment of Draft Finding 2.2), the Law Council queries the basis of the draft finding that greater use of ombudsmen and other informal dispute mechanisms could cut the level of unmet need by more than two-thirds.
44. As noted further below, the Law Council strongly supports the use of ombudsmen and other informal dispute resolution mechanisms. However, these are all mechanisms in the dispute-resolution 'kit', which may not be effective or appropriate to every dispute. For example, outside the categories of consumer, business and government disputes, it is difficult to envisage an effective role for ombudsmen. Mediation, both court-mandated and voluntary, is increasingly used but there remains conjecture about its effectiveness or appropriateness in all or even most disputes.

Chapter 5: Understanding and navigating the system

INFORMATION REQUEST 5.1

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

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

45. In terms of effectiveness and efficiency, the Law Council notes there is considerable evidence of downstream savings to be gained through identifying and dealing with legal problems before they exacerbate.
46. The Productivity Commission has referred in the Draft Report to the PricewaterhouseCoopers paper on *The Economic Value of Legal Aid*, which estimated that each dollar spent on legal aid returns between \$1.60 and \$2.25 in downstream savings to the justice system.¹³ Put simply, unresolved legal problems can lead to wider economic and social costs, which are borne by the community through health care, social security, unemployment and reduced productivity and well-being.
47. Legal aid commissions are likely to be best placed to conduct legal health checks, having the infrastructure and outreach capacity to assist people in both metropolitan and regional areas. In addition, as noted in the Draft Report, CLCs, Law Societies, law clearing houses and the private profession can also assist in initial legal assessment, referral and outreach.

¹³ PricewaterhouseCoopers, 2009, *The Economic Value of Legal Aid: Analysis in relation to Commonwealth funded matters with a focus on family law*, report prepared for National Legal Aid, page 39. See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload15a6.pdf>

48. However, the capacity and effectiveness of these programs is unfortunately restricted due to the worsening funding situation for LACs and CLCs. Moreover, ATSILS have virtually zero capacity to provide community legal education to Aboriginal and Torres Strait Islander people, with around 95 per cent of funds being spent on frontline legal services.

49. In a submission to the Australian Curriculum Review (on Civics and Citizenship), the Law Council recommended that legal education should be an intrinsic element of the Australian primary and secondary schools curriculum.¹⁴ The Law Council supports measures to ensure legal education for primary and secondary students equips graduands with the capacity to identify legal problems and appropriate avenues of assistance or redress.

DRAFT RECOMMENDATION 5.1

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

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

50. The Law Council acknowledges the approach in New South Wales, with regard to LawAccess and notes that in its earlier submissions the Law Council suggested the LawAccess model may be worthy of consideration in other jurisdictions.

51. It is noted that all jurisdictions have some mechanism through which people can access referral services.¹⁵ The Law Council considers Recommendation 5.1 contains a risk of establishing a further, unnecessary layer of bureaucracy when there is insufficient evidence that those with legal problems have difficulty gaining referral under existing arrangements. For example, the LAW Survey found there was widespread recognition of legal aid, which in a number of jurisdictions is already the primary referral mechanism, whereas the actual public visibility of LawAccess may be quite low. The Law Council is advised that a recent audit of the New South Wales Law Access model found that their services are predominantly used by those living in middle and high income postcodes.

¹⁴ Available here: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2779-DraftYears3-10AustralianCurriculumCivicsandCitizenship.pdf>. See also the Law Council's earlier, more detailed submission in response to the 'Draft Shape Paper', released during the consultation phases: <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2621%20-%20Consultation%20on%20Draft%20Shape%20of%20the%20Australian%20Curriculum%20-%20Civics%20and%20Citizenship.pdf>

¹⁵ In South Australia, for example, the principal focus is the Legal Services Commission. Other States have similar facilities.

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52. It is also important to recognise that different jurisdictions have different funding histories and models – there is a need to respect different practices and funding mechanisms for advice and referrals.
53. For example, in the Australian Capital Territory, the Legal Assistance Forum has developed a guide that clearly sets out the range of available services and what areas of law are best referred to each of those services. The guide is regularly updated and circulated. The establishment of a Law Access type model is unlikely to improve the efficiency of this co-operative approach and would result in the creation of an unnecessary additional body.
54. The Law Council notes that LawAccess is largely funded by the Public Purpose Fund in New South Wales. If the LawAccess model is adopted in other jurisdictions, it should be funded by State/Territory governments as a public service. However, given the functions of LawAccess are already performed in other jurisdictions by bodies with greater public visibility, there must be a question of whether the expense is justified, next to what may be a low public benefit.

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.

55. It is not possible to comment on this initiative at the present time. The Attorney-General's Department's submission makes only passing reference to the training module. With no other information available, other than the presumption that the training module is intended to assist Department of Human Services (DHS) staff to identify legal problems and refer clients to the appropriate services, it is not possible to assess the costs and benefits of adopting the training module.
56. The Law Council suggests that the training module should be the subject of consultations with the legal profession and legal assistance services prior to being trialled.
57. If the module is deemed appropriate, it might also be beneficial for staff on information and assistance lines managed by the Department of Health and Ageing, Centrelink, Department of Families, Housing, Community Services and Indigenous Affairs, as well as some State/Territory Government agencies, including health services, public housing, police services, social/community services, etc.
58. While the Law Council supports training to enable those with regular contact with vulnerable groups, to assist in identification and referral of potential legal problems, there are significant risks attending any proposal to permit non-lawyers to provide, or purport to provide, legal advice and assistance to vulnerable people. Those who receive advice or assistance with any aspect of a potential legal problem from a non-lawyer should be routinely cautioned that the advice or recommendation does not constitute legal advice.

59. It is worthwhile to note that the use of 'in-house' lawyers by agencies is likely to also be an affordable option. The salaries for many legal positions are not much different to that of officers without legal qualifications, but is likely to result in higher quality advice without the need for resourcing training for 'non legal' agency staff. The larger agencies and departments already have legal departments who can and do deal with enquiries and assist with legal problem identification.

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.

60. The Law Council notes that concepts, such as joined-up legal services and 'holistic' service delivery are often touted as the ideal service delivery models for those experiencing multiple problems or legal problems with multiple dimensions.
61. Legal assistance service providers have developed and implemented "spot the legal problem" training and education modules aimed at those who are assisting disadvantaged people in other areas (e.g. mental health advocates, health receptionists). These programs should be encouraged.
62. The Law Council is not aware of any jurisdictions in which relationships between different government agencies is managed seamlessly or successfully. The capacity of legal aid commissions to manage these relationships is significantly impeded by their funding situation. This not only restricts their capacity to provide services to anyone but the most disadvantaged people, but also limits the scope of services they can provide to particular areas of law, meaning legal aid simply is not available in many areas of civil law need, regardless of means.
63. Moreover, it is very difficult for any other government agency to assume this role. Those providing the sort of holistic services referred to in the Draft Report are likely to need legal background and experience and sufficient knowledge of the extent of the client's legal problems to ensure they are connected with other services.
64. The Law Council considers that the best way to facilitate effective referrals and information sharing is to ensure that legal assistance bodies, including LACs, CLCs, ATSILS and FVPLS, have sufficient additional funding to support that service delivery model.

Chapter 6: Information and redress for consumers

General comments

65. The Law Council notes certain Draft Recommendations in Chapter 6 (and Chapter 7) relate to particular, but isolated, provisions of the Legal Profession Uniform Law, which has been developed by the governments of New South Wales and Victoria as a coherent legislative/regulatory package across all aspects of legal practise. The Legal Profession Uniform Law has now been enacted by Victoria and adopted as a law of New South Wales. No date has been set for the commencement of the substantive provisions of the Uniform Law.
66. The Law Council was and is a proponent of uniform regulatory arrangements for the legal profession and expects that, over time, other states and territories will join the legal profession uniform law regime currently being pursued by New South Wales and Victoria.
67. Furthermore, legal profession regulation has been through at least two major reform cycles – the 2002-2006 Legal Profession Model Bill Project by the Standing Committee of Attorneys-General (which lead to the Legal Profession Acts currently in nearly all States and Territories); and the 2009-2011 COAG Legal Profession National Law Project and now the Legal Profession Uniform Law initiative by New South Wales and Victoria which builds upon the COAG proposals.
68. Governments have been regulating (or perhaps de-regulating) for more competitive, consumer-empowered approaches to legal costs, costs disclosure, the ability to negotiate costs agreements and associated consumer protections for many years.
69. The Law Council suggests that the Commission would especially benefit from further consultations with the New South Wales and Victoria Attorney-Generals Departments on their Draft Report.

Legal costs

70. In his 2nd Reading Speech on the *Legal Profession Reform Bill 1993 (No.2)* the New South Wales Attorney-General said¹⁶:

“...it is often difficult to shop around for legal services...to compare cost, either because information is limited or because fees and charges are not described in ways that make comparisons easy...”

“Full and frank fee agreements between lawyers and clients will increase price competition between lawyers and hence will tend to lower legal costs. Consumers will be able to compare the price and quality of different services more easily, choosing the offer that best suits their needs.”

71. The 1993 New South Wales cost disclosure and related reforms (as well as other associated consumer protection and redress reforms) were a deliberate move away

¹⁶ New South Wales Legislative Assembly Hansard, 9 November 1993, pp 4981-4983, accessed at <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LA19931109023?open&refNavID=undefined> [14/05/2014 11:21:32 AM]

from the previous regime of fixed fees for legal services¹⁷ and have been in place for a long time in most states and territories through their own legal profession legislation.

72. –However, it is noted that the policy aspiration of the New South Wales Attorney-General in 1993 that “consumers will be able to compare the price and quality of different services more easily, choosing the offer that best suits their needs” has not, according to this Chapter of the draft Report, been met.
73. Unfortunately, the Draft Report offers the same “information asymmetry” discussion as the cause of the problem and follows the same path - that the solution to this “market failure” problem is ever more intrusive and punitive regulation of lawyers.
74. Notwithstanding this, the Draft Report contains no data or empirical analysis demonstrating that information asymmetry is causing systemic exploitation of non-sophisticated legal services consumers. This absence of evidence that lawyers are systematically roting clients undermines the credibility of the recommendations in Chapter 6 – they are recommendations for responding to a problem – bad behaviour by lawyers - that has not in fact been shown to exist.
75. In its submission of 13 November 2013, in response to the Issues Paper, the Law Council engaged in a protracted analysis of existing data with respect to complaints about excessive fees and costs. The Law Council noted that:
- (a) in New South Wales, complaints lodged against legal practitioners in relation to excessive costs are estimated to represent between 0.075 per cent and 0.246 per cent of all clients;
 - (b) in Victoria, the estimate was similar, representing between 0.078 per cent and 0.225 per cent of all clients; and
 - (c) in Queensland, the estimate was between 0.11 per cent and 0.35 per cent of all clients.
76. While the Law Council acknowledges legal costs are high, the Draft Report should acknowledge, on the basis of the complaint data mentioned above, suggestions that legal costs are disproportionate to matters in dispute, or that clients are reacting adversely to costs in a significant proportion of cases, appears to lack empirical support.
77. The Report should acknowledge that lawyers are members of an ethics-based profession, acting in the best interests of clients and that, in the overwhelming majority of cases, legal services are provided to a standard, and at a cost, that is acceptable to clients.

Community legal education

78. The starting point for Chapter 6 should be that non-sophisticated legal services consumers need a basic level of knowledge about the law, the legal system and the legal process to provide a meaningful context within which to see and understand their particular legal problem.

¹⁷ See *Legal Profession Act 1987* (NSW) Chapter 11.

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79. The reform problem should be how best to equip a non-sophisticated legal services consumer with this knowledge *before* he or she is required to make decisions about how to deal with his or her legal problem.
80. Governments, lawyers and community advocates should work together on finding solutions for better educating non-sophisticated legal services consumers. While legal practitioners necessarily inform and educate clients as part of their professional services, this educative burden should not be left entirely to practitioners.

Characteristics of effective regulation

81. Legal practitioners are bound by rules of professional conduct which reflect the set of ethical principles governing the behaviour of the profession. Also, as officers of the court, legal practitioners are subject to the inherent disciplinary jurisdiction of the court in relation to their conduct.
82. Therefore, “regulation” of the profession, in its broadest sense, encompasses more than statutory compliance – it covers all of the professional and other obligations imposed by or under legislation, the supervision of the courts and the legal profession conduct rules.
83. The Law Council agrees that overlaps in regulatory jurisdiction are inefficient, undesirable, create an unnecessary compliance burden for business and leads to confusion for consumers.

INFORMATION REQUEST 6.1

Is there scope for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of lawyers within their jurisdictions? What are the relative costs and benefits of consolidating the regulation of lawyers in this manner (as opposed to existing levels of cooperation with Offices of Fair Trading and their equivalents)? Are there alternatives?

84. Law Council does not consider the legal services regulators should be given such powers. They are State bodies appointed by State legislative and constitutional powers and should not be vested with the power to enforce Commonwealth laws.
85. As a further consideration, the Law Council submits that application of the Australian Consumer Law to lawyers amounts to unnecessary and costly dual-regulation of legal practitioners.
86. The legal profession is regulated under comprehensive state and territory statutory schemes, by the Courts and through self-regulation.
87. State and Territory regulation focuses not only on the professional qualifications and conduct of legal practitioners *per se*, they also comprehensively regulate operational aspects of legal practice, and contain extensive consumer protection and redress measures.
88. The Law Council considers that the Commonwealth’s regulatory objectives as they affect the legal profession and provision of legal services should be negotiated and delivered through State and Territory legal profession legislation.

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89. Further, the distinction assumed on page 190 of the Draft Report between the “specific legal profession regulations in each jurisdiction” and the application of the Australian Consumer Law to the “operations of lawyers as they interact with consumers” as a basis for separate regulatory spheres is illusory.
90. By way of example, both the Australian Consumer Law and state and territory legal profession legislation contain statutory rules about requests by clients/consumers for an itemised bill. These rules conflict. Most states and territories have legislated to modify or not adopt the Australian Consumer Law’s itemised billing rules. This has, for constitutional reasons, only been achievable by states and territories for legal bills rendered by sole practitioners and partnerships. Legal bills rendered by incorporated legal practices remain subject to the Australian Consumer Law rules.
91. Accordingly, what is essentially a conflict of policy preference between the Commonwealth and the States and Territories over how long it should take to give a client/consumer of legal services an itemised bill has resulted in different entitlements for clients/consumers within and between states and territories for itemised bills. This regulatory conflict simply adds compliance costs and complexities, for no apparent benefit.
92. As a general comment the relationship between client and legal practitioner is a confidential relationship. There are ethical obligations to maintain the confidentiality of the client’s information and to avoid conflicts with the interests other current or former clients. The idea that government departments and agencies could decide to share information about a person’s legal problems without their informed consent is very strange. Legal assistance service providers are well aware of the difficulties of maintaining confidentiality and avoiding conflicts of interest

DRAFT RECOMMENDATION 6.1

In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.

93. Recommendation 6.1 is an incorrect summary of the intent of section 174(3) of the Legal Profession Uniform Law and has been made in isolation of other provisions relating to legal costs.
94. The Law Council does not take issue with the principle that a lawyer should do whatever he or she reasonably can to explain and discuss with a client the proposed course of action for dealing with the client’s matter and the costs and issues that might be involved – this is a necessary part of a lawyer’s ordinary professional responsibilities and duties towards his or her clients. It is in everyone’s best interest that clients/consumers of legal services make informed decisions about whether and how they will resolve their legal issues.
95. The Law Council’s concern is the difficulty for a legal practitioner to objectively demonstrate that the steps that were taken to satisfy himself or herself that the client understood and gave informed consent to the proposed course of action and likely costs were all of the reasonable steps that could have been taken at that time and in the circumstances as they then were.

96. As the Commission notes, “some estimates have become impenetrable”. This is a fundamental problem with attempting to simplify complexity and uncertainty by disclosure. It leads to complex and worthless disclosure, as can readily be seen in Information Memoranda in the corporate investment sphere.

97. In responding to this proposal during the course of the COAG National Legal Profession Reform Project the Law Council made clear that legal practitioners will require extensive regulatory guidance on what kinds of actions taken in particular circumstances and situations would be sufficient to meet the “reasonableness” standard.

DRAFT RECOMMENDATION 6.2

Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.

98. The Law Council supports a uniform approach to billing requirements and notes that the states and territories have in place stringent consumer protection requirements of a generally similar nature.

DRAFT RECOMMENDATION 6.3

State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.

- *This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.*
- *The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.*

99. The Law Council is opposed to the Draft Recommendation in principle and notes that implementation may be impractical.

100. There may be some difficulty maintaining a meaningful database, given most matters involving time-based or event-based billing will differ significantly. As suggested by the Law Institute of Victoria in its submission in response to the Draft Report, it may only be of assistance in relation to fixed price matters, with some explanation of the sorts of tasks which had to be performed, by whom and which tasks were not performed, and why.

101. The Law Council notes any such requirement may create an onerous compliance burden for practitioners and firms. It would also be inappropriate for firms to be compelled to disclose confidential or potentially market-sensitive costs data. The Law Council is not aware of any other profession which is required to list professional fees and costs online.

102. The Law Council does not consider that the Draft Recommendation is likely to address information asymmetry or assist consumers to compare different legal services. Unless a consumer or client is a repeat player, it will always be difficult to

assess whether the service provided was sufficient, excessive or sub-standard. The same is generally true if a person retains a doctor or accountant – notwithstanding that there are far less stringent regulations with respect to costs disclosure in those professions.

103. Moreover, in view of the estimates of complaints in relation to costs and fees provided by the Law Council above and in its previous submission, the recommendation appears to be singularly unnecessary and is almost certainly an excessive measure to address what is objectively a very minor problem. As noted above, a cursory examination of complaints data published by Legal Services Commissions next to an educated estimate of the likely number of matters dealt with by practitioners in each jurisdiction demonstrates that complaints about legal costs represent a very small proportion of complaints against legal practitioners.

104. The Law Council suggests that the Productivity Commission analyse and compare these data with the experience of other professions and attempt to better explain why the recommendation is necessary or appropriate.

INFORMATION REQUEST 6.2

How would central online resources with information about legal fees be implemented? What level of aggregation is required to avoid any confidentiality issues? On what measures should information be available (means, medians, hourly rates, total bills)? Are the prices charged by all providers relevant — for example, should a minimum threshold of number of cases of each type per year be required before cost data is submitted, should very small and very large firms be included?

105. As noted above, the Law Council is concerned about the efficacy of such a database. While many bills of costs are itemised, and are required to meet statutory requirements in terms of detail, it will not be clear at the commencement of most matters what tasks will need to be carried out, which is a significant difficulty faced by practitioners in accurately estimating costs prior to commencing to act.

106. All published information should be by way of guidance only and contain significant caveats as to the reliability of the data when determining value for service.

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?

107. The Law Council does not have a concrete view on this matter and is not aware of any service quality surveys or databases existing internationally.

DRAFT RECOMMENDATION 6.4

In the event that overcharging is found from a complaint, complaints bodies should have the power to access existing files relating to the quantum of bills, including original quotes and final bills. The lawyer in question would be free to submit additional information if they saw fit. This process should not breach any privacy considerations within the lawyer-client relationship (though as a result of later investigations, the complaints body may wish to publish percentages related to any overcharging).

- *Lawyers should be required to provide access to this information within five days of the request.*
- *The cost information should be used to assess whether the lawyer's final bills are frequently (across a range of clients) much greater than initial estimates. This could indicate that the lawyer's overcharging may be a systemic, rather than isolated, issue.*
- *Any initial conclusions drawn from the cost information can contribute to an own motion investigation if the complaints body deems that one is warranted.*

108. The Law Council cannot see any reasonable basis for this Draft Recommendation.

109. To the extent that it would create even more onerous compliance obligations than already exist, the Law Council considers the Draft Recommendation is not warranted or justified.

110. If this Draft Recommendation is implemented, the Law Council is particularly concerned about the confidentiality of costs information provided to the complaint body and notes that appropriate systems would need to be implemented to ensure that confidentiality is maintained.

111. The proposed five day timeframe is also manifestly inadequate. Lawyers, particularly sole practitioners and those in small or even medium sized firms, cannot be expected to have the resources to deal with such a request within the proposed timeframe. Absent any urgency for requiring the information, practitioners should have a reasonable time within which to provide the information.

112. The Law Council is advised, by way of example, that the number of applications made by clients against a practitioner for costs assessments in the Supreme Court of New South Wales represents a very small proportion of bills issued in civil cases every year. Since 2006, the number of applications has been as follows:

2006 – 224

2007 – 259

2008 – 169

2009 – 253

2010 – 209

2011 – 192

113. It is a regrettable but obvious fact that there will be some clients who seek to avoid paying for the services they have received, and who will exploit complaint mechanisms accordingly. As discussed elsewhere in the Draft Report, there are also litigants whose perception of their entitlements does not accord with their actual legal rights. Every lawyer must be willing to substantiate and justify legal fees and disbursements, but client entitlements should not be so elevated as to become an invitation or charter to evade payment.

DRAFT RECOMMENDATION 6.5

Cost assessment decisions should be published on an annual basis (and, where necessary, de-identified to preserve privacy and confidentiality of names, but not of cost amounts or broad dispute type).

- *Cost Assessment Rules Committees (and their equivalents) should develop and publish guidelines for assessors relating to the inclusion or exclusion of categories of charge items in cost assessments.*

114. The Draft Recommendation is supported in principle, but may face practical difficulties.

115. While Western Australia does not have costs assessors, publication of decisions of Taxing Officers (Court Registrars) is supported. Similarly, the Australian Capital Territory and South Australia have informal costs approval mechanisms and, therefore, may face difficulty publishing guidelines or bills of costs. Victoria has established a costs court, and therefore already publishes decisions of the court with respect to costs. Queensland and New South Wales have costs assessors. It may therefore be appropriate to revise the Draft Recommendation to encourage publication, where it is possible to do so.

DRAFT RECOMMENDATION 6.6

Other state and territory governments should align their legislation with New South Wales and Victoria to allow disciplinary actions for consumer matters (those matters relating to service cost or quality, but which do not involve a breach of professional conduct rules).

- *This should include the ability for complaints bodies to issue orders such as: cautions; requiring an apology; requiring the work to be redone at no charge; requiring education, counselling or supervision; and compensation.*
- *Failure to comply with these orders should be capable of constituting a breach of professional conduct rules, and be subject to further disciplinary action.*

116. The Law Council supports the New South Wales and Victorian approach, however it should be recognised that other jurisdictions have similar protections under legal profession legislation. The Law Council notes that legal profession regulatory bodies already have similar powers to those recommended by the Commission.

¹⁸ Note this is an unpublished figure provided by the Supreme Court of New South Wales.

DRAFT RECOMMENDATION 6.7

As in New South Wales and the Northern Territory, all complaints bodies should be empowered by statute to suspend or place restrictions on a lawyer's practising certificate, while allegations are investigated, if the complaints body considers this in the public interest.

117. The Law Council notes that the provisions referred to in this Draft Recommendation would enable the immediate suspension of a practising certificate where it is in the public interest to do so, on the ground of the seriousness of the conduct in respect of which a complaint has been made.
118. The Law Council also notes that legal profession legislation in general provides for the suspension or amendment of a practising certificate where, among other things, the holder is no longer considered to be a fit and proper person to hold the certificate.
119. Immediately suspending the right to practice is a protective measure generally reserved for situations involving serious professional misconduct or risk to the public. To apply such a sanction in response to an allegation of overcharging or excessive costs before any investigation is concluded or findings have been made (and perhaps even before the practitioner has been given the opportunity to respond) would amount, at the least, to a denial of natural justice, and at worst, to a penalty being applied prospectively despite the very real possibility of exoneration.
120. Again, having regard to actual data with respect to complaints about costs, it is difficult to understand why this recommendation is necessary.

DRAFT RECOMMENDATION 6.8

The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself.

121. The Law Council notes that current legal profession laws in most jurisdictions contain extensive, similar investigatory powers. The Law Council sees no reason to advocate a change the existing approach.

INFORMATION REQUEST 6.4

The Commission is seeking further evidence regarding the effectiveness of legal complaints bodies. Specifically, is there available evidence regarding whether:

- *consumers are aware of complaints avenues and using them*
- *resolution of disputes and investigations is timely and the sanctions imposed proportionate*

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- *consumers and lawyers are satisfied with the outcomes of complaints processes?*

122. Having regard to the number of complaints received and investigated by legal services commissions, boards, law societies and bar associations, the Law Council considers that it is reasonable to conclude that consumers are either aware of the existence of complaints mechanisms or are regularly referred to them by other bodies, including consumer watchdogs, regulatory agencies and lawyers themselves.

123. In most jurisdictions, legal practitioners are required to inform clients about avenues for complaints when presenting a bill for legal services. There are also many avenues of referral for people wishing to make a complaint.

124. The Law Council is not aware of any persistent complaints that legal complaints bodies are not functioning effectively.

Chapter 7: A responsive legal profession

DRAFT RECOMMENDATION 7.1

The Commonwealth Government, in consultation with state and territory governments, jurisdictional legal authorities, universities and the profession, should conduct a holistic review of the current status of the three stages of legal education (university, practical legal training and obtaining a practising certificate). The review should consider:

- *the appropriate role of, and overall balance between, each of the three stages of legal education and training*
- *the ongoing need for the 'Priestley 11' core subjects in law degrees*
- *the best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court (such as tribunal) options, and the ability to match the most appropriate resolution option to the dispute type and characteristics, into one (or more) of the stages of legal education*
- *the relative merits of increased clinical legal education at the university or practical training stages of education*
- *the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold practising certificates.*

125. The Law Council generally supports the recommendation.

Appropriate role and balance between the various stages of legal education and training

126. As the Draft Report notes, the education and training required to become a lawyer requires university education to obtain a degree that must include the equivalent of at least 3 years full-time study of law. In addition an approved course or program of practical legal training (PLT) must be satisfactorily completed. Both of these education

requirements, together with the applicant being found to be a fit and proper person, are the necessary prerequisites for admission to the legal profession.

127. Following admission, a lawyer may apply for a practising certificate, which will be subject to a condition that the lawyer must only engage in supervised legal practice for (in most instances) a period of 2 years. Different requirements may apply after admission for lawyers who wish to enter legal practice as a barrister.
128. Further, all jurisdictions require those wishing to renew a practising certificate to affirm that they have undertaken a certain amount of continuing professional development (CPD) in the preceding year.
129. In contrast to the pre-admission requirements for academic and PLT noted above, there are no national mechanisms for CPD to determine whether the appropriate knowledge of competencies to be developed by CPD (apart from including ethics and some other competencies as 'mandatory' components to be completed each year), to accredit CPD providers and programs or monitor, review and reaccredit CPD providers and courses. The Law Council supports the views of the LACC that the Productivity Commission might benefit from encouraging the development of comparable requirements and standards for CPD (which will be uniform in New South Wales and Victoria following introduction of the Legal Profession Uniform Law). The Law Council agrees that greater awareness and understanding of ADR could be promoted through CPD, but does not support accreditation of CPD providers or mandating specific disciplines within those courses.

Priestley 11

130. The Law Council considers there is an ongoing need for the *Academic Requirements for Admission* (Priestly 11), which currently plays an important role in:
- standardising a threshold level of knowledge of substantive law;
 - determining the adequacy of training of overseas lawyers and additional training they require before becoming eligible for admission in Australia;
 - constituting the common threshold for subsequent PLT training; and
 - acting as a benchmark for accrediting, reviewing and reaccrediting law schools and their courses for admission purposes.
131. The Law Council considers there is reasonable scope for flexibility within the core subjects. For example, many university law schools combine the study of 'civil procedure' with 'dispute resolution', which addresses mediation and other forms of ADR. The Law Council is not advised that admitting authorities adopt a particularly prescriptive approach to the design and delivery of courses, which might restrict innovative educational approaches.
132. Any substantial amendment to the current Priestly 11 would require significant subsequent reconsideration of thresholds for satisfying admission requirements and reform of the practical training stage of legal education. The Law Council considers that the Productivity Commission would need to clarify how each of the above functions could be successfully and cost-effectively fulfilled if the Priestly 11 was to be amended or removed, and what the perceived benefit might be.

Incorporation of alternative dispute resolution options

133. The Law Council notes the national *PLT Competency Standards for Entry-level Lawyers* require all lawyers to have acquired and demonstrated entry-level competence in assessing the relevant merits of each case and identifying dispute-resolution alternatives, having regard to a client's circumstances.¹⁹ Sufficient and appropriate training in ADR is currently offered at the academic and PLT stages of legal education to develop knowledge and competencies appropriate for an entry-level lawyer.
134. The Law Council notes that in view of this and the competitive pressures on law schools to adapt to changing requirements of legal practice, the flexibility of universities to compete and innovate in offering more tailored degrees would be limited by adding further academic requirements relating to ADR.

Increased clinical education

135. The Law Council considers the delivery of clinical legal education should be a matter for the relevant university faculties. It is noted that the intensive nature of such courses may tend to disadvantage universities in regional areas.

Tasks conducted by lawyers versus those who have not been admitted and/or do not hold practising certificates

136. Various forms of legal work may be performed by a non-lawyer without a practising certificate, under the supervision of a practising certificate holder. For example, many lawyers who work in government or corporate roles have been employed in legal capacities but do not require practising certificates – a practice which has continued for many years. Many law firms employ people who hold or are studying for a law degree, who have not been admitted to the legal profession, on legal tasks which do not require them to hold practising certificates, including foreign lawyers, recent graduates and paralegal staff. Regulatory requirements and professional indemnity insurers require a principal or partner who holds a practising certificate to sign off on external advice given by a firm, however there is no requirement that much of the preparatory work must be done by someone who is admitted and/or holds a practising certificate.

INFORMATION REQUEST 7.1

Which aspects of legal professional regulation present the greatest obstacles to the profession? Are there 'best practice' jurisdictions or would new forms of regulation represent the best way to reduce regulatory burdens while still meeting valid policy objectives?

Regulatory burden

137. The Information Request implicitly recognises that the burden of professional regulation is substantial, and contributes to the overhead costs of legal practice. Regrettably, the tenor of other recommendations, such as those which are designed to

¹⁹ Element 1 of the compulsory practical area of Civil Litigation Practice at item 5.3

empower clients as consumers of legal services, is to increase that level of regulation. It is suggested that the Productivity Commission review the Discussion Papers, Consultation Report, Consultation RIS, Consultation Submissions received and other materials published by the COAG Taskforce, and discuss this matter with legal professional associations in jurisdictions which have adopted the Uniform Law.

138. There are distinctions between, for example, probity regulation such as the management of trust accounts, and ad-hoc layers of obligations to disclose, advise, etc., as is increasingly the case in respect of costs. The starting point to rationalize regulation, and make it as efficient as possible, is to identify what regulation is truly necessary, and to what extent it should be imposed.

Lack of uniformity

139. The Law Council also notes that lack of uniformity has been identified as an obstacle for firms operating in more than one jurisdiction.
140. While implementation of the Legal Profession Uniform Law will resolve this with respect to New South Wales and Victoria (and other jurisdictions if they choose to participate in the Uniform Law scheme at a later point), heavy professional regulation of lawyers provides a challenging conflict between ethical and professional responsibility, necessary professional independence, and economic burden which falls, ultimately, on clients. There remain strong practical and economic reasons to maintain a strong role for the self-regulating activities of legal professional bodies.

Dual regulation

141. A further problem arising for lawyers practising in particular areas is dual-regulation, which often imposes incongruent or costly compliance obligations, with little or no benefit for consumers. Various examples exist, in the regulation of tax agents, migration agents and other areas. Lawyers practising in these areas may be subject to two or three complaints and investigation processes in relation to the same conduct, as well as registration fees and reporting and training obligations, over and above their already substantial regulatory burden as legal practitioners.
142. In 2010, the Productivity Commission reviewed the regulatory arrangements for immigration lawyers, as part of its annual review of regulatory burdens on business, and concluded that regulation of migration lawyers by the Office of the Migration Agents Registration Authority should be ended, or that the OMARA, as an interim solution, should refer all complaints against legal practitioners to the relevant legal services regulatory body. To date, the recommendations of the Productivity Commission in this area have not been implemented.²⁰

DRAFT RECOMMENDATION 7.2

Where they have not done so already, state and territory governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.

²⁰ See <http://www.pc.gov.au/projects/study/regulatory-burdens/business-consumer-services/report>. See also the Law Council's submissions to the review out this topic, which can be provided on request.

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- *Legal complaint bodies, in cooperation with Offices of Fair Trading and the Australian Competition and Consumer Commission, should formulate guidelines to inform practitioners and consumers of good practice in legal services advertising.*

143. The Law Council supports the removal of restrictions on legal services advertising, however any guidance with respect to advertising standards should be developed by legal profession regulatory bodies in consultation with law societies and bar associations. Those bodies might be guided by the Australian Consumer Law in terms of establishing appropriate standards of protection.

144. It is noted there are divergent views in the profession about legal services advertising standards. A number of jurisdictions specifically restrict advertising by personal injuries lawyers, due to public policy concerns about encouraging litigation. Most agree standards or guidelines should exist and a number of jurisdictions already have guidelines. There may be some benefit in developing uniform standards, subject to jurisdictional differences as to particular areas of law.

145. The Law Council's response to the COAG National Legal Profession Taskforce dated 3 December 2009 opposed "any blanket ban on personal injury advertising because such prohibitions:

- (a) are unnecessary;
- (b) amount to little more than censorship;
- (c) are anti-competitive, restricting the capacity of new law practices to establish themselves alongside existing and established firms;
- (d) limit access to justice and the appropriate information for injured people about their legal rights;
- (e) restrict freedom of speech; and
- (f) impose double standards for lawyers, depending on who they represent, contrary to the objectives of national legal profession reform."

146. It should also be noted that Australian Solicitors' Conduct Rule (ASCR) 36 states –

36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:

- 36.1.1 false;*
- 36.1.2 misleading or deceptive or likely to mislead or deceive;*
- 36.1.3 offensive; or*
- 36.1.4 prohibited by law.*

36.2 A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words accredited specialist or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional body.

DRAFT RECOMMENDATION 7.3

State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority (APRA).

147. The Law Council opposed a similar proposal raised in the COAG Legal Profession National Law Project.
148. Of particular concern is the potential effect on local schemes if multi-jurisdictional law practices, in accordance with the Legal Profession Uniform Law, move their professional indemnity insurance arrangements into and out of jurisdictions on a regular basis.
149. Legal professional indemnity schemes serve at least two functions – they provide recourse for clients and they protect the profession from the consequences of mistakes – an inevitable risk in professional advisory services.
150. The longevity, stability and focus of existing professional indemnity schemes stands in contrast to short-term offerings of insurance ‘products’. General insurers have no obligation to renew a contract of insurance and it is for this reason that the profession has had to develop its own sector-specific professional indemnity insurance arrangements. The Draft Recommendation, if adopted, would re-introduce the instability in insurance arrangements that previously prevailed. It should be emphasised that although clients are significant beneficiaries from compulsory professional indemnity schemes, they gain at most a slight indirect benefit if the premiums paid by legal practitioners are reduced. Competition in premiums is necessary, and in the short-term it may benefit individual practitioners, but it is unlikely to benefit clients, and may significantly disadvantage them.
151. For example, under the *Legal Profession Regulations 2009 (WA)* the Law Society of Western Australia enters into arrangements with one or more insurers (they are APRA approved) for the provision of professional indemnity insurance for practitioners and former practitioners. Law Mutual (WA) administers the compulsory professional indemnity scheme making arrangements for stable and economically priced professional indemnity cover with efficient and effective management.
152. The stability and viability of a professional indemnity insurance schemes (and insurance premiums) depends upon factors such as the number of practitioners in the jurisdiction and long-term claims history. For smaller jurisdictions in particular, the impact of a regular movement of (relatively) large numbers of practitioners into and out of the local PII scheme could substantially affect the scheme’s premium and financial stability, and its ability to negotiate with underwriters for want of certainty about numbers, risk profiles and effects on retroactive cover.
153. The Law Council has read, and agrees with, the submission of the Victorian Legal Practitioners Liability Committee dated 20 May 2014. The Law Council recommends no change to the current insurance arrangements for the legal profession.

Previous review of the current structure

154. In a COAG National Legal Profession Reform Project Discussion Paper dated 11 November 2009, the Taskforce noted national competition policy principles provided legislation should not restrict competition unless it could be shown that the benefits of the restriction to the community as a whole outweigh the costs, and that the objectives of the legislation can only be achieved by restricting competition.

155. Having considered that proposition, the Taskforce:

- recalled previous, detailed, reviews of the “captive” professional indemnity arrangements in both New South Wales (2001) and Victoria (2004) which did not establish a case for moving away from the “single supply arrangements”.
- *concluded that neither the fundamentals of the insurance market nor the arrangements for professional indemnity insurance have changed to warrant a re-examination of this position.*²¹

156. The Taskforce’s conclusions remains valid.

Rationale for current arrangements

157. The current structure provides significant benefits to the profession and thereby ultimately to consumers of legal services, including:

No practice left out

158. The current “captive” suppliers of insurance have an obligation to insure each and every practice in the jurisdiction, irrespective of size or claims history. Unlike the commercial insurance market, where insurers can “pick and choose” the risks insured so as to maximise shareholder returns, the captive suppliers of insurance cannot refuse coverage to what could be seen as uncommercial risks.

Consumer protection

159. This universal insurance philosophy reflects ideals of access to justice and consumer protection by:

- guaranteeing that small practices (sole principal firms represent the bulk of practices) can obtain insurance which may not otherwise be available at an affordable price – thereby permitting them to continue to serve the community; and
- providing comfort to consumers that should a claim need to be made against a practitioner, a comprehensive insurance policy sits behind each practice.

Independent reviews of the single supplier schemes

160. The single supplier arrangements in the states have been periodically reviewed and the recent review findings include:

²¹ COAG National Legal Profession Reform Discussion Paper: Professional Indemnity Insurance – 11 November 2009.

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- Queensland – Aon Risk Services has conducted regular reviews of the Queensland scheme since 2008 and has concluded that:
 - Commercial insurers are not willing to participate at the single partner to three partner levels. Practices with up to 15 partners would be considered on a case by case basis at premium costs they could commercially justify and which would be substantially higher than the captive pricing model.
 - Commercial insurers have traditionally focussed only on the large national law firms where they can derive multi layered programs that generate large premiums, which can support one off placements.
 - Unlike commercial insurers, Lexon is not required to distribute profit to shareholders and therefore Lexon is not required to factor a profit margin into its financial considerations.
 - The Lexon model allows insurance to be provided to all members, with the most benefit being to the majority of smaller practitioners, who if otherwise left to the retail insurance market would not be able to obtain insurance, or if they could it would be at an unreasonable cost.
 - New South Wales – Taylor Fry Consulting Actuaries carried out a review in 2001 and supported the continuation of the LawCover single supplier arrangement. Relevantly, they concluded that:
 - Competitive market forces in an open market would probably lead to significantly wider fluctuations in premium rates over time.
 - An open market would tend to reduce coverage to a minimum with certain features (notably unlimited “free” run off cover to members ceasing practice and limited avoidance rights) being removed.
 - The failure of HIH provides a first-hand view of how the failure of an insurer affects solicitors and consumers. The risk to solicitors and consumers of an insurer failure (i.e. that valid claims for indemnity will not be met by the insurer) can be suitably contained due to the current structure and the power to levy the profession.)

Following the collapse of HIH in 2001, Lawcover obtained a licence from the Australian Prudential Regulation Authority (APRA) in 2004, and continues to operate a statutory insurance scheme as a licenced entity. The drivers behind this new arrangement were the provision of heightened levels of protection to consumers and insurers. The view underpinning the APRA model is that the measure of ultimate economic efficiency has to over time be assessed through satisfying a high degree of protection to consumers, which is delivered through a high degree of capital strength. This may not always in the short term deliver the cheapest premiums, however the strength and fertility of the APRA licence model over the long course is argued to provide a safe and sustainable model over the longer term.

- Victoria - PricewaterhouseCoopers (PwC) conducted a review in 2004 on behalf of the Victorian Department of Justice into the single supplier arrangement in Victoria for solicitors’ compulsory professional indemnity insurance. After considering the costs and benefits of the existing arrangement and competitive alternatives, PwC recommended the continuation

of the existing single supplier arrangement for solicitors and its extension to Victorian barristers, which has subsequently occurred.

Potential adverse outcomes of removal of the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers

161. As noted above, the implementation of recommendation 7.3 may be detrimental to small practices (which represent the vast bulk of practices) and will ultimately increase costs.
162. This experience has been borne out recently in the United Kingdom lawyers' professional indemnity scheme which is underwritten by commercial insurers. Since 2008 it has experienced significant volatility in premiums and been plagued by uncertainty – particularly for small practices.
163. In October 2008, insurance premiums were volatile and it was expected that around 500 legal practices (approximately 5 per cent of all UK practices) would be forced to join an assigned risk pool (ARP) because they could not secure insurance coverage in the commercial market.
164. The ARP then required that these practices pay up to 27.5 per cent of their fee income in insurance premiums if they entered the scheme or 47.5 per cent if they did not²². Ultimately 150 firms were forced to join the ARP²³ - with an undisclosed number simply choosing to close their doors. The subsequent renewal in October 2009 saw similar issues with more than 340 practices then in the ARP.²⁴
165. Despite a number of changes to the model in England and Wales, the process continues to create uncertainty. Issues in recent times include questions regarding the ongoing viability of insurers to underwrite the scheme and last minute decisions by insurers to withdraw from the market. The Solicitors Regulation Authority in England and Wales is now also considering reducing the level of mandatory professional indemnity cover to £500,000, to increase availability to small practices. This, of course, runs counter to consumer protection ideals. The current system in Australia successfully maintains coverage for all small practices with a minimum \$2 million per claim cover being offered throughout Australia.
166. Even when commercial insurers may offer cheaper, one-off premiums from time to time, it is important to recognise that commercial rates can be cyclical and volatile (being based on many factors unrelated to an individual practitioner's circumstances).

INFORMATION REQUEST 7.2

Does the inability to operate as a limited liability partnership represent a significant cost to, or barrier to entry for, law firms? What are the potential benefits of allowing this particular business structure and to whom do the benefits accrue? What are the potential costs of allowing this structure and who bears those costs?

167. The Law Council has established a Working Group to deal with this issue. While the Working Group has yet to recommend a position to Law Council Directors, there is

²² Source - The Law Society of England and Wales Law Society Gazette 2 October 2008.

²³ Source - The Law Society of England and Wales Law Society Gazette Supplement July 2009.

²⁴ Source - The Law Society of England and Wales Law Society Gazette 19 October 2009.

a broad view in the profession that restrictions on business models adopted by firms should be limited only to matters affecting the capacity of a law practice to manage its professional and ethical obligations to clients and to protect clients from misconduct, such as misappropriation of trust money.

168. The Law Council is advised that restrictions on establishing limited liability partnerships may pose a barrier to the ability for a firm to internationalise, although international clients are unlikely to accept limited liability.
169. Law practices may already be able to effectively limit their liability under existing Law Society Professional Standards Schemes, but this varies from state to state.

INFORMATION REQUEST 7.3

To what extent would harmonising accounting standards and mutually recognising audits between jurisdictions reduce the compliance burden on firms from maintaining trust accounts in each jurisdiction? Are there alternative ways to ' earmark' interest earned from the account as arising in particular jurisdictions? Is it possible to develop funding formulas to redistribute funds if national trust accounts are adopted? If so, what should these formulas be based on — legal activity or legal need in each jurisdiction?

170. The Law Council notes that the COAG Taskforce was not able to come up with an acceptable method for allocating to jurisdictions the interest earned from a single multi-jurisdictional trust account.

INFORMATION REQUEST 7.4

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

171. The Law Council considers that use of public purpose fund monies is a matter for each jurisdiction to determine.
172. It is also important to note that it is inappropriate that legal aid and CLCs should be as dependent on grants from public purpose funds as they are currently required to be. The fluctuations in the amount available for distribution due to variations in interest rates makes forward planning very difficult. Any fall in grants has a serious deleterious impact on legal aid programs.

INFORMATION REQUEST 7.5

In what areas of law could non-lawyers with specific training, or 'limited licences' be used to best effect? What role could paralegals play in delivering unbundled services? What would be the impacts (both costs and benefits) of non-lawyers with specific training, or 'limited licences', providing services in areas such as family law, consumer credit issues, and employment law? Is there anything unique to Australia that would preclude the adoption of innovations that are occurring in similar areas of law overseas? If so, how could those barriers be overcome?

Limited licences

173. Legislation in some states has established separate regulatory structures to enable people who are not qualified as lawyers and who are not subject to the insurance and training regulations governing lawyers to provide limited services to the community in certain fields of legal work. The exceptions must be carefully defined as otherwise a person providing the service would be committing a crime.
174. In such cases, the development and enforcement of the separate regulatory structures is of vital importance in the protection of the members of the community. But even where such structures are in place problems have arisen.
175. Caution should be exercised in any expansion of these kinds of incursions into the regime for the protection of the community from the obvious dangers of unqualified practice of the law.
176. As noted in the Law Council's previous submission, removal of restrictions on legal practice by non-lawyers would be undesirable for the following reasons:
- (a) lack of any comparable regulatory framework for non-lawyers;
 - (b) lack of any requirement to hold professional indemnity insurance;
 - (c) lack of any specific education or professional training required for admission; and
 - (d) lack of specific duties owed to the court, to clients and related parties (including client confidentiality and privilege).
177. In addition to this, there are concerns about whether consumer protection will be diminished by the potential confusion created in respect of the client's understanding of the services a limited licensee is permitted to perform. The Law Council acknowledges this concern may also apply in respect of lawyers who hold different classes of practising certificate or specialise in certain areas, however in all cases those lawyers have been admitted to practice and the client is entitled to (and can) expect to be protected by the associated professional regulatory framework.
178. Persons charged with the responsibility for advising on and advocating for individuals' legal entitlements should face the same level of probity, regulation, liability and insurance as the legal profession. It is very doubtful that there would be any or any significant saving in cost of services if they are provided by those who are regulated, licensed and insured and subject to appropriate disciplinary structures.
179. As suggested earlier in this submission, it is the view of the Law Council that the legal profession has a critical role in maintaining effective access to justice. Put shortly, in the face of deeply complex law and regulation, only access to skilled, independent, ethical, confidential and fiduciary advice is likely to permit effective access to justice.
180. Accordingly, the Law Council is strongly opposed to the removal of restrictions on legal practice by non-lawyers or otherwise permitting non-lawyers to engage in the provision of work which, to ensure the protection of the public, is usually undertaken by lawyers requiring the necessary training and expertise in the law.

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181. There are of course a number of examples of work being done by unqualified persons such as paralegals and litigation clerks who are employed by law firms and working under the supervision of a qualified and licensed lawyer. The Law Council does not consider that this creates a problem
182. On the other hand the concept of establishing a group of persons who are not qualified and are not employees, but who are permitted subject to supervision to carry on legal practice in any respect effectively shifts the burden of responsibility and liability to the supervising lawyer. That responsibility comes at a cost - as does the burden of insurance for the increased danger of the service being done poorly. Furthermore there must be a question about the effectiveness of supervision outside an employment context. The Law Council's view is that the ultimate cost to the community of this form of external supervision and double regulation is likely to be prohibitive of any such innovation, which also, in any event, inadequately manages the risks identified above.

"Lay" Advocacy

183. In one sense the above principles can apply to "lay advocacy". Such work, performed by persons not holding a legal qualification, but acting under supervision, could seem a valuable resource to help to meet the clear need of persons standing accused on criminal charges, but without the means to secure a lawyer's assistance. If a lay advocate would be a less costly means of providing appropriate advocacy, then the prospect of increasing equality of arms (and the corresponding access to justice that provides) demands that lay advocacy must be considered.
184. There are however particular problems in this solution. First, there is no means effectively to supervise the performance of advocacy. It is wholly unlike the work of writing a letter or analysing a contract. Advocacy is an intrinsically individual activity and has an immediacy which calls for the continual exercise of personal judgment. There is no scope for a mentor to relay instructions on the spot.
185. A second and related difficulty is that advocacy is a real-time activity and mistakes made by an advocate in a hearing are of effectively irretrievable impact. This is the case in both criminal and civil work and whether before a court or a tribunal. Mistakes at trial can be extremely costly, both for the client and opposing party, as well as the broader justice system if there is a mistrial or abuse of process.
186. Finally, to the extent that there is an effective regime of discipline of advocates it comes from the Court or Tribunal and through the responsibility of a lawyer as an officer of the Court. The duties owed to the Court and the paramountcy of that duty over duties to the client are what facilitates trust by the judge in the submission of the advocate – in what is said and in what issues are pursued – and this makes the process work, and work efficiently.
187. These special factors mean that for the proper protection of the community in the case of anyone who is not a qualified practicing lawyer a few additional criteria should be applied:
- (a) there should be a basic system of accreditation as a "lay advocate" - to reduce the risk of the most egregious of forensic mistakes;
 - (b) there should be a requirement of "supervision" in the loose sense – i.e. a requirement for briefing and discussion beforehand and debriefing - and problem solving - afterwards with a qualified and experienced trial advocate;

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- (c) adequate disciplinary structures should be put in place to enforce the fundamental principles of advocacy - candour and care;
 - (d) there will need to be a focus on the principles to guide trial and appellate judges faced by the unfamiliar half-way house between the un-represented litigant (where judges and other decision makers have developed mechanisms to endeavour to cope with the difficulties this creates) and the conventionally represented litigant; and
 - (e) adequate compulsory insurance provisions must be in place .

188. These criteria will have to apply to all unqualified - whether employed by a lawyer or not. Of course in the case of employees some of the criteria will be more easily met.

189. From a regulation point of view, the risk for clients in using lay advocates as they currently do in limited circumstances is that currently lay advocates have no duties and no oversight/complaints mechanism. The risk and reality for clients is paying a lot for questionable value with and few if any options for recourse.

190. The problems standing in the path of a satisfactory regime of lay advocacy demand close attention and investigation. The Law Council and its constituent bodies would welcome the opportunity to engage constructively in such an examination.

191. In the meantime, the Law Council submits that the only regime which provides the perceived benefits of lay advocacy along with the protection of the public and the integrity of the justice system is one where the lay advocate can only appear if the advocate's work is supervised by a practicing lawyer and the other issues referred to above are adequately answered.

Restrictions on legal practice

192. In addition to the other matters raised here by the Productivity Commission, the Law Council submits that it is inappropriate and undesirable to restrict areas in which qualified legal practitioners may represent a client. This has occurred, for example, in the context of WorkCover and other statutory compensation schemes, industrial law proceedings and elsewhere. For example:

- (a) In New South Wales changes to the workers compensation scheme in New South Wales following implementation of the *Workers Compensation Legislation Amendment Act 2012* (NSW) have created problems, in particular as a consequence of the new Division 2 Subdivision 3 of the *Workers Compensation Act 1987* (NSW) ("1987 Act") dealing with work capacity assessments, work capacity decisions and the review process for such decisions by insurers. As the WorkCover Independent Review Office (WIRO) itself has acknowledged, the legislative framework governing the entitlement to benefits and the transition from the previous benefits scheme is complex and yet injured workers are denied access to legal assistance or advice as a result of section 44(6) of the 1987 Act. This section provides that a legal practitioner is not entitled to recover any amount for costs incurred in connection with a review of a work capacity decision of an insurer. The Committee has received regular feedback from practitioners who have been placed in the difficult position of explaining to an injured worker that they are prohibited from being paid for any advice with respect to a work capacity decision and are therefore unable to assist them. Of course there will have

been many instances when solicitors, for a variety of reasons, have provided free advice to injured workers in these circumstances.

- (b) Two main concerns have arisen about restrictions on legal representation in section 596(2) of the *Fair Work Act 2009* (Cth) which is set out below for ease of reference.

Section 596(2) of the Fair Work Act states:

(2) The [Fair Work Commission (FWC)] may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:

- (a) It would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter, or
- (b) It would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively, or
- (c) It would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

Note: Circumstances in which the FWC might grant permission for a person to be represented by a lawyer or paid agent include the following:

- (a) Where a person is from a non-English speaking background or has difficulty reading or writing
- (b) Where a small business is a party to a matter and has no specialist human resource staff while the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.

193. The Law Council notes that utilisation of lawyers would generally result in more expedient use of the FWC's time and resources. Secondly, often the question of legal representation is determined at the beginning of a hearing or several days before the hearing is due to commence. Effectively this means a lawyer needs to prepare his or her client to run the hearing without the lawyer and the client is put to the additional costs of preparing for this contingency.

194. The law is complex, which is a consequence of a complex society and a massive, increasing burden of regulation. Few people who do not have legal expertise and experience can navigate the justice system or adequately represent themselves. The courts and tribunals do not have the resources or opportunity to do it for them. The legal profession is the necessary counterpart to the formal justice system, and the Law Council repeats that it is an ethics-based profession, with fundamental fiduciary duties to its clients and established regulatory processes. Effective access to justice requires effective advice and representation.

Limited scope representation

195. The Law Council supports the practice of limited scope representation (LSR) or 'unbundling' of legal services. However, it is noted there are ethical concerns with respect to LSR which, while not insurmountable, need to be resolved to facilitate greater readiness of practitioners to act on that basis. There is further discussion of this below in response to Chapter 19 of the Draft Report.
196. Consistent with the views outlined above, the Law Council would only support LSR by limited licensees if the work were performed under the supervision of a qualified, unrestricted practising certificate holder.
197. It is noted that this is consistent with current practice. Paralegals and law clerks are routinely employed by law practices to handle a range of less complex legal or procedural matters, as a means of reducing costs for the client. However, the supervision arrangement means that the client enjoys protection of the regulatory framework, as though the supervisor had performed the work themselves.

Chapter 8: Alternative dispute resolution

DRAFT RECOMMENDATION 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

198. The Law Council supports this recommendation. Mediation is a valuable and common part of dispute resolution but its secrecy means that there is a risk of overbearing behaviour and undue pressure being exerted on a weaker party. Most mediators are careful to try to avoid the risk becoming a reality but nevertheless mediation is not suitable for all cases or even all kinds of case. Also, the importance of judicial decision making to the establishment of standards of personal and commercial conduct should never be underestimated. Published decisions tend to prevent the litigation of similar cases, however mediation does advance the law or jurisprudence.

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.

Encourage mediation, not mandate

199. The Law Council suggest that there is merit in courts and tribunals making *consideration* of mediation mandatory and strongly encouraging recourse to mediation. However, the Law Council does not support a system which is rigidly mandatory. It remains the position that citizens are entitled to have their disputes independently adjudicated according to law. In the face of a recalcitrant or manipulative litigant, mediation is potentially a tool to defer, and to increase the cost of, vindication of an opponent's legal rights. The best approach is to make mediation the default recommendation in all matters, with judicial discretion to vary this position in appropriate circumstances, for example, if neither party wants to attend mediation or there is a risk of harm or undue cost. This would encourage parties to consider alternative dispute resolution at an early stage and is more or less the approach taken in the Administrative Appeals Tribunal. The Law Council notes that if such an approach were adopted, practitioners, court staff and the judiciary would require appropriate education and training.

200. The Law Council submits that the amount in dispute is an arbitrary and artificial indicator of suitability for alternative dispute resolution. Some low value cases are very complex, while some high value cases are very simple. The savings are greater in more complex than less complex cases. The Law Council suggests that a better approach would be to have experts in alternative dispute resolution triage cases that get to court, to identify the best alternative dispute resolution option. This has been trialled by the Federal Court in Sydney with a settlement Registrar sitting one day per week. Other examples of targeted models are the Farm Debt Mediation, Retail Leasing and Workers Compensation. The Law Council notes that consideration is being given to using these models in other areas including debt recovery (for example, where banks seek to enforce securities), small business disputes, partnership and stakeholder disputes, defamation, estate disputes and personal injury disputes (so long as there is appropriate pre-suit information). In the Supreme Court of New South Wales, all proceedings involving family provision applications must be mediated unless the court orders otherwise.

201. In addition, there are a range of circumstances in which mandatory mediation would not be appropriate, including:

- (a) when a limitation period is about to expire and the cause of action would be barred by statute if the civil proceeding is not commenced immediately;
- (b) the civil proceeding involves an important test case or a public interest issue;
- (c) a person involved in a civil dispute or civil proceeding has a terminal illness;
- (d) the civil dispute involves allegations of fraud;
- (e) expert opinion is required;
- (f) multi party civil disputes and civil proceedings are contemplated;
- (g) mediation or other alternative dispute resolution processes would result in personal or financial hardship;

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- (h) the subject matter of the dispute or proposed civil proceeding has been dealt with at arbitration/mediation pursuant to a contractual (or statutory) obligation and such arbitration was not successful (provided that the arbitrator/mediator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such arbitration/mediation despite the best efforts of the parties to resolve the dispute);
 - (i) civil disputes and civil proceedings involving allegations of medical negligence;
 - (j) mortgagee actions for possession of land;
 - (k) civil proceedings not involving a dispute;
 - (l) claims where there already exists a legislative or industry obligation to serve a notice or notices before taking action;
 - (m) civil proceedings in which additional parties are brought in subsequent to the commencement of the proceeding; and
 - (n) Family law matters involving a history of domestic and/or sexual violence.

Right to legal representation must be retained

202. The Law Council submits that, regardless of the amount in dispute, parties to mediation must retain the right to be legally represented.

203. As noted in the Law Council's earlier submission, those participating in mediation require legal advice and, in many cases, representation. Without access to legal advice and representation prior to participation in mediation or other ADR, participants may not be in a position to fully appreciate their legal rights and options. Mediators are largely restricted from providing legal advice to participants in mediation. In these circumstances, legal representation is crucial for parties to understand their legal rights and obligations and which underlying facts are relevant to resolving the dispute. It is also necessary to level any power imbalances between the parties in the mediation.

DRAFT RECOMMENDATION 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

204. The Law Council supports the Draft Recommendation.

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.

205. The Law Council supports the Draft Recommendation but notes that, to a significant extent, this is already occurring. NADRAC's Guide to Dispute Resolution may be a useful model to consider.

206. The Law Council considers that education is an essential requirement to facilitate the more widespread use of ADR.

DRAFT RECOMMENDATION 8.4

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

207. The Law Council supports the Draft Recommendation and notes that before such a recommendation is adopted, appropriate training would need to be provided to the staff within the relevant organisations and courts, including the judiciary. It is considered that a facilitated and collaborative approach to the process of dispute resolution can have enormous benefits, as is the experience of the Administrative Appeals Tribunal.

DRAFT RECOMMENDATION 8.5

Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.

Consideration should also be given to developing courses that enable tertiary students of non-legal disciplines and experienced non-legal professionals to improve their understanding of legal disputes and how and where they might be resolved.

208. The Law Council supports the Draft Recommendation in-principle, but considers that the focus of training in ADR should remain at the post-graduate level, as part of Practical Legal Training (PLT) courses required for admission to practice.

209. It is noted that, to a large extent, ADR is already a core component of undergraduate courses, including civil procedure. There can be no doubt that a majority of law graduates are aware of different dispute resolution options. However, it is not until students undertake PLT and supervised practise that practical skills are learned and applied. In this regard it is noted that law graduates generally do not graduate knowing how to practise law.

DRAFT RECOMMENDATION 8.6

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

210. The Law Council supports the Draft Recommendation.

211. The Law Council suggests that accreditation standards could be developed in consultation with legal professional bodies. The Law Council is advised that the Mediator Standards Board is progressing this issue.

Chapter 9: Ombudsmen and other complaint mechanisms

212. The Law Council broadly supports the greater use of ombudsmen and other government or industry-funded dispute resolution services, as a cheap and often effective means of resolving complaints before matters escalate.

INFORMATION REQUEST 9.1

Given the difficulty in estimating the individual costs of the various functions of some ombudsmen and complaints mechanisms, the Commission seeks feedback on whether the estimates it has derived can be further refined. The Commission also seeks feedback on the costs of ombudsmen undertaking systemic reviews.

213. The Law Council is unable to comment.

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.*

214. The Law Council supports this Draft Recommendation.

DRAFT RECOMMENDATION 9.2

Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

215. The Law Council supports this Draft Recommendation.

DRAFT RECOMMENDATION 9.3

In order to promote the effectiveness of government ombudsmen:

- *government agencies should be required to contribute to the cost of complaints lodged against them*
- *ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded*
- *government ombudsmen should be subject to performance benchmarking.*

216. The Law Council supports this Draft Recommendation.

DRAFT RECOMMENDATION 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

217. The Law Council supports this Draft Recommendation.

Chapter 10: Tribunals

INFORMATION REQUEST 10.1

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

218. It is unclear whether ADR will assist in all or even most cases brought before tribunals and may lead to significant risk of exacerbating costs involved in relatively straight forward proceedings.

219. The Law Council would support, in principle, more active case management and referral of appropriate disputes to ADR, where both parties agree. However, the Law Council does not support mandatory ADR or pre-action protocols in disputes before tribunals due to the lack of evidence that mandatory ADR improves resolution rates and the corresponding likelihood of increased cost and delay in reaching just resolution.

DRAFT RECOMMENDATION 10.1

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

220. The Law Council strongly opposes this Draft Recommendation.

221. The suggestion that allowing parties to be legally represented in tribunal proceedings “can create unintended consequences such as increased formality, length and cost of proceedings” is singularly unsupported by any evidence. Further, characterisation of legal representation in tribunals as the classic “prisoners’ dilemma” is simplistic, inapt and incorrectly assumes that the outcome for both parties is the same if legally represented, or that the best outcome for both parties is achieved if they waive that right. The parties are in a legal dispute, not working toward some common objective.

222. Tribunal proceedings, while less procedurally formal than courts, deal with legal issues which are often complex and routinely involve power imbalances between parties. The Law Council is advised that the involvement of legal practitioners in tribunal proceedings generally assists in reaching determination faster and with greater satisfaction to the parties and lower cost overall.

223. Often in proceedings involving a consumer dispute or administrative appeal, both parties will ostensibly be unrepresented, however the defendant, often a corporation or government agency, may employ experienced lay-advocates, who may well be legally trained and are invariably very experienced in tribunal proceedings. The plaintiff, on the other hand, is inexperienced, usually a one-off player and is at a significant disadvantage, notwithstanding any support which is offered by the Tribunal Member or staff.

224. Furthermore, it is not the case that restricting legal representation automatically saves time and money. To the contrary, the absence of legal representation can result in more protracted hearings with more assistance needed to guide an unrepresented person through unfamiliar procedures and to avoid irrelevant issues. Preserving for parties the choice to be legally represented in tribunal proceedings would ensure more matters are dealt with expeditiously and without risk to fairness.

225. Most, if not all, tribunals have guidelines, outlining the tribunal procedures and the role of parties and their representatives. Where these exist, they should be applied consistently and fairly. However, the Law Council opposes further restrictions on the right of parties to be represented in tribunal proceedings.

DRAFT RECOMMENDATION 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.

226. The Law Council supports the Draft Recommendation, in-principle.

227. Legal practitioners, as officers of the Court, have a duty to advance the administration of justice and to act in a manner which is consistent with that duty. Courts already have broad powers to make orders in relation to parties and their representatives, including adverse costs orders for delays or abuse of process.

228. The Law Council recommends that guidelines would need to be sufficiently clear about the kind of conduct which might attract sanctions by the tribunal.

INFORMATION REQUEST 10.2

Due to the varying degrees to which tribunals have implemented information and communication technologies, the Commission seeks further information on the extent to which such technologies are used in tribunals, and on the experiences of tribunals that have implemented them.

229. The Law Council is unable to comment, but suggests that implementation and updating of information and communications technologies in tribunals is likely to improve efficiency and customer service.

INFORMATION REQUEST 10.3

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

230. The Law Council notes that the Commonwealth Attorney-General recently announced the consolidation of the Refugee Review Tribunal, Migration Review Tribunal, Social Security Appeals Tribunal and Classification Review Board into the AAT, as well as the abolition of the Office of the Australian Information Commissioner (whose review functions will be shifted back to the AAT). The reason stated for the merger, as part of the 2014 Federal Budget announcement, was to “provide an accessible ‘one stop shop’ for external merits review” and “ensure that end-users have a review option that is fair, less confusing, just, economical, informal and quick”.²⁵

231. This appears to have followed moves by State and Territory Governments to establish ‘super tribunals’, such as in the Australian Capital Territory, Victoria,

²⁵ See <http://www.ag.gov.au/Publications/Budgets/Budget2014-15/Pages/Streamlined-arrangements-for-external-merits-review.aspx>

Queensland, Northern Territory, Western Australia, South Australia and New South Wales.

232. The Law Council does not oppose the consolidation of Commonwealth tribunals in-principle, but submits that this must not be at the cost of reduced rights of review.

INFORMATION REQUEST 10.4

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

233. The Law Council supports greater use of co-location, shared administration and outreach, in principle. However, this should only be trialled where the facilities are suitable for shared purposes and not attempted if it is likely to diminish the capacity of each tribunal to deliver services, particularly in regional areas.

INFORMATION REQUEST 10.5

The Commission seeks views on whether current appeal and review mechanisms within and between tribunals, and between tribunals and courts, are operating fairly, efficiently and effectively, and what opportunities exist for rationalisation or improvement.

234. The Law Council submits that it is important that existing review mechanisms to tribunals, between tribunals and from tribunals to courts are maintained and not diluted by any moves to amalgamate tribunals. The Law Council is advised that all tribunals operate fairly and efficiently. 'Rationalisation', which leads to fewer options for those seeking just determination or resolution through tribunals would be highly undesirable.

Chapter 11: Court processes

DRAFT RECOMMENDATION 11.1

Courts should apply the following elements of the Federal Court's Fast Track model more broadly:

- *the abolition of formal pleadings*
- *a focus on early identification of the real issues in dispute*
- *more tightly controlling the number of pre-trial appearances*
- *requiring strict observance of time limits.*

235. There are some preliminary matters affecting this recommendation.

236. The Law Council suggests it is not for the Commission to recommend a particular management model. To do so ignores the fundamental experience of individual courts in managing their own processes and clientele. Although the Law Council generally supports early, active intervention by courts and tribunals to identify and, if appropriate, limit issues, alternate models exist, for example, standard orders working back from a fixed trial date, with minimum tolerance of delay or non-compliance. Different models are more or less appropriate in different types of dispute. Courts control their own processes – and must continue to do so if they are to maintain their independence.

237. Each case, or at least class of case, is different. Blanket rules are often a poor fit for the requirements of an individual case or type of case.

238. Rules that are overly complex can be ineffective whereas rules that are kept at a sensible level of generality are easier to adopt and apply.

The abolition of formal pleadings

239. The Law Council recognises the perception that formal pleadings are technical, however there are good reasons why they should not be ‘abolished’.

240. Litigation concerns the enforcement of legal rights and is necessarily based upon accurate and precise identification of the causes of action, the elements of those causes of action, and what matters of fact need to be the subject of evidence and determination. Properly drawn, pleadings are directed to precisely those questions:

*A statement of claim needs to state clearly and precisely the material facts that together comprise the essential elements of the plaintiff’s cause of action.*²⁶

241. Pleadings are crucial for identifying the basis of the claim, defining the issues of fact and law that parties and the Court need to address. The earlier the matters in issue are identified, the sooner it can be determined which issues or allegations are disputed.

242. Court time spent clarifying and testing the sufficiency of pleadings is not wasted time. If the proceedings do not disclose a reasonable cause of action or defence, or are an abuse of process, they can be struck out by the Court. If the pleadings are unclear and require amendment, it is far better for this to occur early rather than leaving uncertainty, which may reduce the prospects of early settlement or prevent the efficient conduct of the ultimate trial of the proceeding.

243. For this reason, the Law Council generally agrees that it is desirable for courts to engage with the parties, at an early stage of litigation and to identify the issues of law and fact to be determined. The result must be embodied in a formal document (or documents) fulfilling the purpose of the statement of claim and defence.

244. The suggestion that cases can be efficiently run without pleadings is misguided and fails to understand their basic elements and purposes. A move away from properly pleading cases is likely to obscure the matters in issue, lead to lengthier and more disrupted trials and fail to provide the proper framework for judicial determination of the dispute.

²⁶ *Rawson v National Jet Systems Pty Ltd (2005) 159 ACTR 18 at 23*

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245. Complaints about the content of pleadings often arise from inadequate attention by the drafter to the rules which govern their style and content. The importance of this work being done well cannot be over-emphasised and the Law Council recognises that close attention is paid to the proper approach to pleading in the Readers courses that most barristers are required to undertake.
246. The rules governing the style and content of pleadings are a combination of jurisdiction-based rules and the common law. There are some differences in the rules as expressed in different States and Territories and in different courts. These differences should be eliminated wherever possible.
247. Further, the Law Council is advised that different approaches can be seen by different judicial officers, even within the same court, as to the appropriate style, detail and length of pleadings. The development by the Australian judiciary of guidelines to assist judges to approach pleading questions in a consistent way would greatly assist practitioners when drafting and assist judicial officers in making rulings with respect to the content of pleadings.
248. The Law Council notes that the Australian Consumer Law Committee of the Law Council's Legal Practice Section expresses a different view on this matter and the other aspects of the Draft Recommendation – see the ACLC's comments appended to this submission at **Attachment C**.

A focus on early identification of the real issues in dispute

249. As noted above, the Law Council encourages early identification of the real issues in dispute. It is considered that this is best achieved by clearly defining the issues in formal documents, usually called pleadings, and the active engagement of the Court as early as possible in the litigation process, to ensure that only the issues and elements that require determination are identified.

More tightly controlling the number of pre-trial appearances

250. The Law Council supports courts reducing the number of pre-trial appearances but notes that this can only be done by the courts and tribunals implementing efficient case management. It is obviously a false economy to limit the use of pre-trial hearings that clarify and limit the issues for determination at the ultimate trial. Leaving such issues unclear can lead to lengthy and costly difficulties at the trial itself.
251. In any event, when considering this issue, it must be recalled that many pre-trial hearings relate to substantive issues affecting a party's rights (injunctions, search and freezing orders, adequate disclosure of information), which must be dealt with judicially, on the basis of the available evidence.

Requiring strict observance of time limits

252. The Law Council supports the strict observance of time limits provided the Court retains the discretion to extend time limits in appropriate circumstances. Litigation is not an assembly line.

DRAFT RECOMMENDATION 11.2

There is a need for greater empirical analysis and evaluation of the different case management approaches and techniques adopted by jurisdictions. These evaluations should consider the impact of different case management approaches on court resources, settlement rates, timing of settlements, trial length (for those matters that proceed to trial), litigant costs, timeliness, and user satisfaction.

The Commission sees merit in courts within and across jurisdictions collaborating to better identify cases in which more or less intensive case management is justified (on a cost-benefit analysis).

253. The Law Council supports the commissioning of a proper overview of the effectiveness of different case management techniques in all jurisdictions. However, it is noted that individual courts, when reviewing their own procedures, research and observe practices in other jurisdictions as a matter of course.

INFORMATION REQUEST 11.1

The Commission seeks feedback on the most appropriate body for coordinating analysis and evaluation of the different case management approaches and techniques available to Australian courts.

254. The Law Council suggests that this would be best undertaken by consultants engaged specifically for that purpose. It would require the support and assistance of the judiciary and their registries in the various jurisdictions and requires a high level of understanding and experience in court practice and procedure. It would also need to be supported by relevant State and Territory Departments of Justice, or their equivalent. It could be overseen and coordinated by a national body such as the Law Council, the Australian Institute of Judicial Administration or the National Judicial College of Australia if sufficient resources were provided. Access to the Report on Government Services (ROGS) data would be essential.

DRAFT RECOMMENDATION 11.3

The National Judicial College of Australia and other judicial education bodies should continue to develop and deliver training in effective case management techniques drawing from empirical evaluations to the extent that these are available.

255. The Law Council supports the continuing work of the National Judicial College of Australia in this way.

DRAFT RECOMMENDATION 11.4

Courts that do not currently utilise an individual docket system for civil matters should move to this model unless reasons to do the contrary can be demonstrated. In courts where adoption of a formal docket system is not feasible, other approaches to ensuring consistent pre-trial management should continue to be explored.

256. The Law Council supports the use of the individual docket system for civil matters generally. There are other effective approaches to ensuring consistent pre-trial management, usually involving Registrars and rule based models such as in the District Court of New South Wales. All such systems depend on the commitment of the judicial or court officer administering them, and on the culture of the court or tribunal.

257. The Law Council notes that individual docketing requires resources, and can overburden judicial officers. Less complex or smaller matters could be sensibly managed by Registrars and similar officers.

INFORMATION REQUEST 11.2

The Commission seeks information on whether discovery has different access to justice implications for different types of litigation which require particular consideration.

258. The disclosure of key, relevant information and documents at an early stage of proceedings is a crucial tool in defining the real issues in dispute, highlighting the relative strengths and weaknesses of cases and thereby promoting early resolution by way of settlement or other outcomes. Compulsory disclosure of documents against interest is a critical tool for the just resolution of disputes.

259. Attempts to limit the scope of disclosure tend to generate interlocutory disputes as parties seek to obtain, or hold back, determinative material. Significant time and money is often spent arguing over the precise description of classes of documents to be produced and this exercise is not always helpful.

260. 'Informal' disclosure does not have the force of requiring parties to provide sworn documents. A benefit of formal discovery is that it requires parties to produce all documents and information that relates directly or indirectly to the proceedings, even if it may damage their own case, and to do so in a way for which they are accountable.

261. Dispensing with discovery is likely to provide an unfair advantage to some litigants against others, often defendants at the expense of plaintiffs. Enabling a litigant to withhold information that assists the opponent's case is not conducive of just outcomes.

262. Alternatives to discovery are less effective:

- (a) subpoena, require particularity of description, and so are a limited means of obtaining disclosure. They are effective when a party knows which types of document they are looking for, but do not cover documents crucial to the case that don't fall within known criteria. They are also a 'once-off' mechanism and therefore there is no requirement to provide documents that come into existence after production.

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- (b) interrogation, or pre-trial questioning, is contentious, and is effectively defunct in some jurisdictions. It is often dependent on previous access to documents. Nonetheless, it often encourages defendants to seriously consider their case and evidence and often results in serious settlement negotiations.

263. Concerns with the disclosure process are mainly over wasted cost and time. Attempts to address this by blanket restrictions, or rules which create arguable definitions, is unlikely to assist access to justice. Rather, what is needed is practical management of the process of disclosure.

264. These issues are further addressed in the following paragraphs.

DRAFT RECOMMENDATION 11.5

Jurisdictions that have not already acted to limit general discovery to information of direct relevance should implement reforms to achieve this, in conjunction with strong judicial case management of the discovery process. In addition:

- court rules or practice directions should promote tailored discovery and clearly outline for practitioners and the court the discovery options that are available*
- courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly*
- court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate*
- courts should be expressly empowered to make targeted cost orders in respect of discovery.*

265. The ability to compel, and enforce, the “discovery” or disclosure of relevant documents against a party’s interest is a critical strength of the court system. There are a number of factors affecting the disclosure of documents, and it is essential to ensure that the relevant documents are disclosed, especially when they are against a party’s interests.

266. The Law Council agrees that in many cases there is scope for discovery obligations to be tailored for each case. However, it is critical that parties are not able to hide relevant documents, and that the time of the parties and courts is not wasted by interlocutory arguments over what is, or is not, relevant.

267. The Law Council understands the concern that disclosure or “discovery” of documents can be time consuming, expensive, and disproportionate to the matters in issue. It is suggested that:

- (a) Although disproportionate discovery can be a problem in any case, very large discovery tends to be a feature of larger cases. In many cases, discovery is not a significant problem;

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- (b) Much of the concern relates to the continuing 'paper-based' approach to disclosure. The answer to the significant increase in electronic documents may lie within the commercial need to manage electronic information. There is software enabling the sorting and prioritizing of electronic documents, which are being adapted to enable electronic disclosure to be conducted efficiently and effectively. It seems possible, or probable, that as electronic tools catch up with the growth in electronically stored information, the associated problems of legal disclosure will become increasingly manageable. This issue can be properly dealt with as part of the process of updating court technology and other resources.

268. The third recommendation is that: "courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly."

269. The Law Council does not support requiring leave for discovery in all matters. However, subject to the over-riding obligation to disclose against interest, the Law Council supports a tailored approach to the scope of discovery depending on the nature of the issues in dispute, and refers to the reasons provided in response to information request 11.2.

270. The fourth recommendation is that: "court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate."

271. The Law Council supports attention being paid in every case to the appropriate demands of discovery in particular cases. Sometimes the most efficient and economical approach will be to require general discovery. For the reasons in the preceding paragraphs, the Law Council does not support the recommendation that all disclosure be justified in advance.

272. The fifth recommendation is: "courts should be expressly empowered to make targeted cost orders in respect of discovery".

273. The Law Council supports a tailored approach - i.e. one which is mindful of the needs of the particular litigation – but not necessarily a targeted approach, as that could, by definition, exclude the class of documents and information that might be highly relevant to the issues in dispute.

INFORMATION REQUEST 11.3

The Commission seeks feedback on the effectiveness and access to justice implications of the approach to discovery in Practice Note No. SC Eq 11 of the Supreme Court of NSW under which the Court will not make orders for disclosure of documents until the parties to proceedings have served their evidence, unless there are exceptional circumstances necessitating discovery.

274. The Law Council does not support such an approach generally.

275. The Law Council notes that this Practice Note applies only to disclosure in the Equity Division of the Supreme Court of New South Wales. The most common rule is

that disclosure cannot be requested until the close of pleadings. The rules with respect to what evidence must be served before trial differ according to jurisdictions. Usually an important part of the evidence is the expert reports, which must be served within a certain period of time prior to trial. It is often the case that the material provided pursuant to disclosure is exactly the information that experts require before they can prepare their reports. Or more importantly, if they prepare their reports prior to disclosure, and important documents and information come to light in the discovery process, which they inevitably do, then the reports have to be redone at great expense and in the need for further time.

DRAFT RECOMMENDATION 11.6

All courts should have practice guidelines and checklists which cover ways to use information technology to manage the discovery process more efficiently.

All jurisdictions should ensure that, at a minimum, these checklists cover:

- *scope of discovery and what constitutes a reasonable search of electronic documents*
- *a strategy for the identification, collection, processing, analysis and review of electronic documents*
- *the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data)*
- *a timetable and estimated costs for discovery of electronic documents*
- *an appropriate document management protocol.*

276. The Law Council supports processes that assist with the provision of discovery electronically whenever possible.

DRAFT RECOMMENDATION 11.7

Court rules and practice notes should facilitate and promote the consideration by courts and parties of the option of the early exchange of critical documents, drawing on the practice direction used in the Supreme Court of Queensland's Supervised Case List.

277. The Law Council supports practice directions generally that provide for early exchange of critical documents provided that the documents required extend to the kinds of documents for which disclosure is required pursuant to discovery. The Law Council notes that most jurisdictions already have in place timetables and procedures for the provision of documents and information generally.

INFORMATION REQUEST 11.4

The Commission seeks feedback on the impact of the pre-disclosure requirements in section 26 of the Civil Procedure Act 2010 (Vic) on the conduct of litigation in that jurisdiction.

278. The Law Council notes that many jurisdictions have legislation dealing with civil litigation that requires early disclosure of documents and supports such provisions, provided that the entitlement to formal discovery remains for matters that are ultimately litigated.

DRAFT RECOMMENDATION 11.8

Jurisdictions that have not adopted key elements of Part 31 of the Uniform Civil Procedure Rules (NSW) (or similar) should consider implementing similar rules, including:

- *a requirement on parties to seek directions before adducing expert evidence*
- *broad powers on the part of the court to make directions about expert evidence, including to appoint a single expert or a court appointed expert.*

279. The Law Council is aware that most jurisdictions already have in place guidelines and practice directions that prescribe procedures for streamlining and limiting the provision of expert evidence and broad powers to direct for procedures such as court appointed experts, 'hot tubbing' of experts and similar procedures when appropriate.

DRAFT RECOMMENDATION 11.9

Practice directions in all courts should provide clear guidance about the factors that should be taken into account when considering whether:

- *a single joint expert or court appointed expert would be appropriate in a particular case*
- *to use concurrent evidence, and if so, how the procedure is to be conducted.*

280. The Law Council repeats its response to Draft Recommendation 11.8.

DRAFT RECOMMENDATION 11.10

All courts should:

- *explore greater use of court-appointed experts in appropriate cases, including through the establishment of 'panels of experts', as used by the Magistrates Court of South Australia*
- *facilitate the practice of using experts' conferences earlier in the process, as in the Queensland Planning and Environment Court model, where appropriate.*

281. The Law Council has serious concerns about the use of 'expert panels' in any circumstances and cautions the Commission from making such a recommendation. The Court must always be the ultimate decision maker in all cases and it is often the case that governments have sought to introduce 'efficiencies' by elevating the role of experts beyond their area of specialisation to replace judicial discretion.

282. Furthermore, limiting expert evidence to those that are part of a panel, inappropriately changes the focus of assessing each expert on the strength of his or her expertise and argument in a given case, to a focus on how and who chooses the expert panel.

283. The Law Council generally supports conferencing of experts, but notes that it is not appropriate in many cases and can increase the expense and time of the pre-trial procedures unnecessarily. It is often the case that once trial commences, expert reports are simply handed up and there is only limited cross examination of the experts, if any.

Chapter 12: Duties on parties

INFORMATION REQUEST 12.1

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

284. The enforcement of litigation obligations is inseparable from the management of litigation. The Law Council has elsewhere supported judicial case management. Enforcement of the obligations comprised in that management is a matter for the courts, and the culture of court management.

DRAFT RECOMMENDATION 12.1

Jurisdictions should further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.

285. The Law Council considers that specific pre-action protocols may be appropriate for particular types of cases but notes that a one-size-fits-all model would neither be useful nor acceptable to the legal profession or judiciary.

286. Pre-action protocols have been tried and abolished in the Victorian Supreme Court and was mooted then rejected in New South Wales. The Commonwealth implemented pre-action protocols in the Federal Court under the *Civil Dispute Resolution Act 2010* (Cth) and the Law Council notes the Commonwealth Attorney-General's Department has recently carried out a review of the Act's effectiveness. The results of the review have not, to the Law Council's knowledge, been published.

287. Notwithstanding this, the Law Council notes there are differing views about the effectiveness of certain pre-action procedures. The Law Council is advised that measures implemented for civil claims in most jurisdictions have improved case management of the litigation and identification of the issues between the parties.

288. The Law Council submits that, while certain pre-action obligations are effective in relation to certain matters, they may add to costs in some matters without perceivable benefit. Highly tailored pre-action obligations are preferred and should be developed in consultation with the law associations in the relevant jurisdictions. Pre-action protocols suffer from the problem of principle that they are an obstacle to access to the Court (or Tribunal) process. However, the Law Council agrees that for reasons of both practicality and principle, disputants should be encouraged, and where consistent with the fundamental right of access, obliged, to identify what is in dispute, and to attempt to resolve the disputed issues.

289. Pre-action protocols suffer the further problems that:

- (a) they may confront a disputant's conceptions of entitlement or interest, giving rise to an attempt to subvert them;
- (b) they may become a token process, where effort is directed to superficial compliance only. This is particularly problematic where, as is all too often the case, there is an attempt to control the pre-action process by very detailed regulation; or
- (c) they may become a tool for intimidation or obstruction, allowing an opponent to argue that technical non-compliance should lead to loss of substantive entitlements. Thus, failure by claimants to strictly adhere to pre-action protocols may lead to obstructive behaviours, such as 'anti-suit' injunctions.

290. Nonetheless, it is fundamental to effective justice that disputants confront the true extent of their legal rights, and the factual issues that will determine those rights, as quickly and efficiently as possible. It is generally thought, for example, that pre-action protocols for motor vehicle injuries have been beneficial in providing the framework for agreed resolutions.

291. For all these reasons, pre-action protocols need to be flexible, sensitive to the nature of the dispute, probably couched in general terms and realistically enforced.

Concerns about pre-action obligations

292. The Law Council is concerned that parties may engage in additional processes to ensure that they have satisfied pre-action obligations. Participation in ADR processes may be valuable, but may ultimately fail to successfully facilitate the resolution of a dispute, thereby increasing the cost burden in a particular case.

293. The costs of complying with pre-litigation requirements outlined in the *Civil Dispute Resolution Act 2011* (Cth) or in the *Federal Court Rules 2011* may disadvantage a party if the requirements are burdensome, inappropriate in the circumstances or are not proportional to the value of the claim in dispute. To challenge the breadth of the requirement in a particular case may add to the costs burden.

294. Pre-action obligations may also be inappropriate in the context of commercial litigation, where parties are likely to proceed with litigation only as a last resort, after other reasonable methods of resolution of the dispute have already been explored.

295. In addition, pre-action obligations are unlikely to assist in the early resolution of complex medical negligence cases, where there are conflicting expert opinions on negligence from multiple medical disciplines, factual disputes, a need for interrogation and extensive discovery, multiple defendants and issues with apportionment.

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296. In some jurisdictions, lawyers have obligations to inform their clients of alternatives to fully contested litigation (for example, Law Society of New South Wales Advocacy Rule 17A, which has been replaced by rule 7.2 of the New South Wales Professional Conduct and Practice Rules 2013 / Australian Solicitors Conduct Rules), potentially encouraging some changes to the adversarial culture of the legal system.
297. The Law Council is also concerned that in practice, pre-action obligations are increasingly becoming subsumed into the ordinary litigation process. This operates to undermine the objective of encouraging parties to engage in early consideration of the issues in dispute and to consider alternative means of resolution, prior to the commencement of litigation.
298. The Law Council is advised that, in some cases, pre-action obligations have been used by defendants to 'test the waters', by demanding extensive particulars of a potential claim. Pre-action obligations may also be used to frustrate the claimant and delay the filing of a claim; where a respondent appears to be engaging in reasonable negotiations, but is in reality attempting to wear the claimant down to accept a lower settlement. Such strategies have potential to adversely impact on access to justice and the dispute resolution process.
299. For example, in the context of Superannuation and Total and Permanent Disability (TPD) claims, parties must engage in mandatory internal dispute resolution processes. Pursuant to the internal dispute resolution process:
- (a) a superannuation fund is required to respond within 90 days of receiving a complaint; or
 - (b) an insurer is required to respond to a complaint within 45 days of receiving a complaint.
300. Only in circumstances where a complaint has not been satisfactorily resolved, is a complaint able to be pursued via an external dispute resolution process through the Financial Ombudsman Service, the Superannuation Complaints Tribunal and / or proceedings in the Supreme or District Courts.²⁷
301. Before a claim can be filed, a complaint under s101 of the *Superannuation Industry (Supervision) Act 1993* (Cth) must be lodged with the super fund that is denying the claim and/or the insurer. This is an internal dispute resolution process, or "an IDR complaint". It is a mandatory step if one is to later access an external dispute resolution process or "EDR". The EDR schemes available for super fund members are the Financial Ombudsman Service (FOS) or the Superannuation Complaints Tribunal (SCT). These complainants can also choose to file proceedings in the Supreme or District Courts. A Super fund is required to respond within 90 days of receiving a complaint (see section 19 of the *Superannuation Resolution of Complaints Act 1993*).

²⁷ Before a claim can be filed, a complaint under s101 of the *Superannuation Industry (Supervision) Act 1993* (Cth) must be lodged with the super fund that is denying the claim and/or the insurer. This is an internal dispute resolution process, or "an IDR complaint". It is a mandatory step if one is to later access an external dispute resolution process or "EDR". The EDR schemes available for super fund members are the Financial Ombudsman Service (FOS) or the Superannuation Complaints Tribunal (SCT). These complainants can also choose to file proceedings in the Supreme or District Courts. A Super fund is required to respond within 90 days of receiving a complaint (see section 19 of the *Superannuation Resolution of Complaints Act 1993*). The Insurance Code of Practice requires insurers to respond to a complaint within 45 days of receiving a complaint. It is only if a complaint has not been satisfactorily resolved or these time limits are not met, can the complaint be taken to the SCT or FOS. If a complainant were to ignore these requirements and head to court, there may be costs consequences.

The Insurance Code of Practice requires insurers to respond to a complaint within 45 days of receiving a complaint. It is only if a complaint has not been satisfactorily resolved or these time limits are not met, can the complaint be taken to the SCT or FOS. If a complainant were to ignore these requirements and head to court, there may be costs consequences.

302. However, the Law Council is advised that the experience of some practitioners working in the Superannuation and TPD practice is that in the majority of cases, superannuation funds and insurers will maintain their original denial to pay a claim or will fail to respond within the requisite time frames.

303. As such, the internal dispute resolution processes often fail to contribute to the earlier resolution of disputes, and may cause further delays and operate to the disadvantage of the complainants.

304. The following examples are provided to highlight this point:

- (a) Ms H left work due to debilitating symptoms arising from Hashimoto's disease and chronic fatigue syndrome. Ms H, who had an income protection policy with an insurance provider, supported her claim under the policy by two medical certificates. The insurer had initially paid under the policy but terminated the payments following an independent medical examination conducted by the insurer's identified doctor (IME). Ms H sought re-instatement of the payments, however this request was denied.

The denial was sent more than 60 days after the complaint was lodged (i.e. outside of the 45 day limitation period) and merely stated that the IME was correct. Ms H has commenced action in the District Court.

The delay in proceedings has meant that Ms H has been required to survive on limited means, relying on Centrelink payments and unable to receive payments pursuant to her insurance policy.

- (b) Ms F suffered orthopaedic injuries and was unable to return to work. Ms F's superannuation fund and its insurer paid Ms F disability benefits for 2 years but declined to pay the TPD lump sum, on the basis that the condition had not stabilised.

Ms F's attempts at rehabilitation were unsuccessful, a claim supported by her treating specialist. The superannuation fund demanded that Ms F be further examined by a doctor of the insurer's choice.

Proceedings were commenced in the Supreme Court. Following the commencement of proceedings, the insurer advised that the claim had been accepted and agreed to pay legal costs and interest. The client was not required to undergo further medical examinations or rehabilitation programs and received a lump sum payment.

305. In the context of professional negligence claims, the relevant Practice Notes of both the Supreme and District Courts require the plaintiff to file evidence of breach of duty of care, causation and damages when issuing a Statement of Claim. However, there is no onus on the proposed defendant to participate in any pre-litigation discovery or disclosure.

306. Furthermore, ambiguity in Part 2A of the *Civil Procedure Act 2005* (NSW), which does not allow for a potential defendant to adhere to the obligation to disclose relevant information, may make it difficult to obtain a potential defendant's medical records. The Law Council is advised that in circumstances where a potential defendant is unwilling to disclose relevant information, the defendant has argued that the information was sought in an 'investigation' context as opposed to formal litigation and need not be disclosed, thereby defeating the purpose of Part 2A.

307. As such, pre-action obligations in the context of professional negligence claims may result in additional costs and burdens on a plaintiff, which are not similarly required to be met by a potential defendant.

Challenges to pre-action protocols

308. The Law Council considers that pre-action obligations may in some cases provide an additional point of dispute, with associated higher costs.

309. The Explanatory Memorandum as circulated in the House of Representatives relating to the *Civil Dispute Resolution Bill 2010* (Cth) by the then Attorney-General, the Hon. Robert McClelland MP noted the overall aims of the Bill (at page 4) were:

- (a) to change the adversarial culture often associated with disputes;
- (b) to have people turn their minds to resolution before becoming entrenched in a litigious position; and
- (c) where a dispute cannot be resolved, ensuring that if a matter does progress to court, the issues are properly identified, ultimately reducing the time required for a court to determine the matter.

310. However the Law Council is concerned that additional disputes may arise on the basis of:

- (a) uncertainty surrounding the relevant obligations; and / or
- (b) whether a party has adequately satisfied their pre-action obligations (such as taking all "genuine steps" to resolve the dispute, as is required under the *Civil Dispute Resolution Act 2010*).

311. In Queensland, extensive pre-action protocols exist in relation to personal injuries common law claims. There are separate regimes for motor vehicle claims, workers compensation claims and other personal injuries claims (including public liability, medical negligence etc.).

312. One of the significant issues identified in Queensland has been the effect of the absence of pleadings in what is essentially a quasi-litigation process. Claims are commenced by the delivery of notices which vary in form and content depending upon the type of claim being pursued. Such claim forms do not – and cannot – take the place of formal pleadings. The result is that the issues in dispute between the parties can be difficult to identify and often do not coalesce until the time of a compulsory conference (held prior to the commencement of formal litigation) or indeed at the time the claim is commenced in Court and pleadings are filed and exchanged.

313. The process has been the subject of judicial criticism in Queensland. In considering the pre action procedures required under the *Motor Accident Insurance Act 1994*, McGill DCJ noted:

The real difficulty is that the provisions for the pre-litigation procedures in the Act are too superficial and too rigid to accommodate the multitude of possible situations which can arise in practice. They have been insufficiently thought through, and inevitably therefore throw up all sorts of difficulties when something out of the ordinary happens. The sections make no express provision for what is to happen if an admission of liability is subsequently withdrawn, and apart from s 41(6) do not make any allowance even for the possibility that an admission of liability could be withdrawn. That is all very unhelpful.

314. The Law Council suggests the findings of the Attorney-General's Department's review of pre-action obligations should be released for public consideration before the Productivity Commission confirms this Draft Recommendation.

INFORMATION REQUEST 12.2

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

315. As noted above, the Law Council submits that the draft recommendation should not be implemented until the findings of the Commonwealth Attorney-General's Department's review of the *Civil Dispute Resolution Act 2011* (Cth) is released for public consideration.

DRAFT RECOMMENDATION 12.2

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

316. The Law Council supports this Draft Recommendation, in principle, noting that most if not all Commonwealth, State and Territory Government agencies are already subject to model litigant guidelines.

317. The Law Council notes that in most jurisdictions, government lawyers are not subject to a requirement to hold a practicing certificate or to submit to regulation by legal profession regulators.²⁸ The Law Council considers all practitioners, including in-house counsel and lawyers practising in a legal role in government agencies should hold legal practising certificates, to ensure enforcement of legal professional obligations with respect to ethical and appropriate conduct in litigation by governments.

²⁸ Note that government lawyers who are admitted to practise are subject to court supervision and regulation in New South Wales. Under the Legal Profession Uniform Law, all government lawyers will be required to hold a legal practising certificate unless granted an exemption (for example, due to the length of time since they graduated and have not held a practising certificate).

INFORMATION REQUEST 12.3

The Commission seeks views as to which, if any, local governments should be subject to model litigant requirements. How should such requirements be administered?

318. The Law Council submits that it would be desirable to subject all levels of government to the model litigant guidelines. The guidelines would most effectively be administered by the Court, either through scheduling to Court Rules or governing legislation.

INFORMATION REQUEST 12.4

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

319. The Law Council does not have a strong view about this. It may be that courts and tribunals could play a role in enforcing the guidelines. It could also be an appropriate role for a government ombudsman, however implementing this at each level of government may be inefficient, having regard to the Productivity Commission's analysis in Chapter 9.

INFORMATION REQUEST 12.5

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

320. The Law Council suggests it may be appropriate to apply model litigant guidelines to well-resourced parties in these circumstances.
321. If implemented, it seems likely that the most appropriate body to oversee the guidelines would be the Court or Tribunal.

INFORMATION REQUEST 12.6

The Commission seeks feedback on the best way to respond to vexatious litigants and litigation. Could reform that focuses on earlier intervention with more graduated responses to manage vexatious behaviour reduce negative impacts? Should the bar be lowered in terms of the type of behaviour that attracts a response from the justice system? Do jurisdictions need to make available a publicly searchable register of orders against vexatious litigants?

322. The Law Council has read and agrees with the submission of the LIV in response to this request.

Chapter 13: Costs awards

DRAFT RECOMMENDATION 13.1

Australian courts and tribunals should continue to take settlement offers into account when awarding costs. Court rules should require both defendants and plaintiffs who reject a settlement offer more favourable than the final judgment to pay their opponent's post-offer costs on an indemnity basis.

323. This rule is already in effect at common law, with settlement offers routinely made “without prejudice, save as to costs”, commonly referred to as a ‘Calderbank’ offer.²⁹

324. As noted by the Judicial Commission of New South Wales:

“In broad terms, these two devices provide a sanction as to costs against a party who unreasonably fails to accept an offer of settlement. Settlement is thereby encouraged and a measure of relief is afforded to the party who incurs costs unnecessarily as a consequence of such unreasonable conduct.”³⁰

325. The Law Council prefers the present approach, which leaves the discretion with the Court to take into account that an offer of settlement was made, which was unreasonably rejected, when determining the award of costs from the date the offer was made.

326. If the Draft Recommendation is put forward by the Commission, the Law Council suggests it be revised as follows:

Australian courts and tribunals should continue to take settlement offers into account as a factor when awarding costs. Court rules should generally require both defendants and plaintiffs who reject a settlement offer more favourable than the final judgment to pay their opponent's post-offer costs on an indemnity basis to encourage early settlement.

DRAFT RECOMMENDATION 13.2

In the Federal Circuit, Magistrates, District and County courts, costs awarded between parties on a standard basis should be set according to fixed amounts contained within court scales. Scale amounts should vary according to:

²⁹ *Calderbank v Calderbank* [1975] 3 All ER 333. See http://www.judcom.nsw.gov.au/publications/benchbks/civil/calderbank_letters.html

³⁰ *Ibid.*

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- *the stage reached in the trial process*
 - *the amount that is in dispute.*

For plaintiffs awarded costs, the relevant amount in dispute should be the judgment sum awarded. For defendants awarded costs, the amount in dispute should be the amount claimed by the plaintiff.

Fixed scales of costs should reflect the typical market cost of resolving a dispute of a given value and length. Data collection and analysis should be undertaken to periodically update these amounts and categories.

327. The Draft Recommendation is not supported as it relies on unspecified data collection by an unspecified entity.

328. A fixed scale should not be used because it fails to take into account the individual complexity of cases. Scale rates can also present problems where the nature of the proceedings and the legal representation of the parties varies widely. Experience shows that scale rates are inevitably set too low and the process for review and increase of those rates is too slow.

329. The Law Council's view is that the New South Wales Costs Assessment Scheme, under Part 3.2 of the *Legal Profession Act 2004* (NSW) and administered by the Supreme Court of New South Wales, provides an efficient mechanism for determining what fair and reasonable costs are if an issue arises between the client and solicitor. The Law Council also notes section 98(4)(c) of the *Civil Procedure Act 2005* (NSW) which is set out below for ease of reference:

Courts power as to costs

(4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to:

- (c) a specified gross sum instead of assessed costs.

DRAFT RECOMMENDATION 13.3

Superior courts in Australia that award costs, such as supreme courts and the Federal court, should introduce processes for costs management, based on the model from English and Welsh courts. Parties would be required to submit, and encouraged to agree on, costs budgets at the outset of litigation. Where parties do not reach agreement, the court may make an order to cap the amount of costs that can be awarded.

330. The Law Council opposes the proposal to introduce a requirement for parties to submit a costs budget at the outset of litigation, based on the model from English and Welsh courts. There are many factors affecting an estimate of costs in any particular case which make it difficult for practitioners to predict costs at the outset of litigation, for example, the nature of the proceedings, the complexity of the issues in dispute and uncertainty about the approach to be taken by the client, counsel, the other parties and the Court.

331. The Law Council notes that practitioners owe many duties to their clients, including the duty to disclose information about how they are going to charge. The obligation to disclose information about costs is ongoing: the practitioner has to notify the client of any substantial change to anything included in a disclosure. Failure to comply with these obligations carries serious consequences, including disciplinary action.

DRAFT RECOMMENDATION 13.4

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

332. The Law Council agrees that parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the cost rules of the relevant courts. However, the Law Council does not agree that the amount to be recovered should be a fixed amount set out in court rules. Costs should be recoverable on the usual basis, as if no pro bono arrangement was in place.

INFORMATION REQUEST 13.1

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

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

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

333. The Law Council does not express a strong view, but considers that enabling practitioners to recover their costs in representing parties on a pro bono basis would be likely to encourage practitioners to act on a pro bono basis more regularly.

DRAFT RECOMMENDATION 13.5

Unrepresented litigants should be able to recover costs from the opposing party, subject to the costs rules of the relevant court.

334. The Law Council opposes the proposal to allow unrepresented litigants to recover costs from the opposing party, other than out of pocket expenses. By definition an unrepresented litigant has no legal costs to recover.

335. The Law Council is concerned that allowing litigants in person to recover more than out of pocket expenses would result in a proliferation of litigation by unrepresented litigants and arguments of costs entitlement and quantification.

336. It is noted that a number of states and territories have already removed cost recovery in some areas and there is generally a limited right to costs if a lawyer who is a party to the proceedings, represents themselves, or has their firm represent them.

DRAFT RECOMMENDATION 13.6

Courts should grant protective costs orders (PCOs) to parties involved in matters of public interest against government. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.

337. The Law Council supports the Draft Recommendation in principle, whereby the Court would have discretion to make orders in both public (government) and private actions. However, the Court must first decide that the matter is in the public interest.

DRAFT RECOMMENDATION 13.7

Subject to an initial favourable assessment of the merits of a matter, public interest litigation funds should pay for costs awarded against public interest litigants involved in disputes with other private parties.

These funds would be resourced by cost awards from those cases where the public interest litigant was successful. Access to the fund should be determined by formally outlined criteria, with cases evaluated by a panel of qualified legal experts. The criteria should be based on those used by courts to determine if a party is eligible for a protective costs order in a dispute with government.

338. The Law Council supports the Draft Recommendation in principle, but considers it requires greater exploration. The Law Council considers that public interest litigation should not be funded by depriving successful public interest litigants from recovering costs.

INFORMATION REQUEST 13.2

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

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

339. The Law Council considers the PILF, if established, could be effectively managed by the legal aid commission in each jurisdiction. Government funding should be allocated to establish the PILF and it should not rely on the public purpose fund or equivalent in each jurisdiction.

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?

340. The Law Council has read and agrees with the comments by the LIV in response to this request and the subsequent Draft Recommendation.

DRAFT RECOMMENDATION 14.1

Courts and tribunals should take action to assist users, including self-represented litigants, to clearly understand how to bring their case.

- *All court and tribunal forms should be written in plain language with no unnecessary legal jargon.*
- *Court and tribunal staff should assist self-represented litigants to understand all time-critical events in their case. Courts and tribunals should examine the potential benefits of technologies such as personalised computer-generated timelines.*
- *Courts and tribunals should examine their case management practices to improve outcomes where self-represented litigants are involved.*

341. The Law Council supports the Draft Recommendation, but it is noted that court and tribunal staff should not be involved in providing advice or assistance with the running of the litigation. It would be more appropriate to contract and fund either the Public Interest Litigation Clearing House or other appropriate body to provide direct assistance. There are a number of models on which this could be based, including the QPILCH trial in the Queensland Registry of the Federal Court, referred to in the Law Council's previous submission.

342. It must be acknowledged that requiring Court and tribunal staff to assist self-represented litigants as suggested will have large resourcing implications. There is also a real issue to be considered relating to what information can appropriately be provided by court staff without crossing into the realm of providing advice.

DRAFT RECOMMENDATION 14.2

Governments, courts and the legal profession should work together to develop clear guidelines for judges, court staff, and lawyers on how to assist self-represented litigants within the courts and tribunals of each jurisdiction. The rules need to be explicit and applied consistently, and updated whenever there are changes to civil procedures that affect self-represented litigants.

Governments should consider how lessons from each jurisdiction can be shared on an ongoing basis.

343. The Law Council supports the Draft Recommendation.

344. However, the Law Council considers that the Draft Recommendation should be limited to the development of guidelines, rather than prescriptive rules.

INFORMATION REQUEST 14.2

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

345. The Law Council supports extension of limited scope retainers, in principle.

346. Unbundling occurs in practice, as when solicitors cease to act before trial. This is unsatisfactory, and a better basis for unbundling is needed.

347. Unbundling involves both ethical and liability issues:

- (a) ethical because a practitioners' duty is to act in the client's interests, and confining those interest to a stage in a dispute may ignore the client's overall interests and reduce the service to a limited transactional service; and
- (b) liability because the Courts hold lawyers accountable for omission, including not dealing with issues which, objectively, a client needed to have addressed.

348. The ethical issue may be able to be addressed through professional conduct rules, but more than this is required. There will need to be explicit recognition that legal practitioners are not liable for failing to do work they are not contracted to do.

349. It is noted that the Law Society of England and Wales has produced a [Practice Note](#) on *Unbundling of Family Legal Services*, which provides guidance to the Law Society's members on limited scope representation in family law matters, which could form the basis for similar guides to be developed by Law Societies and Bar Associations in Australia.³¹

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?

³¹ See <http://www.lawsociety.org.uk/advice/practice-notes/unbundling-family-legal-services/>

350. The Law Council, in developing the Australian Solicitors Conduct Rules 2011 and Commentary,³² consulted with a number of legal assistance service providers in relation to the scope for limited representation services and the impact of conflict of interest provisions in the ASCR on the ability of these service providers to provide limited representation services. The Law Council is further considering this issue and has indicated to legal assistance service providers that it will consult further with them on any possible change to the ASCR or the Commentary.

351. It is notable that in a number of Canadian provinces which have introduced limited representation rules, the conditions included in these rules appear to mirror the common law requirements of practitioners who are faced with potential conflicts of interest in relation to the earlier provision of advice to former clients or the provision of advice by separate practitioners to concurrent clients, particularly in relation to the use of information barriers to maintain the confidentiality of client information.

DRAFT RECOMMENDATION 14.3

Governments, courts and tribunals should work together to implement consistent rules and guidelines on lay assistance for self-represented litigants.

352. The Law Council supports the Draft Recommendation on the basis that it is extended to include the legal profession working with governments, courts and tribunals.

353. It is submitted, as outlined above, that there are strong views within the legal profession that legal practice by non-lawyers should not be permitted. The Law Council does not support the unregulated licensing of lay advocates and other non-lawyers to provide legal services. However, if implemented, all paid lay representation should be subject to the supervision and control of a registered Australian legal practitioner holding an unrestricted practising certificate. This will enable litigants who cannot afford legal representation to have access to a lower-cost alternative, whilst ensuring that the lay associate representing them is supervised and subject to the control of a legal practitioner owing a primary duty to the court and the administration of justice.

Chapter 15: Tax deductibility

DRAFT RECOMMENDATION 15.1

The Commission recommends that no change be made to existing tax deductibility of legal expenses.

354. The Law Council supports the Draft Recommendation.

³² http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/SolicitorsConductRulesHandbook_Ver3.pdf

Chapter 16: Court and tribunal fees

355. As a statement of principle, the Law Council objects to the Commission's analysis in this Chapter and strongly recommends that none of the Draft Recommendations in the chapter be put forward.
356. Excessive court fees are inimical to the notion that justice should not depend on the litigant's capacity to pay. Court services are not the same as 'government' services. The courts serve a critical function in maintaining civil society and upholding the rule of law. Restricting peoples' effective access to the courts through euphemistically-termed 'price signals' undermines that function and, by extension, the rule of law in Australia.
357. Many parties have no choice but to bring their legal problems to a court or tribunal. For example, there is often no other option in many family law applications, in civil claims for damages, insolvency or bankruptcy proceedings, etc. 'Price signals' simply do not work where applicants have no choice. It simply exacerbates the hardship of both parties and increases the Court's administrative burden, in terms of processing applications for fee waiver, deferral or exemption and/or chasing applicants for unpaid fees.
358. The Productivity Commission's conclusions in this Chapter are unsupported by reference to any evidence that so-called 'price signals' have any impact, in terms of corraling people into alternative dispute mechanisms, lowering the propensity to litigate or reducing the incidence of unmeritorious claims. A review of substantial increases in federal courts' filing fees carried out in 2011 by the Commonwealth Attorney-General's Department found no evidence of any change in the number of applications filed in the courts, or any increase in the rate of out-of-court settlement. In a response to a Senate order to disclose the findings of the 2011 review, the Federal Attorney-General advised that:
- Data provided by the federal courts and Administrative Appeals Tribunal showed no clear changes to filing levels coinciding with fee changes, including no reductions in the filing of consent orders or significant changes to full fee filings for corporations. Overall, the data did not allow any conclusive observations to be made other than that there were no significant changes to numbers of filings in the period July 2010 to May 2011.³³
359. Accordingly, the notion that the federal courts are regarded as the 'first port of call' for dispute resolution is incorrect. As successive increases in federal courts' fees in 2010 and 2013 have had no demonstrable impact, it appears that the only basis for recommending fees be increased further is driven by ideology, rather than evidence.
360. In 2012, the Australian Government spent \$276 million on the federal courts and tribunals,³⁴ which (while seemingly expensive) amounts to just 0.017% of gross domestic product. When it is considered that over 30% of these costs are already

³³ Letter from the former Attorney-General, the Hon Mark Dreyfus QC, MP, to the former President of the Senate, Senator the Hon John Hogg, 26 February 2013.

³⁴ Attorney-General's Department submission to the Senate Legal and Constitutional Affairs References Committee's *Inquiry into the Impact of Changes to Federal Court Filing Fees Since 2010 on Access to Justice*, April 2013.

recouped with existing fees, it can be inferred that the relative net cost of the federal courts and tribunals is around 0.0051% of GDP. The Law Council considers this represents a sound investment, for an institution that is the foundation of our third branch of government and an essential pillar of our democracy. Further, consideration should be given to the value of the courts, in terms of their contribution to commerce, trade, enforcement of contractual and other obligations and economic growth – the Law Council suggests this contribution accounts for government expenditure many times over.

361. In June 2013, the Senate Legal and Constitutional Affairs References Committee handed down its Report into the Inquiry into the Impact of Changes to Federal Court Fees Since 2010 on Access to Justice in Australia. While the outcome of that Inquiry was disappointing, in terms of the failure of the majority of the Senate Committee to align its recommendations to the substantial evidence that increases in filing fees were neither effective as a 'price signal', nor desirable in terms of good policy, the Senate Committee did make some recommendations, none of which are referred to in the Productivity Commission's analysis. The Law Council suggests that the Productivity Commission should have regard to those recommendations.³⁵

362. The Law Council further recommends that the Productivity Commission abandon each of the Draft Recommendations in this Chapter and replace them with a Recommendation that no further changes be made to filing fees in the federal, state or territory courts and tribunals at the present time; and that any future changes be evidence-based and occur only after careful consultation with the courts and tribunals, the legal profession, legal assistance sector and other stakeholders.

DRAFT RECOMMENDATION 16.1

The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:

- *in cases concerning personal safety or the protection of children*
- *for matters that seek to clarify an untested or uncertain area of law — or are otherwise of significant public benefit — where the court considers that charging court fees would unduly suppress the litigation.*

Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.

363. The Law Council rejects the Draft Recommendation and strongly submits that it should be removed from the Productivity Commission's final report.

364. As noted above, the Commission's analysis is not underwritten by any evidence that so-called 'price signals' have achieved anything other than increasing hardship for users of the federal courts.

³⁵ See

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/courtfees/report/b01

365. The Law Council supports the maintenance of fee waivers and exemptions for financially disadvantaged litigants. However, this will not assist the majority of court users who are not on a government pension or eligible for legal aid. Basically, anyone earning a modest income, who is already facing significant strain due to unresolved legal issues, will be adversely impacted by this recommendation, if implemented.

366. It is not a sufficient basis for good policy to merely point to the proportion of cost recovery in the courts of other countries, without engaging in a proper analysis of the impact on access to justice. Indeed, it is concerning that, in an inquiry into access to justice arrangements, there is no reference in this Chapter to what impact the Productivity Commission considers this recommendation will have, if implemented. There is no reference to submissions or consultations with the federal, state and territory courts and tribunals. To the Law Council's knowledge, there has been no serious discussion with any other stakeholder or empirical analysis of the possible impact.

367. The Law Council appreciates that the Commission considers cost recovery or cost-reflexive fees might resolve concerns about resourcing of the courts, however it is clear that this is not the case. Only around 30 per cent of additional fees made from massive increases in federal court filing fees in 2013 were reinvested in the courts, and all funds from the 2010 fee increases were allocated to legal assistance providers. Successive governments have shown a propensity to merely use the courts as an effective revenue raiser for other programs, under the guise of 'sending price signals', which have no demonstrable impact on filings.

DRAFT RECOMMENDATION 16.2

Fees charged by Australian courts — except for those excluded case types alluded to in draft recommendation 16.1 — should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts.

The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute. Relevant factors should include:

- *whether parties are an individual, a not-for-profit organisation or small business; or a large corporation or government body*
- *the amount in dispute (where relevant)*
- *hearing fees based on the number of hearing days undertaken.*

368. For the reasons outlined above, the Law Council rejects the Draft Recommendation and strongly submits that it be removed from the Productivity Commission's final report.

369. On the basis of cost recovery estimates provided by the Attorney-General's Department, the overall increase in filing fees in the federal courts alone would be over 300% on present day levels.

370. Fees set at this level would have a profound, adverse impact on access to justice and the operation of the courts, which would become mere revenue raisers for government, with no perceivable or corresponding improvement in court services.

INFORMATION REQUEST 16.1

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

371. Fees should be maintained at present levels.

DRAFT RECOMMENDATION 16.3

The Commonwealth and state and territory governments should ensure tribunal fees for matters that are complex and commercial in nature are set in accordance with the principles outlined in draft recommendation 16.1 and draft recommendation 16.2.

372. For the reasons outlined above the Law Council rejects the Draft Recommendation and strongly recommends that it be removed from the Productivity Commission's final report.

373. Complex commercial cases are already subject to significant increases in fees in the federal courts, in many cases costing more than \$16,000 per sitting day on top of other fees. Almost all of these cases will have already been through different stages of ADR, including arbitration and mediation, unsuccessfully. This is not because the parties lack the incentive to settle their dispute. It is because the parties have been unable to settle their dispute. Setting fees in this way simply places businesses with fewer financial resources at a distinct disadvantage when pursuing losses against a party which is very well resourced and capable of simply holding out as costs accrue.

DRAFT RECOMMENDATION 16.4

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

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

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

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

Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full

waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.

374. If the earlier Draft Recommendations are adopted against the Law Council's very strong objection, there would be merit in establishing consistent criteria for waivers and exemptions, with very broad judicial discretion to grant fee relief.

375. The Law Council submits that there should not be any provision that the courts and tribunals must use fee postponements if there is any prospect of recovery of damages. The litigant is not receiving some sort of gift or income – invariably the amount recovered will be only a small proportion of their actual losses, or amounts to compensate for significant harm. The fact that there is money available at the end of the proceedings does not change the policy considerations in respect of fee waivers, which is recognition of financial hardship or other special circumstances.

INFORMATION REQUEST 16.2

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

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

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

376. The Law Council maintains the strong view that the recommendations in this Chapter should not proceed.

377. In respect of fee exemptions, the Law Council considers that all people in receipt of a social security benefit or who hold any evidence of having met certain means tests, should be automatically exempt from paying fees.

378. In addition, anyone in receipt of legal assistance from a legal aid commission or other provider should also be automatically exempt. Further, all parties who are represented pro bono should also be automatically exempt.

379. The Law Council also strongly recommends that the courts and tribunals should have broad discretion to waive or postpone payment of fees if the matter is unlikely to proceed due to the fees charged.

Chapter 17: Courts — technology, specialisation and governance

DRAFT RECOMMENDATION 17.1

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

380. The Law Council supports the Draft Recommendation, in principle.

381. The Law Council considers the Draft Recommendation could potentially lower court costs and improve access to justice, however it will require considerable further investment in court infrastructure and information and communications technology in the short term to ensure longer term benefits, without compromising existing services or access to dispute resolution.

DRAFT RECOMMENDATION 17.2

Australian governments and courts should examine opportunities to use technology to facilitate more efficient and effective interactions between courts and users, to reduce court administrative costs and to support improved data collection and performance measurement.

382. The Law Council supports the Draft Recommendation.

INFORMATION REQUEST 17.1

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

383. The Law Council recommends that the Productivity Commission consult closely with Chief Justices, Judges and Magistrates and with court Registrars on this issue.

DRAFT RECOMMENDATION 17.3

Courts should continue to facilitate civil matters being allocated to judges with relevant expertise for case management and hearing through use of specialist lists and panel arrangements.

384. The Law Council notes and supports the initiatives by different courts to use case management and to develop specialist lists and considers these initiatives have helped improve the efficiency of the courts.

INFORMATION REQUEST 17.2

The Commission seeks feedback from stakeholders on the extent to which existing jurisdictional arrangements for planning and environment matters present problems for access to justice in those Australian jurisdictions lacking a specialist environment court, and cost effective options for improving current arrangements.

385. The Law Council is unable to comment.

INFORMATION REQUEST 17.3

The Commission seeks feedback from stakeholders on whether changes to current court administration arrangements are desirable to facilitate more efficient and effective court operations.

386. The Law Council suggests that shared information between court registries can only improve administrative arrangements, and that this is already occurring.

INFORMATION REQUEST 17.4

The Commission seeks input on the most appropriate mechanism for funding courts and allocating fee revenue. Options to consider may include:

- *maintaining existing funding and revenue arrangements*
- *reforms to appropriations, which may include use of separate appropriations for judicial salaries*
- *a hypothecated model where courts are funded through retained fee revenue (with fees set by the government) and payments received from government in lieu of fees that have been waived. Alternatively, such a model could allow courts to set their own fees and levels of expenditure.*

387. The Law Council submits that a model predicated on fee revenue would seriously undermine access to justice. The courts cannot be forced to run as a business, making decisions about whether to agree to a fee waiver or deferral, or designing their policies with respect to exemptions, based on finances. The cost of accessing the courts is already extremely high and insurmountable to many of those with legal problems. Such a proposal, if implemented, would lead to extraordinary increases in fees and seriously undermine the dispute resolution system in this country.

388. As noted earlier in this submission, the Law Council considers that the courts provide a service which not only offsets expenditure, but adds considerably to economic growth. The court system underwrites and facilitates our entire system of commerce and government. It attracts overseas and domestic investment and above

all, upholds the rule of law. As noted previously, government appropriations with respect to the courts are a minor fraction of GDP.

389. The Law Council submits that court fees should not be further increased but, if anything, wound back to levels which do not create such a significant barrier to those wishing to approach the courts. Government funding should be considerably increased in recognition of their importance in our system of government and commerce, in maintaining civil society and upholding the Rule of Law.

Chapter 18: Private funding for litigation

DRAFT RECOMMENDATION 18.1

Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.

- *The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.*

390. The Law Council is unable to comment on this Draft Recommendation at the present time. The Law Council and its constituent bodies have been engaged in an extensive consultation process with the legal profession in all jurisdictions in relation to this issue. A draft report has been prepared by the Law Council and, at the time of drafting this submission, was due for imminent release to constituent bodies for comment. It is expected that Law Council Directors will be asked to vote on the maintenance or abolition of the prohibition on contingency fees at the Law Council's board meeting in mid-June, and the nature of any limitations the Law Council might support if abolition of the prohibition is supported.

391. The Law Council will advise the Commission of the Law Council's position on this issue as soon as possible.

INFORMATION REQUEST 18.1

The Commission is seeking evidence on appropriate percentage limits for conditional and damages-based fees. Specifically:

- *Is the 25 per cent limit on uplift fees for conditional billing appropriate? What are the benefits and costs of changing this limit?*
- *Is a limit on damages-based fees necessary? If so, what should this limit be or how should it be determined? And should consideration be given to adopting a 'sliding scale' (where the maximum percentage payable to the lawyer decreases as the amount recovered by the client increases)?*

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392. The Law Council agrees that the 25 percent limit on uplift fees for conditional billing is appropriate. Some jurisdictions have prohibitions that limit this inappropriately and these should be looked at generally.
393. The issue of the current limit on damages-based fees generally is being considered by the Law Council by its Percentage Based Contingency Fee Working Group and will be able to report further on this in the near future.

DRAFT RECOMMENDATION 18.2

Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.

Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.

394. The Law Council notes there are differing views in the legal profession as to the most appropriate regulatory framework for litigation funders.
395. The Law Council's established policy is that litigation funders should be subject to a formal licensing framework, either under the AFSL regime or another *sui generis* arrangement under the *Corporations Act 2001* (Cth), and be subject to supervision by ASIC. The Law Council considers this is not a matter for additional regulation of legal practitioners, however the Court should also have a role in supervising the conduct of funders, as it presently does. Further, there should be no further regulation of group proceedings and other matters maintained on a conditional fee basis or under damages-based agreements (absent a litigation funding company), if the prohibition on contingency fees is lifted in the future. It is also considered that, if a licensing regime is introduced for litigation funders, it should be implemented carefully to ensure it does not create a significant barrier to entry, thereby stifling competition.
396. The Law Council's policy has been reached following extensive work and deliberation by the Law Council's Litigation Funding Working Group and Class Actions Committee and subsequent adoption of a Law Council Position Paper on Regulation of Third Party Litigation Funders³⁶ by Law Council Directors in June 2011.
397. However, there is a view among members of the Law Council Business Law Section's Corporations Law Committee that more stringent regulation of funders is necessary. The views of the BLS are appended to this submission at **Attachment B**. The Law Council further notes that the views of the BLS are currently being considered by the Law Council's Federal Litigation and Dispute Resolution Section's Class Actions Committee, which may provide comments by way of a further addendum submission to the Inquiry.

³⁶ See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Regulationofthirdparty litigation funding in Australia.pdf>

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398. The Law Council acknowledges the BLS' concerns and observes that there is not much debate about *whether* litigation funders should be regulated, but *how*.
399. The Law Council notes that the Federal Attorney-General recently stated during an interview that he intended to establish an advisory panel to assist a review of the regulation of litigation funders and law practices working in this area.³⁷
400. The Law Council considers that litigation funders have become an important part of the access to justice framework. There is a need for certainty and clarity with respect to oversight of the industry, to ensure the development of competitive forces to drive down prices. Bentham IMF is the most prominent funder in Australia, with most competition coming from foreign funders. Whatever regulatory model is adopted, the Law Council considers that it should not create significant barriers to entry.
401. Further, the Law Council strongly submits that existing legal profession regulation is sufficient to ensure law practices effectively manage conflicts of interest and that no further regulation of legal practice in this area is required or justified.

Chapter 19: Bridging the gap

DRAFT RECOMMENDATION 19.1

The Commonwealth and state and territory governments, in collaboration with the legal profession and regulators, should develop a single set of rules that explicitly deal with unbundled legal services, for adoption across all Australian jurisdictions. These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address:

- *how to define the scope of retainers*
- *the liability of legal practitioners*
- *inclusion and removal of legal practitioners from the court record*
- *disclosure and communication with clients, including obtaining their informed consent to the arrangement.*

402. The Law Council supports the Draft Recommendation.
403. The concept of limiting the scope of a retainer for professional services is not new. Limited scope retainers for legal services already exist and an increased use of such retainers can increase access to justice for many clients.
404. The use of limited scope retainers can be increased by extending the understanding and acceptance of the concept amongst lawyers, clients, courts, regulators and insurers.

³⁷ Chris Merritt, 'Crackdown on opportunistic class actions', 23 May 2014, the Australian.

405. The Law Council considers that any rules should raise the profile of limited scope representation by simply affirming that a lawyer may limit the scope of a retainer with a client provided:

- (a) the client gives informed consent; and
- (b) the limitation is reasonable.

406. Any new rules should not be extensive because extended prescriptive detail is likely to impede, rather than assist, the uptake of limited scope retainers.

407. There is also a need to reform the rules of those courts that require a separate application to the Court for leave to withdraw as a legal representative. Those courts should adopt the model in the Family Law Rules which permit a lawyer to withdraw from the court record seven days after giving notice to the client.

408. Development of any such rules or guidelines should be done in close consultation with the legal profession.

DRAFT RECOMMENDATION 19.2

The private legal profession should work with referral agencies to publicise the availability of their unbundled services.

409. The Law Council supports the Draft Recommendation.

INFORMATION REQUEST 19.1

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

410. The Law Council has read and supports the response of the Law Institute of Victoria in relation to legal expense insurance (LEI). It is noted that LEI is likely to require a national market and has the potential to be successful, as an 'add-on' to credit or insurance contracts, or other financial products.

411. As noted previously, attempts to establish LEI in Australia have been unsuccessful to date, largely due to assessments by the insurance industry that the market in Australia is too small to make such products viable.

412. The Law Council considers that, if LEI is established in Australia, it is essential that it be available to cover family law disputes, among other areas of law. Consumers/policy holders should also have the right to retain the counsel of their choice, subject to certain minor strictures with respect to appropriate expertise or specialisation. The Law Council considers attempts to restrict coverage for fees or costs above a certain level may limit the uptake of LEI.

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.

413. The Law Council considers a Legal Expenses Contribution Scheme (LECS) would be a reasonable measure to improve access to justice and would meet a need currently not able to be provided by the private sector. Under the proposal, the Commonwealth would agree to lend funds to an applicant in order to support their cause of action, on a zero or low-interest basis, to be repaid through income tax on a similar basis to the existing Higher Education Loan Program (previously the Higher Education Contribution Scheme).
414. The Law Council agrees the LECS could be administered by Legal Aid Commissions. However, it is recommended that loans provide for contributions well above existing legal aid rates, to ensure the private profession is not given a disincentive to accept briefs maintained under the LECS. It is considered that, while legal aid commissions are well placed to administer the program, they are not sufficiently resourced to perform the work required, in-house.
415. Ideally, the LECS should be available for most kinds of civil disputes, subject to public policy considerations, for example, with respect to vexatious litigants and an initial assessment of the merits of the claim.
416. The Law Council submits, however, that a LECS, if established or adjoined to an existing loan scheme, should not precipitate any withdrawal of funding for the legal assistance sector, or abrogation of government support for legal aid. As outlined below, funding for legal assistance programs is already unsustainably low, meaning that legal aid grants for most civil law matters are simply not available and, where it is available, only the most economically disadvantaged people are eligible.

INFORMATION REQUEST 19.3

The Commission seeks feedback on whether there are any policy barriers that unnecessarily obstruct not-for-profit provision of legal services.

417. The Law Council is not aware of any specific barriers. It may be that certain measures are necessary to improve the attractiveness of not-for-profit legal services as a business model, including tax relief.
418. It is noted that Salvos Legal is one business model for a self-funding community legal service through cross-subsidisation, which has attracted a reasonable amount of interest from the Productivity Commission and with other legal assistance providers. While the Law Council supports the wider use of such models among CLCs, the Law Council considers it is not an appropriate model for the provision of mainstream legal aid or Aboriginal and Torres Strait Islander Legal Services, and is unlikely to be appropriate for many CLCs, particularly those operating in regional or remote areas.

Chapter 21: Reforming the legal assistance landscape

419. Next to funding for the courts, the Law Council regards inadequate funding of the legal assistance sector as the most critical problem facing the civil justice system.
420. Persistently inadequate funding for legal assistance has consequences reaching far beyond the lack of availability of legal aid for most Australians. Poor funding means that civil legal aid is simply not available for the vast majority of civil law matters. Where it is available, many of those living below the Henderson Poverty Line cannot satisfy the means test under legal aid guidelines.³⁸
421. The unavailability of civil legal aid inevitably drives up the number of unrepresented litigants, which in turn impacts on the efficiency of civil trials and interlocutory proceedings, as well as increasing the number of unfounded applications before the courts, stress on both plaintiffs and defendants, the costs to both parties and the prospects of injustice occurring due to mistakes in managing the litigation.
422. In criminal matters, parties will often be ineligible for legal aid unless they face the real likelihood of a custodial sentence. In extreme circumstances, criminal trials have been stayed due to the lack of sufficient legal assistance to ensure a fair trial.³⁹ Inevitably, as the funding pool shrinks, as has already been announced twice by the Commonwealth Government since the 2013 federal election, legal aid commissions are forced to prioritise representation in criminal law matters, further diminishing the amount of available civil law assistance.
423. In family law matters, unrepresented parties are often required to confront a violent partner or former partner with no assistance. In Victoria, there have been cases where people have lost a grant of legal assistance after it was revealed that the other party is not represented, due to restrictive legal aid funding guidelines.
424. Due to the very poor rates offered by legal aid commissions for legal aid briefs, many private practitioners who used to accept legal aid work have effectively stopped doing so. In 2008, the Victorian Bar commissioned a *Review of Legal Aid Fees Paid to Barristers in Criminal Cases* by PWC,⁴⁰ which found that between 1993 and 2007, Victorian Legal Aid's fees paid to barristers increased by just 16 per cent for appearances in the Magistrates Court and 33 per cent for appearances in the Supreme Court. Over the same period, barristers' costs increased by 54 per cent and CPI increased by 44 per cent. A junior criminal barrister accepting only legal aid work

³⁸ PricewaterhouseCoopers, 2009, PWC Report, *Legal Aid Funding: Current Challenges and the Opportunities for Cooperative Federalism*, Report prepared for National Legal Aid. See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload099f.pdf> ; and PricewaterhouseCoopers, 2009, *The Economic Value of Legal Aid: Analysis in relation to Commonwealth funded matters with a focus on family law*, report prepared for National Legal Aid, page 39. See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload15a6.pdf>

³⁹ See *R v Chaouk* [2013] VSC 48 stay on the basis of no instructing solicitor. Leave to appeal by DPP refused by the Court of Appeal: *R v Chaouk* [2013] VSCA 99. See also *MK v Victorian Legal Aid* [2013] VSC 49.

⁴⁰ PWC, 2008, *Review of Legal Aid Fees Paid to Barristers in Criminal Cases*, report prepared for the Victorian Bar. See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Legal_Aid_Fees_-_2008_PWC.pdf

could expect an annual income of just \$36,000 per year. This was less than half the income a solicitor in a law firm could expect to earn at the same stage of career.

425. For many firms, the cost of accepting a legal aid brief can be greater than the remuneration they will receive. Many barristers handling complex criminal trials find that they cannot obtain funding for an instructing solicitor. In many cases, accepting a legal aid brief is akin to acting pro bono.

426. The only way to address these problems is to invest significantly more funds in the system. Unfortunately, since this inquiry commenced, the Commonwealth Government has announced further cuts to the legal assistance sector - \$43 million over 4 years earlier this year and a further \$15 million cut to legal aid commissions in the May 2014 budget alone.

Misleading characterisation of “increasing” legal assistance funding

427. The Law Council is concerned about the misleading statement in the Draft Report that “In real terms, government funding for the four main legal assistance services has increased by around 40 per cent between 2000-01 and 2012-13” (section 20.8).

428. This statement completely disregards the fact that Commonwealth funding for legal aid plummeted from 55 per cent of the total in 1996 to less than 35 per cent today. The table below, produced by PricewaterhouseCoopers and provided in the Law Council’s earlier submission, outlines a more accurate picture of legal aid funding.

429. The Law Council has commissioned an update of projected real funding of legal aid commissions, incorporating the most recent budget figures and announcements by the Commonwealth Attorney-Generals, as well as the Mid-Year Economic and Fiscal Outlook to determine if:

- the projected decline in Commonwealth funding has occurred; and
- funding has kept a pace with the cost of service delivery, inflation and population changes.

430. To do this PWC sourced data for from National Legal Aid⁴¹ and the Australian Bureau of Statistics (ABS)⁴² and compared the figures presented in the PwC Legal Aid Report 2009 with updated figures from National Legal Aid for the Commonwealth input grants. Table 1 demonstrates the actual real funding of legal aid commissions per capita, per source.

Table 1 – Actual (2013) real funding of legal aid commissions per capita by source (\$’000, 2014)

Year	Commonwealth grants	State grants	Spec. trust & statutory interest**	Self generated income**
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⁴¹ National Legal Aid, Finance – Income and expenses, 2014 accessed at: <http://www.nationallegalaid.org/home/finance/>

⁴² Australian Bureau of Statistics, 3101.0 Australian Demographic Statistics, 2013; Australian Bureau of Statistics, 3222.0 Population Projections Australia, 2012, Australian Bureau of Statistics, 6401.0 Consumer Price Index, Australia, 2014.

Year	Commonwealth grants	State grants	Spec. trust & statutory interest**	Self generated income**
1996/97	10.88	6.22	1.94	3.34
1997/98	9.02	6.75	2.06	2.44
1998/99	8.88	7.01	2.19	1.76
1999/00	8.08	8.09	2.26	2.48
2000/01	8.01	8.04	2.46	1.67
2001/02	8.55	9.50	2.83	1.49
2002/03	8.23	9.14	2.72	1.44
2003/04	8.32	10.01	2.78	1.68
2004/05	9.01	10.15	3.41	1.74
2005/06	8.77	10.11	3.73	1.79
2006/07	8.58	10.49	4.83	2.13
2007/08	9.52	10.23	5.87	1.87
2008/09	8.75	10.82	5.71	1.54
2009/10	9.11	10.79	5.14	1.50
2010/11	9.41	11.69	4.70	1.48
2011/12	9.30	12.23	4.14	1.70
2012/13	9.43	12.92	4.04	1.51
2013/14*	9.56	12.72	3.74	1.19
2014/15#	8.89	12.72	3.74	1.19
2015/16#	8.86	12.72	3.74	1.19
2016/17#	8.84	12.72	3.74	1.19

Source: NLA, ABS 6401.0 CPI, ABS 3101.0 Estimated Resident Population, ABS 3222.0 Population Projections Australia

Note: Excludes Commonwealth funding for Community Legal Centres.

Key: The following symbols indicate what figures were previously budgeted or budget and forecasts in the previous report;

* Budgeted

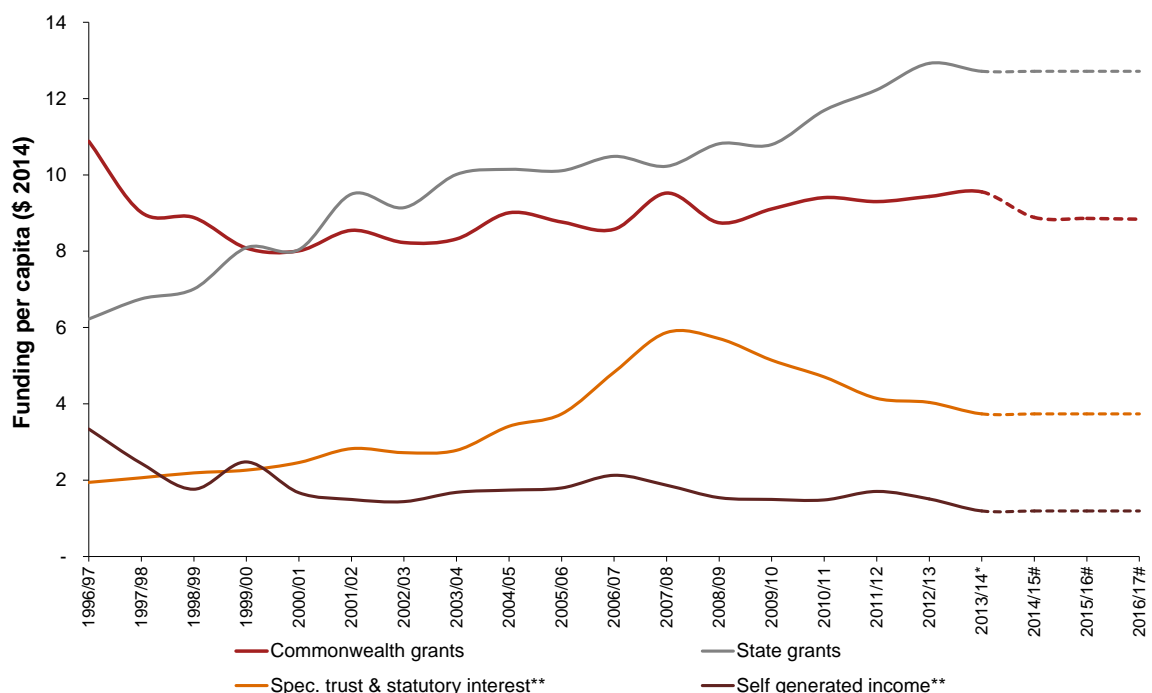
Budget and forecasts

431. As can be observed above, 2000-1 was the year in which Commonwealth funding reached its lowest point, at \$7.80 per capita. At that point, it had fallen dramatically from its earlier 1996 level of 10.59 per capita – an extraordinary and crippling 26 per cent reduction in Commonwealth spending on legal aid. It is seriously misleading to ignore this part of the picture when attempting to describe the state of

legal assistance funding, as these services still have not recovered to their pre-1996 levels. The cuts have transferred significant additional costs to the States and Territories (e.g. the costs of servicing aboriginal clients who are unable or unwilling to use the Aboriginal Legal Service and would previously have been funded by the Commonwealth.) The states and territories have increased their funding to Legal Aid Commissions to partially offset the Commonwealth cuts. Given their relatively limited revenue raising capacity, there would not seem to be scope for States to compensate further for the Commonwealth's historic and future cuts in order to fund civil legal aid.

432. Over the same period, there has been significantly increasing demand for legal assistance services. Accordingly, in real terms, the Commonwealth's static funding has failed to keep pace with escalating legal need. Worse, the forward estimates see the Commonwealth's funding share drop to \$8.89 per capita, \$2 per capita below the 1996/97 figure.

Figure 1 – Actual real funding of legal aid commissions per capita by source (\$2014)



Source: NLA, ABS 6401.0 CPI, ABS 3101.0 Estimated Resident Population

** These are considered state sources of funding

Note: Excludes Commonwealth funding for Community Legal Centres.

433. Figure 1 above sets out graphically the estimated future funding for legal aid. The forecasts are based on holding State sources constant from 2013-14, allowing for inflation and population growth, and including the estimates for Commonwealth funding of legal aid per the Budget 2014-15. This shows that, holding all other things constant, real per capita legal aid funding is set to decline going forward, due to falling Commonwealth contributions. As can be observed, there has been a sharp recent decline as a result of legal aid funding cuts announced in the recent federal budget and the MYEFO in December 2013.

434. In addition to this, the Commission has conflated Commonwealth, State and Territory funding in its analysis, as well as funding provided to all legal assistance

bodies. However, the funding amounts are set by different levels of government without any regard to national objectives for the provision of legal assistance, and each service (as acknowledged in the Draft Report) is funded under a different model.

435. The Commonwealth would have needed to add a further \$80 million in 2014-15 to bring its share of LAC funding to a 50 per cent share with the states and territories. Instead, it has cut its funding by over \$15 million.

436. The Productivity Commission has not canvassed the question of how to fund increased legal aid for civil cases. The suggestion that it be funded as a fixed percentage of legal aid funding is in effect recommending cuts to aid in criminal and family law cases. For the reasons raised elsewhere in this submission, this would have serious, adverse impacts on legal aid commissions and their clients, unless substantial additional funding is provided to prevent shortfalls in funding for criminal cases. In every jurisdiction, for example, legal aid in criminal cases in the Magistrates' Court is only available to people who are likely to go to jail. Further cuts in criminal legal aid could well see no aid to such people. Given that the Productivity Commission has not reviewed access to justice in criminal cases, there is no proper basis for such a recommendation.

437. Notwithstanding the mischaracterisation of funding, the Draft Report clearly demonstrates that Commonwealth funding for legal assistance has been largely static, following its massive decline in 1996-7. The only real increase has been through State grants.

Identification of flow on impacts

438. The Commission is to be congratulated on identifying the flow-on impact of inadequate legal assistance sector funding, as shown through numerous studies.

439. As noted in the Draft Report, there is ample evidence suggesting that investment in legal assistance creates genuine savings over the longer term, which is likely to offset the expenditure over the longer term. Early intervention by legal assistance providers can prevent minor problems becoming more significant and costly to solve in the future. Further, expenditure on other services, including legal aid, health services, social security benefits, etc., is likely to also diminish.

440. In terms of value for money, the Law Council suggests expenditure on legal assistance services is a very sound investment. As stated in the Law Council's previous submission, PWC has estimated that for every dollar spent on legal aid there is a return of \$1.60-\$2.25 (noting that this is a highly conservative estimate).⁴³ The National Association of Community Legal Centres has estimated that the return on investment in CLCs is \$18 for every dollar.⁴⁴

National Partnership Agreement

441. The Law Council welcomes the finding by the Productivity Commission that the National Partnership on Legal Assistance Services (NPA) is not working as a national

⁴³ PricewaterhouseCoopers, 2009, *The Economic Value of Legal Aid: Analysis in relation to Commonwealth funded matters with a focus on family law*, report prepared for National Legal Aid, page 39. See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload15a6.pdf>

⁴⁴ Judith Stubbs & Associates, *Economic Cost-Benefit Analysis of Community Legal Centres*, June 2012, National Association of Community Legal Centres. See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload0463.pdf>.

agreement in practice. The Law Council agrees that the NPA should be re-negotiated with a commitment to national objectives for the provision of legal assistance services.

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.

442. The Law Council does not support the Draft Recommendation in its present form.

443. At the present time, funding for legal aid commissions and other legal assistance providers is fixed under the NPA, regardless of changes in demand, which is driven by factors beyond the control of legal assistance providers. For example, increasing penalties for certain offences or the introduction of new offences will impact on the amount legal aid commissions are required to spend on criminal law matters, diminishing the amount which is generally available for family and civil law assistance. It is not feasible under the present model to realistically determine and manage funding for criminal and civil jurisdictions separately, because (as mentioned previously) changes in demand for one area affect available funds in the other.

444. It may be possible to implement the recommendation if a more flexible model was implemented to address changes to demand for criminal legal assistance. This would also require a complete overhaul of the funding model, with substantial additional funds injected under a new NPA (as discussed below).

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.

445. As noted above, the Law Council does not believe it is possible to demarcate funding for criminal and civil/family law jurisdictions without a more flexible funding model and substantial injection of additional funds into the system.

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.

446. The Law Council agrees with the Draft Recommendation, in principle.

447. As stated in the Draft Report, the financial eligibility guidelines are extremely restrictive and there would be merit in considering new guidelines, requiring an assessment not just of economic disadvantage, but also the impact of the legal problem on the applicant, the antecedents of the applicant, any public interest involved and prospects of success. However, such an assessment process will require substantial additional funding to implement as it is likely to front-end load a number of additional costs for legal aid commissions.

448. It is important to bear in mind that, in several jurisdictions, means tests are already so restrictive that people living on social security benefits and government pensions do not qualify for legal aid. Accordingly, substantial increases in funding are essential to ensure the legal needs of priority groups are met.

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.

449. The Draft Recommendation is somewhat nebulous in its present form and is therefore difficult to respond to in any helpful manner.

450. The appropriate eligibility criteria for each service provider will depend largely on their cost profile, focus practice areas, services provided, etc. As recognised in the Draft Report, the cost of providing direct representation and advocacy is generally greater than matters involving advice, referral and minor assistance. CLCs providing advice, for example, on immigration matters will have a different cost structure to a CLC providing representation in welfare disputes, or a legal aid commission, which tends to limit the focus of their civil law practices, excluding family law, to areas not generally serviced by the private profession. Given the large amount of simple advice-type work done by CLCs, the time and expense of means testing is not warranted.

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?

451. There is currently, virtually no relationship between the rate for private practitioners and that set by legal aid commissions.

452. The Law Council submits that, if the rates offered to the private profession for accepting legal aid work do not increase significantly, the withdrawal of the private profession from the legal assistance sector will continue. This will threaten the viability of the mixed model for legal service delivery and the efficiencies that model achieves.

453. The Law Council considers that the private profession is capable of delivering these services at a high standard and more efficiently. However, there will need to be changes to the funding model to ensure more law practices and barristers can consider it viable to accept legal aid briefs. There is ample evidence before the

Commission which demonstrates the forced withdrawal of the private profession from legal aid, due to inadequate remuneration.⁴⁵

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.*

454. The Law Council supports the Draft Recommendation in principle and suggests that it may need to go further.

455. If the NPA is to be renegotiated with national objectives for the provision of legal assistance services, the Law Council considers it is axiomatic that all legal assistance peak bodies should be covered by the agreement and be a party to it. The Law Council further recommends that the Australian Legal Assistance Forum should be given a formal advisory role with respect to the development and implementation of the NPA.

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.

456. The Law Council notes that the National Association of Community Legal Centres' views should be sought in response to this information request.

457. However, the Law Council considers competitive tendering is likely to divert many CLCs from their core business of providing free or low cost legal services and operate as non-profit entities. Many CLCs rely on volunteers providing pro bono assistance. Competitive tendering may be regarded as appropriate for government procurement, however it is difficult to see the benefit in extending it to the provision of public funding to non-profit entities providing an important community service.

⁴⁵ See, for example, PWC, 2008, *Ibid*, *op cit* 40.

458. Moreover, requiring CLCs to compete with one another for government funding may affect their capacity to operate collaboratively, which the Law Council considers would be highly undesirable. CLCs have very significantly expanded access to justice and innovated in areas of civil justice that had hitherto not been serviced.⁴⁶ The small amount of money available for a small number of paid staff to coordinate volunteers and provide representation and advocacy should not be diverted to tendering processes.

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.

459. The Law Council cannot begin to estimate the actual cost of addressing existing civil legal need. The Law Council has already supplied estimates of the level of additional Commonwealth funding required to restore the Commonwealth to a 50:50 share with the States and Territories, however those figures are not linked to legal need. It may be possible to extrapolate from data in the LAW Survey to formulate an estimate, based on the average costs involved.

460. The benefit of greater investment in addressing civil law assistance services would obviously be a reduction in civil legal need. As noted previously, it has been estimated that this can lead to significant downstream savings in expenditure on court services, legal services (if the problems are caught at an early stage), income support and health and other community services.

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.

461. The Law Council strongly supports the Draft Recommendation and submits the following:

- (a) The NPA should be renegotiated on the basis of cooperative federalism. The Commonwealth, States and Territories should commit to agreed national objectives for the provision of legal assistance services, having regard to unmet legal need, target communities, priority clients and common eligibility tests which ensure that those who require legal assistance can access it, regardless of means, location, disability or health, or ethnic or national origin.
- (b) The expansion of legal aid in the 1970s was largely driven by the Commonwealth making equality before the law a national commitment. In the following two decades, the Commonwealth provided 55% of the funding for

⁴⁶ David Neal, "Law and Power - Livin' in the 70s" (2013) Law in Context

legal aid commissions.⁴⁷ In 1997, it arbitrarily reduced that commitment to 33%. As the national government and the principal revenue raiser, the Commonwealth should return to a 50% share of legal aid commission funding. That would be the single most important contribution that could be made to access to justice in Australia.

- (c) The Commonwealth should retain primary funding responsibility for CLCs, ATSILS and FVPLS, and ensure funding for those services is linked to legal need (civil and criminal).
- (d) A 'justice impacts assessment' process should be annexed to the new NPA, requiring all governments party to the agreement to engage in an assessment of legislative changes and policy initiatives on demand for legal assistance services (see discussion below, in response to Draft Finding 22.2).
- (e) The NPA should contain reference to contingency funding, to be contributed by each level of government in the event of natural disasters and other events which might significantly affect demand for civil law assistance.
- (f) Future reviews of the NPA should attempt to assess the contribution of legal assistance services to downstream savings and economic growth through improved productivity.
- (g) The Law Council supports greater coordination between LACs and CLCs, but notes that LACs must remain the primary legal assistance provider and be funded accordingly.

Chapter 22: Assistance for Aboriginal and Torres Strait Islander people

DRAFT FINDING 22.1

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

462. The Law Council strongly agrees with the Draft Finding.
463. Aboriginal and Torres Strait Islander legal services provide culturally appropriate and tailored support for Aboriginal and Torres Strait Islander communities and remain an important part of the legal assistance landscape.
464. It is noted that ATSILS have very limited capacity to provide civil or family law assistance, and often face conflicts in the provision of services, given the nature of the work they are required to perform. Indigenous Australians are among the most disadvantaged groups in Australia. Many Indigenous communities are in regional or remote locations, with few or no private practitioners. In matters involving family or

⁴⁷ The history is traced in David Neal, "Law and Power - Livin' in the 70s" (2013) *Law in Context* 99, 133 – 136.

domestic violence for example, while both parties may meet the test for eligibility for the provision of legal assistance services, the ATSILS in their area may be able to represent only one party or the other.

465. The vast majority of ATSILS funding is provided in frontline criminal law advice and representation, with extremely limited expenditure on civil and family law advice.

INFORMATION REQUEST 22.1

The Commission seeks views on the most appropriate model for engagement between governments and Indigenous-specific legal assistance services. Practical examples of successful models and the lessons from implementation are also sought.

466. The Law Council notes that ATSILS, as frontline providers of legal services to Indigenous Australians, are the most likely means through which Aboriginal and Torres Strait Islander people receive legal assistance. However, FVPLS also predominantly assist Indigenous people and there is a substantial amount of assistance also provided by legal aid commissions – as noted in the submission by New South Wales Legal Aid.

467. These service providers regularly seek to analyse gaps in service provision and impacts of new laws and government policies, which lead to greater contact between Indigenous people and the criminal justice system. This information is provided to governments by way of correspondence, submissions, direct contact with ministers and relevant government agencies. Those organisations also report regularly on the direction of government expenditure on legal assistance, as required under their respective funding agreements.

468. In order to ensure engagement with government is effective, the Law Council considers that government funding must be provided to enable the collection of data and other empirical information, and to facilitate policy development and advocacy.

469. Therefore, it is very concerning that the Commonwealth has announced cuts of \$13 million over four years, allegedly directed at ‘policy and law reform’ programs. This appears to suggest that ATSILS and other legal assistance providers should not be attempting to engage with government or collect and publish information of relevance to policy development.

470. Further, as part of its funding announcement, the Commonwealth stated that it will defund the ATSILS peak body, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS). The Law Council considers this is a very unfortunate decision, which will impact significantly on the capacity of ATSILS to effectively engage with governments and may limit the capacity of those organisations to properly coordinate strategic advice and input into significant legislative and policy initiatives affecting ATSILS.

471. Further, FVPLS has extremely limited capacity to engage in policy development and advocacy and have also been subject to significant cuts.

472. The Law Council considers that the capacity of all legal service providers to conduct this important work is essential to rational and successful policy development and must be supported by a specific, evidence-based funding allocation under any new NPA.

DRAFT RECOMMENDATION 22.1

The Commonwealth Government should:

- *establish service delivery targets (as currently apply to Aboriginal and Torres Strait Islander legal services (ATSILS)) within service plans for family violence prevention legal services (FVPLS)*
- *develop and implement robust benchmarks with ATSILS and FVPLS to better measure performance. These agreed benchmarks should be a consideration in framing the administrative data collection for ATSILS and FVPLS.*

473. The Law Council agrees with the development and implementation of benchmarks for ATSILS and FVPLS.

474. However, under existing funding, the Law Council submits that it will be impossible for either service to collect and provide the data necessary to support this recommendation, particularly in view of recent cuts announced by the Commonwealth Government.

475. If this Draft Recommendation is to proceed, it must include a recommendation that sufficient funding is agreed upon, in consultation with NATSILS and National FVPLS, sufficient to enable those bodies to carry out the recommendation.

DRAFT RECOMMENDATION 22.2

The Commonwealth Government should allocate funding for both Aboriginal and Torres Strait Islander legal services and family violence prevention legal services in accordance with differences in need and service costs across geographic areas.

476. The Law Council supports the Draft Recommendation in principle, but strongly recommends that the Draft Recommendation be revised to require direct and close consultation with those bodies in determining the appropriate allocation of funds. Preferably, the peak organisations should have responsibility for allocating the funds after the funding required to meet national objectives in the provision of these services has been agreed upon.

477. Further, where relevant training is required for those with responsibility as board members and financial management officers, this should be an element of that agreement.

INFORMATION REQUEST 22.2

The Commission seeks feedback on how the funds determined in draft recommendation 22.2 should be distributed across providers and how the relatively small scale of some providers affects the efficiency and effectiveness of services. Would there be benefits from further amalgamation of services and if so, how might this process be brought about?

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478. The Law Council considers the analysis in this section is sound and notes that, while there may be minor advantages in 'efficiency' of service provision by way of further centralisation, there is a significant prospect for service quality to be diminished in the context of ATSILS and FVPLS.
479. As noted above, ATSILS and FVLPS assist communities in regional and remote locations. There is a significant prospect of those services becoming less effective if required to further centralise administrative arrangements.
480. In this context, efficiency becomes a relatively antithetical concept. Reduction in the number of local providers essentially reduces ATSILS and FVPLS contact with the communities they are required to assist and educate. Local engagement is an essential aspect of service provision for Aboriginal communities and should be an essential consideration over funding arrangements.

DRAFT FINDING 22.2

The policies of state and territory governments can impact significantly on demand for services provided by Aboriginal and Torres Strait Islander legal services and family violence prevention legal services. Given these services are funded by the Commonwealth Government, there are poor incentives for state and territory governments to consider the ramifications of their policy changes on demand for these Commonwealth funded services.

481. The Law Council agrees with the Draft Finding, in part.
482. Changes to legislation at both the Commonwealth and State/Territory level is a constant challenge facing legal assistance services, including ATSILS. Changes to offence provisions, creation of new offences, increasingly punitive criminal sanctions, increases in police and law enforcement funding, legislative changes and court decisions affecting family law, changes to funding for health services, shifts in economic circumstances (affecting rates of foreclosure, debt recovery, etc.), changes in the rate of people placed in immigration detention, changes to legislation controlling alcohol and narcotics, all impact on demand for legal assistance services.
483. Unfortunately, there is little evidence that this impacts significantly on policy decisions made by Commonwealth, State or Territory Governments. It is a common element of the electoral cycle that political parties seeking public favour often announce 'tough-on-crime' and 'zero-tolerance' initiatives, such as mandatory sentencing, three strikes policies, increased funding for police services, crackdowns in 'illegal' migrants and other punitive measures, while failing to consider the impacts this might have on the justice system as a whole.
484. In 2013, the Law Council developed and adopted a '[Justice Impact Assessment Policy Statement](#)', which calls on all levels of government to develop and implement assessments of the impact of proposed legislative initiatives and policies on the justice sector.⁴⁸ This would be consistent with the existing Regulation Impact Assessment processes encouraged by the Office of Best Practice Regulation and is a process which has been implemented in the United Kingdom, in response to similar concerns.

⁴⁸ http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Justice_Impact_Assessment_Policy_Statement_September_2013.pdf

485. The Law Council submits that consideration of the impacts of government policies and programs on the legal assistance sector, courts, legal profession, prisons, police services and other aspects of the justice system should be a mandatory element of government regulation impact assessment processes.

486. The Law Council further submits, for the sake of clarity, that this recommendation applies to all legal assistance providers.

INFORMATION REQUEST 22.3

The Commission seeks feedback on whether the National Partnership Agreement on Legal Assistance Services should include state and territory government funding for Aboriginal and Torres Strait Islander legal services and family violence prevention legal services to provide a greater incentive for state and territory governments to consider the impact of changes in state or territory based policies on the demand for these services. Are there other ways this could be achieved? Where state and territory governments do not provide funding, or only provide limited funding, what role should they play in influencing service delivery and reporting requirements?

487. The Law Council supports the inclusion of state and territory government funding for ATSILS and FVPLS under the NPA. However, this must not create any justification for withdrawal of Commonwealth funding – both ATSILS and FVPLS are already critically underfunded.

488. The Law Council suggests another way of achieving this might be to link a justice impact assessment process to the NPA on legal assistance services, requiring all governments to assess the impact of changes to legislation or government policies and adjust funding to cope with anticipated changes in demand for legal assistance programs.

DRAFT RECOMMENDATION 22.3

While recognising there are significant challenges to addressing unmet need for Indigenous language interpreters, the Commonwealth and state and territory governments should agree and implement the proposed national framework for the provision of Aboriginal and Torres Strait Islander interpreters as part of the National Partnership Agreement on Remote Service Delivery.

489. The Law Council strongly agrees with the Draft Recommendation.

490. The Law Council notes that there is a need for interpreters to be engaged from the point of police contact, or contact with a legal assistance service or legal practitioner. It will also be necessary to train police officers, legal practitioners, judicial officers and social workers in the use of Indigenous language interpreters.

INFORMATION REQUEST 22.4

The Commission seeks information on the level of funding required to expand interpreter services to meet some or all of the gap in Indigenous interpreter services.

491. The Law Council is unable to provide an estimate, as the actual size of the gap is not known.

DRAFT RECOMMENDATION 22.4

The Commonwealth Government should:

- *undertake a cost-benefit analysis to inform the development of culturally tailored alternative dispute resolution (including family dispute resolution) services for Aboriginal and Torres Strait Islander people, particularly in high need areas*
- *subject to the relative size of the net benefit of such a service, fully fund these services*
- *encourage government and non-government providers of mainstream alternative dispute resolution services to adapt their services so that they are culturally appropriate for Aboriginal and Torres Strait Islander people (where cost-effective to do so).*

492. The Law Council supports the Draft Recommendation.

493. The Law Council further suggests Indigenous cultural awareness training should be provided to those working in the justice system; and that Aboriginal and Torres Strait Islander court programs should be provided with increased funding, to enable wider provision of culturally appropriate court proceedings, or to establish Indigenous court programs if none presently exist.

INFORMATION REQUEST 22.5

The Commission seeks information on the cost of a culturally appropriate Indigenous-specific alternative dispute resolution (including family dispute resolution) service(s), particularly in 'high need' areas. Views on the appropriate engagement model and governance arrangements are also sought.

494. The Law Council is unable to provide an estimate.

495. However, it is noted that culturally appropriate dispute resolution services may be relatively expensive to implement, due to the level of specialisation required.

INFORMATION REQUEST 22.6

The Commission seeks information on the cost-effectiveness of earlier and more pro-active engagements by government agencies with Aboriginal and Torres Strait Islander clients who are at risk of disputes with government.

496. As demonstrated by the LAW survey, early intervention is essential to reduce the risk of significantly larger and expensive legal problems later on.

Chapter 23: Pro bono services

497. The Law Council considers the pro bono contribution of the Australian legal profession is substantial, of inestimable value to government and the broader community and is a celebrated aspect of Australia's legal culture.
498. It is difficult to quantify the amount of pro bono legal work performed by the legal profession. The National Pro Bono Resource Centre (NPBRC) provides valuable information on the recorded contribution, through its participating firms and practitioners. However, it is not possible to reach a conclusive or accurate assessment of the amount of pro bono legal assistance provided by practitioners who assist legal assistance providers, those in small-to mid-sized firms who simply agree to assist or volunteer at different services, or counsel who provide a significant proportion of pro bono legal assistance at the private bar.
499. It is very important to note that, while pro bono legal assistance is complementary to government investment in legal assistance services, it cannot replace legal aid. Pro bono is often provided in areas of law, in which legal aid is not available.
500. Many firms seeking government legal services contracts must demonstrate commitment to and achievement of pro bono targets. While supported, the Law Council notes that reporting requirements should be relatively uncomplicated and consideration should be given to more flexible targets, to ensure smaller firms and firms located in rural or regional areas find it easier to tender for government legal work.
501. The Law Council strongly opposes any suggestion that pro bono targets be made mandatory or be linked with eligibility to practice. The majority of legal practitioners do perform a significant amount of pro bono, whether through an existing voluntary legal service provider or informally, at a day to day level. Mandating pro bono will simply limit the extent of voluntary pro bono practitioners are willing to provide and add significantly to the compliance burden of practitioners, needing to report and satisfy authorities that work performed was in fact pro bono.

DRAFT RECOMMENDATION 23.1

Where they have not already, all jurisdictions should allow holders of all classes of practising certificate to work on a volunteer basis.

Further, those jurisdictions that have not done so already should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a Community Legal Centre or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in Queensland.

- For those not providing court representation, persons eligible for admission as an Australian lawyer coupled with a practising certificate that has expired within the last three years (without any disciplinary conditions) should be sufficient to provide pro bono work, particularly if the service is supervised.*

502. The Law Council supports the Draft Recommendation, in principle. However it is noted that there may be difficulty attracting lawyers to undertake pro bono work if consideration is not given to appropriate professional indemnity insurance cover, any CPD requirements and contributions/coverage by the legal practitioners' fidelity fund (where they exist).

INFORMATION REQUEST 23.1

Would there be merit in exploring further options for expanding the volunteering pool for Community Legal Centres (CLCs)? For example, are there individuals with specialised knowledge that could provide advice in their past area of expertise such as retired public servants or retired migration agents, that CLCs could draw on in the relevant area? Are there currently any barriers to prevent this?

503. The Law Council notes that many CLCs draw on the private profession, retired practitioners and law students, who have not yet been admitted, who offer volunteer their time with CLCs, under supervision by the holder of a legal practising certificate.

504. All jurisdictions have separate rules facilitating this model of service provision and the Law Council is not aware of specific rules proscribing voluntary involvement of non-practising lawyers under supervision. However, there are inherent risks involved with encouraging non-lawyers to provide, or purport to provide, legal advice to vulnerable clients.

505. Migration agents who are registered with the Office of the Migration Agents Registration Authority are permitted to assist migrants in completing and lodging visa applications, but are not permitted to provide "immigration legal assistance", which broadly equates to providing legal advice and preparing review applications before the courts.

506. The Law Council does not have a strong view about this issue, other than to submit that the model adopted by some CLCs may already allow this to occur, but there are reasons it is desirable for those who volunteer to have had legal training, including specific knowledge of the law and its application to the client's circumstances, knowledge about matters incidental to the matters under inquiry and an understanding of the professional and ethical obligations owed by lawyers.

DRAFT RECOMMENDATION 23.2

The Commonwealth Government, and the remaining states and territories, should adopt the Victorian Government's use of a pro bono 'coordinator' to approve firms undertaking pro bono action. The coordinator should be situated within the Department with primary responsibility for legal policy.

507. The Law Council does not support the Draft Recommendation.

508. Whilst there is merit in the Commonwealth and the other States/Territories considering Victoria's approach, which requires law firms tendering for Government legal work committing to undertake pro bono work equivalent to 15 per cent of the revenue from Government contracts, this is not the only method that can be adopted to encourage pro bono work.

509. The Law Council considers there is a conflict of interest inherent in requiring a government agency to determine what is and is not pro bono legal assistance, or in fact defining the criteria by which it might be assessed. For example, if a practitioner or firm represents a significant number of clients in matters challenging sensitive government programs and decisions, and does so in a number of those cases pro bono, the Law Council considers it is foreseeable that new exemption categories might emerge.

510. It is recommended that any such coordination work should be, and usually is, done by pro bono clearing houses in each jurisdiction. Those bodies would be more appropriate and efficient coordinators, and should receive government funding to perform that function.

INFORMATION REQUEST 23.2

The Commission seeks views on the potential for industry pro bono 'coordinators' to alleviate conflicts of interest for pro bono providers. Which, if any, industries should this apply to? Where should the 'coordinators' be housed? What should their relationship be with the industry? Are there barriers that would limit or prevent their effectiveness? If so, can they be circumvented or removed without affecting the relationship between law firms and their corporate client?

511. As noted above, the appropriate coordinators are the pro bono clearing houses. It would be largely inefficient to establish separate industry coordinators and it is more appropriate to have that function managed consistently by a central pro bono body, independent of government, industry or the legal profession.

INFORMATION REQUEST 23.3

The Commission invites views on whether other larger jurisdictions beyond the Commonwealth and Victoria, such as New South Wales, Queensland and Western Australia, should adopt a pro bono target, with conditions tied to government tender arrangements. What prevents the use of a single target by multiple jurisdictions? What approaches should be adopted by smaller jurisdictions to pursue similar objectives?

512. The Law Council generally supports pro bono targets, but notes that pro bono is a voluntary activity – it is not something which should ever be mandated or coerced.

513. Voluntary pro bono work should be encouraged, however any pro bono targets linked to government procurement arrangements should be flexible and require uncomplicated reporting arrangements, to ensure smaller and rural/regional firms are not discouraged from applying for government legal work.

514. It is noted that in Queensland, pro bono targets were considered, however linking targets to government procurement was rejected, due to concerns that it would discourage regional firms from tendering for government work.

DRAFT RECOMMENDATION 23.3

Any pro bono targets used by governments as incentives in tender arrangements should remain flexible. Reporting required for pro bono targets should be clear and simple.

515. The Law Council supports the Draft Recommendation.

INFORMATION REQUEST 23.4

The Commission is seeking views on the most efficient form of pro bono targets. How should they be expressed (in hours, dollars or some other means)? How do the reporting requirements of the two current targets (one for the Commonwealth and the other for Victoria) compare in terms of limiting compliance costs?

516. It is noted that measuring the pro bono contribution either in time or dollar-value terms is likely to be misleading, as the value of the work done really depends on the experience and skill of the legal practitioner. Work undertaken by a senior partner or barrister that takes one hour to complete, to a very high standard, might be worth substantially more than 6 or 7 hours work by a junior solicitor.

517. On balance, time is probably the less-misleading measure, as charge-out rates are variable and can be manipulated or over-estimated, and is unlikely to represent the actual value of the service provided. The important thing is that the work is being done, as most firms do not count and record the actual amount of pro bono legal work they perform.

DRAFT RECOMMENDATION 23.4

The provision of public funding (including from the Commonwealth, state and territory governments, and other sources such as public purposes funds) to pro bono service providers should be contingent upon regular, robust and independent evaluation of the services provided.

518. The Law Council supports the Draft Recommendation, in principle.

519. It is noted that pro bono service providers should be subject to the same probity requirements as any private entity which receives public funds. However, it should be remembered that pro bono clearing houses and other bodies are inexpensive and, in any event, conduct a service of inestimable public value, by coordinating the provision of free or low-cost legal services by the private profession. Therefore, any 'evaluation' should have an advisory status only and not form the contingent basis on which government funding will continue, as it will lead to significant compliance and reporting costs.

INFORMATION REQUEST 23.5

The Commission is seeking views on methods to implement data collection on pro bono services without increasing unnecessary reporting burdens. Are there ways to better utilise existing sources? Can reporting be standardised? Are there existing social impact metrics (or categories of outcome) that should be adopted? How would data collection best be done in a systemic manner? Who should collect the data?

520. The Law Council considers the most appropriate bodies to carry out data collection are pro bono clearing houses. As noted by the Commission, data collection is not a costless activity and, accordingly, sufficient funding should be allocated by federal, state and territory governments to improve data collection about pro bono legal services.

521. The Law Council does not support carrying out qualitative evaluations of pro bono legal services. These are not government-funded legal services – they are voluntary services, cheap or free of charge. The willingness of people to engage in pro bono work is likely to be compromised significantly if their charitable contribution is subject to a qualitative assessment or customer satisfaction survey on completion of the work.

Chapter 24: Data and evidence

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.

522. The Law Council supports the Draft Recommendation, in principle, subject to the comments outlined below in response to Draft Recommendation 24.2.

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.

523. The Law Council supports the Draft Recommendation, in principle.

524. Legal aid commissions are subject to continuous change in respect of their reporting requirements to different levels of government. Change is costly and affects the entire organisation. Sufficient funding and time must be provided to implement the Draft Recommendation.

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.

525. The Law Council adopts the LIV's response to this Information Request:

"The LIV again recognises the issue of funding for such a clearinghouse given the amount of work required to co-ordinate data collection and analyse the data. The LIV submits that there is likely to be little appetite for such a large project in the absence of clear funding provisions. In the short term, the LIV suggests that there might be a University which might further scope a possible larger data collection and analysis project."

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.

526. The Law Council strongly supports the Draft Recommendation, however the LAW Survey was an immense project and careful consideration will need to be given to the manner in which it should be funded and carried out on a regular basis.

527. An alternative proposition might be to include collection of certain data through the national Census, with a substantial, complementary LAW Survey or some form of commission of inquiry, to draw from all available evidence (including a statistically-significant proportion of the population) on the actual unmet need in all jurisdictions.

Conclusion

528. The Law Council acknowledges the significant challenges faced by the Productivity Commission in conducting this Inquiry, particularly in view of truncated reporting timeframes and the amount of material covered in the Draft Report. The Law Council also appreciates efforts made by the Productivity Commission to date, to consult with the Law Council and to engage with the profession, legal assistance providers and the courts.
529. The Law Council reiterates its primary concern, that an inquiry into access to justice arrangements should be directed toward making the justice system more accessible to all. Constraining cost, while an important consideration, is only one aspect of the equation. More fundamental considerations include increasing the availability of legal aid, improving the accessibility of the courts, increasing the effectiveness of alternative dispute resolution, directing disputes toward the most appropriate dispute resolution forum and promoting private sources of funding for litigation.
530. The Law Council has submitted that the most fundamental concerns affecting the civil justice system in Australia is inadequate funding for the legal assistance sector and inadequate funding for the courts. Failure to properly fund the courts undermines the Rule of Law, while the inability to pay for legal representation or advice undermines the capacity of most people to enforce their rights effectively.
531. As said by the Hon Chief Justice Murray Gleeson (as he then was):
- “The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.”⁴⁹
532. The Law Council has submitted that civil legal aid is virtually unavailable, except to the extremely disadvantaged. Without a substantial increase in the level of Commonwealth funding, there is simply no prospect that availability will increase, or that legal need will not continue to grow. Quarantining funding for civil legal aid is simply not the answer – legal aid providers need flexibility to ensure criminal legal aid needs are prioritised and met. Further investment is essential to improve early intervention, harness downstream savings and arrest the growing levels of unmet legal need.
533. As demonstrated in a number of previous inquiries and reports, unmet legal need creates significant costs for society, which are never referred to or measured by governments when determining the budget for legal aid or the courts, or when introducing punitive criminal sanctions or adjusting civil rights or entitlements. The value of any savings for governments in reducing real spending on legal aid, or revenue raised by increasing court fees, is more than offset by downstream costs as unmet legal need grows or the burden of enforcing rights increases.

⁴⁹ State of Judicature, speech delivered at the Australian Legal Convention, 10 October 1999

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534. The Law Council has submitted that setting court fees at full cost-recovery levels would be unacceptable, and would seriously undermine access to justice. Courts account for a very small proportion of total government expenditure, but have an essential role in the system of government and civil society. Reducing the courts to a user-pays system could not be justified on either empirical or philosophical grounds. Courts are a public good, with immeasurable public benefits, both socially and economically, upholding the Rule of Law and supporting the systems of government, commerce and trade. These benefits alone justify government investment in the courts and contradict any notion that higher fees are justified or appropriate.
535. The Law Council has also submitted that additional professional regulation of lawyers is not the way to reduce costs. Legal practitioners are already subject to the heaviest burden of regulation of any profession in Australia. This regulatory burden impacts significantly on the cost of legal service provision, and therefore legal fees and costs. Imposing even *more* regulation will simply add to these costs.
536. The Law Council commends a number of the Productivity Commission's Draft Recommendations. In particular, re-negotiation of the NPA with agreed national objectives for the provision of legal assistance services is essential. All legal assistance services should be a party to that agreement and ALAF should be given a formal advisory role in its development. It is also recommended that the new NPA include annexures with respect to justice impact assessments, to ensure all governments agree to consider the impacts of new legislative or policy initiatives on legal assistance providers, as well as contingency planning with respect to natural disasters or other matters outside government control.
537. The Law Council is grateful to a number of the Law Councils Constituent Bodies and Sections, as outlined in the introductory paragraphs. The Law Council is also grateful to the Productivity Commission for its indulgence in accepting this late submission.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the 17 Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel, President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Chris Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B: Business Law Section's comments concerning litigation funding regulation

The Corporations Committee of the Business Law Section of the Law Council of Australia (**Committee**) wishes to acknowledge the Law Council of Australia's submission dated 13 November 2013 on the Productivity Commission's inquiry into Access to Justice Arrangements. The Committee wishes to make a submission focusing on the Commission's Recommendation 18.2 of the Productivity Commission Draft Report - Access to Justice Arrangement dated April 2014 (**Draft Report**) which relates to the proposed regulation of litigation funders. The Committee welcomes the opportunity to provide input into the Productivity Commission's inquiry.

At the outset the Committee commends the Commission for acknowledging the need to regulate litigation funding in Australia. As identified in the Draft Report, litigation funding is a growing industry but is largely unregulated in Australia. The Committee agrees with the Commission's view that many of the concerns about litigation funding could be alleviated by appropriate regulation and in particular by litigation funding companies being required to hold an Australian Financial Services Licence (**AFSL**), be subject to adequate capital adequacy requirements and meet appropriate ethical standards. However, the Committee considers that there is merit in considering further regulation of litigation funding to address some other inherent issues specific to litigation funding and litigation funders. The Committee would like to encourage the Commission to consider the issues set out below when determining the appropriate mechanism to regulate litigation funding and litigation funders.

- **Unregulated litigation funding allows unmeritorious claims that would not otherwise be litigated to take up the court's time and results in a significant economic burden to both the courts and the corporations and directors against whom the litigation is commenced.**

The Committee does not agree with the view of the Commission that there is no evidence suggesting that litigation funding generates unmeritorious claims. A large proportion of litigation funded actions are class actions founded on allegations of a breach of a listed company's continuous disclosure requirements or that a company's disclosure or non-disclosure of material information was misleading or deceptive. In Australia, class actions and their settlements proceed on a basis which is contrary to current settled law. Under Australian authority, is it mandatory that each plaintiff prove direct causation, i.e. reliance on the contravening conduct or is it sufficient that indirect causation can be established, such as by a general notion of reliance by the market affecting the price at which each plaintiff purchased or sold their securities (often referred to as 'fraud on the market')? However, these claims are being brought, and settled, on the basis that the 'fraud on the market' theory might one day be accepted, contrary to established legal authority. No defendant wants to be the 'test case' for that theory, which would presumably be appealed to the highest court possible in the likely event that it was decided at first instance against the litigation funder. It suits the litigation funders for this theory not to be tested further in the Courts, since by settling they avoid the risk of an emphatic rejection of the theory which may undermine their business model. The Committee is of the view that this approach leads to litigation funders commencing actions without establishing the necessary causation and this subsequently increases the likelihood of those shareholder class actions being settled out of court. In other words, in the Committee's view the current approach gives rise to the potential for litigation funding to generate unmeritorious claims.

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- **The rationale for the award of damages has historically been to compensate those who have suffered loss. Litigation funding is shifting this concept as it is allowing third parties to seek personal profit from another person's loss.**

While the Committee recognises the important role litigation funding can play in providing access to justice, the negative impacts and the commercial reality of how litigation funding actually operates in practice should also be considered.

It has been long accepted that the rationale for the awarding of damages is to compensate those who have suffered a loss. Arguably, the processes undertaken by litigation funders mean that (funded) legal proceedings are now perhaps less about compensating those who have suffered loss and more about being a tool of trade for the funding industry.

The original settlement reached between Storm Financial and its investors is an example of where the rationale for the award of damages initially seems to have been misplaced as the funded plaintiffs were to receive a better outcome than those plaintiffs who had not funded the action. Under the original settlement the investors who funded the class action would have received 42% of their losses. Whereas the Storm investors who did not fund the action would have just received 18% of their losses. ASIC appealed the original settlement in the Federal Court on the basis that the arrangement was not fair or reasonable. The Federal Court upheld the appeal finding that there was an inequality of opportunity afforded to the non-funded plaintiffs and the calculation of the premium by reference to success fee normally charged by a commercial litigation funder was unfair. While ASIC played an important role in that particular case to assist with ensuring an appropriate settlement, a better regulatory structure would hopefully provide a more certain and clear regime for funded actions.

As we understand the current practice, litigation funders will identify a potential for a profit making opportunity themselves, perhaps by reading of an unexpected profit down grade by a listed company in the newspaper. They will then endeavour to put together a class of possible claimants who, unlike themselves, have a potential interest in making a claim. They may do this by enlisting the support of a closely associated law firm and either advertising for possible claimants or writing to them encouraging them to join a potential class. Some, or indeed, many of the potential plaintiffs who have been approached will not even have considered the idea of making a claim until they hear from a litigation funder who offers them the opportunity to participate at little or no cost. That is to say there is all upside and no downside and so the party who has the actual interest in the proceedings does not need to take account of the usual issues which a plaintiff would, such as the cost, the distraction, a long period of uncertainty pending proceedings being heard and judgment handed down and the possibility of an appeal.

These issues, which would usually be of concern to plaintiffs are considered differently by the litigation funder, who is motivated by a desire to make a profit, rather than to be compensated. Litigation funders are more likely to be prepared to take a risk on a less meritorious claim, than a plaintiff might, because they know from their own experience, that just about all funded actions settle, (not so much based on the merits of the case, but on the desire of the defendant to put an end to the legal costs, distraction and damage to corporate and director reputations as soon as possible) so rightly or wrongly, the funders are likely to receive some sort of payout, and since the custom is that legal fees are paid first out of any settlement proceeds, the risk of making a loss is actually quite small.

Accordingly, the usual practice in funded class actions is that the claim is not originated by those who have an interest in it, but by a third party, whose only interest is in making a profit from it by sharing in the spoils, and at least, as far as the plaintiffs are concerned, there are none of the usual issues which might encourage them to give consideration to the prospects of success. The consequent ethical and moral implications, as well as a variety of legal implications which flow from it need very careful thought, and to date, the debate does not seem to have involved a consideration of these concerns, even at a high level.

Indeed the whole process seems altogether inconsistent with the rationale for awarding damages to those who have suffered loss. In reality under a litigation funding arrangement the damages that are awarded by the courts are not just being applied to compensate the person who has suffered loss, but someone else entirely, indeed, the very person who has initiated the claim for profit making purposes. The Committee believes that the underlying principles as to why claimants should be compensated for loss should be re-examined when determining the appropriate regulatory mechanism for litigation funding. Arguably, litigation funding produces no net benefit to the community at all, and when the damage to the community of the kind discussed here is taken into account, may even produce a net disadvantage.

To the extent that litigation funding can be justified, then some of the sorts of controls which the Committee believes should be put in place include those identified in the Law Council's⁵⁰ earlier submission, including:

1. clarification of restrictions on litigation funders performing legal work;
2. guidance as to the appropriate level of control by funders over the class action proceedings;
3. improved transparency in pricing practices under litigation funding agreements;
4. improvement of disclosure requirements in relation to some or all terms of the funding agreements to the Court, clients and defendants/respondents;
5. prudential regulation of litigation funders;
6. limitation of the role of litigation funders in settlement discussions, including prohibition on the funder dealing directly with the opposing party(s) and imposing a fiduciary obligation on the funder;
7. specification of mandatory terms for litigation funding agreements, including cooling off periods and provision of independent (secondary) legal advice for class members; and
8. prohibition of law firms establishing associated litigation funding businesses.

It is noted that some but not all of these issues would be addressed through the requirement for litigation funding companies to hold an AFSL.

⁵⁰ Law Council of Australia, Inquiry into Access to Justice Arrangements submission dated 13 November 2013 at [528].

The Committee wishes to raise a related issue regarding contingency fees. The legalisation of contingency fees in Australia is also contrary to the underlying rationale for the award of damages as a contingency fee is the setting of legal fees as a percentage of the overall agreed settlement or court awarded compensation. Like actions funded by litigation funders, actions conducted by lawyers on a contingency fee basis involve a redistribution of damages which were designed to compensate those who have suffered loss. However, actions conducted on a contingency fee basis give rise to a much greater raft of complex issues, many involving conflicts of interest, and how lawyers can make proper decisions and give sensible unbiased advice to their clients when they have a personal interest in the outcome.

- **Regulation beyond conflict of interest and general duties are required for litigation funders.**

Following the court⁵¹ striking down certain litigation funding arrangements and holding that funded class actions are managed investment schemes as defined in the *Corporations Act 2001* (Cth), the Commonwealth Government chose to exempt litigation funding schemes from the definition of a managed investment scheme in the *Corporations Act 2001* (Cth). It is important to remember that those concerns are still present notwithstanding the regulations that the Commonwealth Government has promulgated. The regulations deal with only certain aspects of the issues surrounding conflict of interest and duty and related matters. The Committee agrees with part 5 of the submission put forward by the Australian Institute of Company Directors (**AICD**) dated 4 November 2014 to the Commission in which the AICD notes that

"the Regulations leave a number of concerns and uncertainties related to litigation funding unaddressed (or addressed by ASIC Guidance only) and that this will continue to impose a burden on participants in class action proceedings. This is because only ancillary or satellite litigation which seeks clarification from courts as to the nature of litigation funding agreements and the conduct of litigation funders is likely to continue".⁵²

The Committee is also concerned about the conflict of interest issues that arise in respect of the tripartite agreement between the funder, lawyer and client. This is especially a concern where the lawyer acts for both the funder and client whose interests in relation to key decisions are likely to diverge. While the *Corporations Amendment Regulation (No.6) 2012* requires litigation funders and law practices to ensure that they have "adequate arrangements" in place for managing conflicts, the Committee does not believe that this is sufficient as the relationships between litigation funders, lawyers and the client are complex. The Committee questions whether rather than seeking to manage conflicts after they have arisen, specific regulatory mechanisms, in addition to the professional standards that apply to lawyers, should be put in place to ensure that the conflicts do not transpire at all.

In addition, the Committee believes that the current processes available to the courts to manage class actions maintained by litigation funders are not adequate, especially given the fact that they proceed on a causation theory in shareholder class actions which is contrary to established Australian law. Among other things, Australia still does not have a US-style 'certification process' applying to litigation

⁵¹ *Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147.

⁵² Australian Institute of Company Directors, Letter to the Productivity Commission – Access to Justice dated 4 November 2013 at [5.1].

funded actions, a policy choice which Clark and Harris (quoting Mulheron) noted back in 2008 "*has been 'singularly unsuccessful' and Australian class action litigation has consequently 'been mired in numerous interlocutory applications about issues that could better have been addressed at a certification hearing'*".⁵³ A 'certification process' could provide an opportunity for unmeritorious cases to be dispensed with quickly as well as for consideration to be given to the reasonableness of the fees to be paid by class members to the funders and other promoters of the class action.

- **Litigation funders are taking it upon themselves to play a quasi-regulatory role which should be left to the corporate regulator.**

The corporate regulator has in recent times, perhaps for budgetary reasons, been seemingly prepared to allow litigation funders to perform a quasi regulatory role. Outsourcing such an important regulatory function to profit driven participants in an unregulated market is highly undesirable from a policy perspective. ASIC is empowered to deal with much of the conduct which litigation funders are currently pursuing, including, through the giving of enforceable undertakings by corporations, or, indeed, the obtaining of a court order, compensation for those who suffer losses a result of corporate misdeeds

The Corporations Committee is of the view that it would be far better for the community if corporate misdeeds, of the kind which are dealt with in the Corporations Act, were left entirely to ASIC to oversee.

- **Due to the adverse economic and productivity consequences flowing from litigation funding, corporations are often in a position where they are forced to accept settlements for reasons other than the merits of the action.**

In a large percent of cases litigation funded actions are settled prior to judgement. The Draft Report on page 535 highlights the track record of Bentham IMF, Australia's largest litigation funder and notes that 64% of its cases were settled. The prevalence of settlements does not necessarily mean that those litigation funded cases have been meritorious but may be evidence of the growing trend to settle. The Committee believes that litigation funding places corporations in a vulnerable position and as a result the corporations are forced to accept a settlement due to the corporations desire to avoid distractions to enable the corporation to focus on its core business, to avoid long periods of uncertainty pending the outcome of proceedings, to eliminate the prospects of an appeal and to avoid continued damage to corporate and director reputations by reason of the proceedings remaining in the public domain. Each of these drivers to settle are external to what should be the main consideration, whether or not the claim has merit.

Further, it has been observed in respect of the US experience with class actions that:

"Because of the high stakes for both sides, the plaintiffs' lawyers' reluctance to risk losing their considerable investment of time and money in preparing the case if the

⁵³ Stuart Clark and Christina Harris, 'The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?' 32 *Melbourne University Law Review* 775, 800.

*trial results in a verdict for defendants, and the efforts of the judge to achieve a settlement, most cases are settled rather than tried."*⁵⁴

It is worth noting that this comment says nothing about the interests of defendants being served by the pressure to settle. This is also an argument in favour of the introduction of US-style 'certification process'.

- **Litigation funding gives rises to the potential for the litigation funder to deny paying costs if the plaintiff's case is unsuccessful as the litigation funder is not a party to the action.**

While a defendant can apply to obtain security for costs orders, traditionally security for costs orders are limited to parties in the proceedings. In *Green as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148 at [51] Justice Hodgson stated that the court should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated'. Despite this in *The Australian Derivatives Exchange Ltd v Doubell* [2008] NSWSC 1174 the court decided not to make an order for security based on the existence of an indemnity for adverse costs orders in the funding agreement, and the consideration that the matter could be dealt with by an undertaking given by the plaintiff to the court to the effect that he would pursue the indemnity for the benefit of the defendants if he suffered an adverse costs order.

The case of *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* [2009] HCA 43, 239 CLR 75 as identified in the Draft Report on page 541, illustrates the problem of litigation funding and security of costs orders. In that case the plaintiff's action was funded by a litigation funder and the plaintiff's action was ultimately dismissed. The plaintiff was ordered to pay the defendant's costs. The plaintiff was unable to pay the costs and the litigation funding agreement did not include an indemnity for an adverse costs order. The defendant applied to the court for an order for costs against the litigation funder on the ground that the funding agreement constituted an abuse of process. The High Court dismissed the appeal deciding that the funding agreement did not constitute an abuse of process.

These cases demonstrate that there is very little, if any, protection for the defendant of an unsuccessful litigation funded claim as the defendant is left to rely on the court's discretion. Further, security for costs orders are typically made in the early stages where the defendant's case is not likely to be appreciated and therefore courts commonly take a conservative approach to the amount awarded. As a result, there are no appropriate safeguards in place for the defenders of litigation funded claims.

- **While there are currently only a handful of foreign litigation funders operating in Australia, the unregulated nature of the industry is likely to encourage new entrants into the Australian market.**

The presence of foreign entities providing litigation funding gives rise to a number of concerns including the need to ensure that foreign litigation funders who finance action in Australia have sufficient resources in Australia to satisfy costs orders and that those costs orders can be enforced.

⁵⁴ Janet Cooper Alexander, "An Introduction to Class Action Procedure in the United States", Presented Conference: *Debates over Group Litigation in Comparative Perspective*, Geneva, Switzerland, July 21-22, 2000.

The Committee considers that in addition to the regulatory mechanisms proposed in the Draft Report there is merit in considering further regulation specifically tailored to address the concerns identified above. The Committee believes that further regulation is required rather than leaving it to the court's processes to resolve these concerns as often litigation funded actions will be settled before the court has the opportunity to address these issues.

Attachment C: Australian Consumer Law Committee's comments

The comments of the Australian Consumer Law Committee of the Law Council's Legal Practice Section are appended for the consideration of the Productivity Commission.

Submission on the draft report on Access to Justice Arrangements

The Australian Consumer Law Committee (**ACLCLC**) of the Law Council of Australia welcomes the opportunity to comment on the Productivity Commission's draft report on Access to Justice Arrangements.

The ACLCLC comprises of representatives from private law firms, community legal centres and members of the bar.

The ACLCLC provides the following comments on the April 2014 draft report.

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 straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

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

The ACLCLC supports draft recommendation 5.1. A number of inquiries in recent years have highlighted the gaps that exist in legal service delivery in the community.

A centralised contact point for the provision of legal assistance and referrals can be an effective means of addressing unmet legal needs to a certain extent.

The LawAccess model in NSW provides an effective template for the establishment of such a service. The effectiveness of such a service lies in its ability to assist consumers with legal matters through the dissemination of legal information, sources of referral and in limited circumstances, minor casework assistance. To do this, it relies on adequate resourcing, well-trained staff and up-to-date legal and referral information.

Any development of the LawAccess model should be seen as a complementary service, rather than as an alternative legal service provider. The development or expansion of a law referral service based on the LawAccess model should not divert resources or funding from existing specialist and community legal centres. The ACLCLC expresses its support for specialist and community legal services, and considers that they occupy a unique place in the facilitation of access to justice, especially for disadvantaged people who experience higher levels of unmet legal need.

Chapter 6: Information and redress for consumers

Draft recommendation 6.1

In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.

The ACLC supports draft recommendation 6.1.

Draft recommendation 6.2

Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.

The present system, in which each State and Territory maintains a different regime for the regulation of the legal profession, creates an unnecessary regulatory burden and avoidable compliance costs which impact on consumers of legal services, as well as lawyers.

The ACLC generally supports a uniform approach to the regulation of the legal profession across the different states and territories.

Draft recommendation 6.3

State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.

- **This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.**
- **The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.**

The ACLC recommends that any move to introduce protections for consumers in relation to billing practices should allow for consumers to be afforded greater choice over how legal costs should be determined in a legal matter.

Although the time-billing method is most commonly used in the legal services market, consumers of legal services should be able to negotiate alternatives to this approach which could include fixed or flat fee billing, contingency fees, event-based billing or fixed fee arrangements. This has the benefit of increasing transparency and certainty for consumers in determining the fee structure applicable to their legal matter.

Chapter 7: A responsive legal profession

Draft Recommendation 7.2

Where they have not done so already, state and territory governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.

- **Legal complaint bodies, in cooperation with Offices of Fair Trading and the Australian Competition and Consumer Commission, should formulate guidelines to inform practitioners and consumers of good practice in legal services advertising.**

The ACLC supports draft recommendation 7.2. The protection of consumer interests, and indeed, the promotion of access to justice, is served by ensuring consumers are able to easily and freely access information about the range of legal services available to them.

Basic economic theory would lend support to the benefits of advertising legal services as a means of encouraging competition in the legal market, thereby ensuring competitive pricing of services. Ethical concerns in relation to advertising legal services can be adequately addressed through regulatory measures.

Chapter 8: Alternative dispute resolution

Draft Recommendation 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

Information Request 8.1

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

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

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

The ACLC acknowledges the benefits of alternative dispute resolution (ADR) processes as a mechanism for promoting access to justice by avoiding costly and protracted litigation where possible. However, ADR is inappropriate and indeed can present a barrier to accessing justice, in circumstances where there is a power imbalance between the parties. For this reason, the ACLC would have concerns about making mediation a compulsory requirement for low value disputes. If this were a compulsory requirement, there would need to be effective safeguards to protect the interests of the parties where power disparities are likely. Ideally, parties should have access to independent legal advice about the process, or at the very least, effective mediators or conciliators adequately trained in dispute resolution methods and managing power disparities between parties.

The ACLC also recognises that the facilitation of ADR, as a relatively new discipline, must be complemented and supported by adequate research into its different methods and practices, in order to responsibly provide these processes to consumers.

If mediation were to be mandated, it is essential that provision is made for a peak research and regulatory body, which would provide for training and development of best practice.

The ACLC notes that with the abolishment of the National Alternative Dispute Resolution Council (**NADRAC**) in late 2013, there is now no independent body in Australia dedicated to the facilitation of ADR.⁵⁵ This body provided expert advice over twenty years, and was responsible for the development of the National Mediator Accreditation System, amongst other initiatives.⁵⁶ The ACLC has concerns about the adequacy of the current arrangements in which the functions of NADRAC have been absorbed into federal Attorney-General's Department and questions whether the department is adequately specialised to be able to carry out the objectives outlined in draft recommendation 8.1.

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.**

Draft Recommendation 9.2

Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

Draft Recommendation 9.3

In order to promote the effectiveness of government ombudsmen:

- **government agencies should be required to contribute to the cost of complaints lodged against them**
- **ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded**
- **government ombudsmen should be subject to performance benchmarking.**

Draft Recommendation 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

⁵⁵ Australian Government, Attorney-General's Department, *Alternative Dispute Resolution*, available at <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx> >.

⁵⁶ Mediator Standards Board, *National Mediator Accreditation System*, available at <http://www.msb.org.au/mediator-standards/national-mediator-accreditation-system-nmas>>.

The ACLC agrees with the Productivity Commission's findings that ombudsmen services in Australia provide many consumers with an important mechanism for accessing justice..

The ACLC generally supports recommendations to improve the effectiveness and quality of service provided by ombudsmen. However, we agree with the view expressed by the Consumer Action Law Centre and the Consumer Credit Legal Centre NSW, in their joint submission,⁵⁷ that government ombudsmen services are not as effective as industry ombudsmen. In particular, the ACLC agrees that within industry ombudsmen bodies, the level of involvement of consumer advocates at all levels of the dispute resolution process provides for the efficient and cost-effective resolution of disputes, and leads to better justice outcomes.

The Financial Ombudsman Service provides a useful model for the handling of complaints. Its quasi-judicial powers are a useful template for the development of other industry funded dispute resolution schemes. These powers enable it to investigate a dispute and issue decisions which are binding on the financial services provider. For this reason, we support the creation of further industry-based ombudsmen.

The ACLC also stresses that a review of government ombudsmen processes may enable such bodies to draw from industry experience to improve their functions, processes and outcomes. The ACLC supports the continued funding of government ombudsmen as a central means of accountability and transparency.

Chapter 10: Tribunals

Draft Recommendation 10.1

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

Draft Recommendation 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.

The ACLC considers that any proposal that restricts access to legal representation during any stage of the dispute resolution process should be regarded with extreme caution. As outlined above, accessing legal representation can be an important safeguard against power disparities between parties involved in a dispute. To deny a party access to legal representation during tribunal processes may present a serious barrier to accessing justice.

⁵⁷ Consumer Law Action Centre and Consumer Credit Legal Centre NSW, *Joint Submission: Productivity Commission's Access to Justice draft report*, 21 May 2014, available at <<http://consumeraction.org.au/joint-submission-productivity-commissions-access-to-justice-draft-report/>>.

Chapter 11: Court Processes

Draft Recommendation 11.1

Courts should apply the following elements of the Federal Court's Fast Track model more broadly:

- the abolition of formal pleadings
- a focus on early identification of the real issues in dispute
- more tightly controlling the number of pre-trial appearances
- requiring strict observance of time limits.

The ACLC supports draft recommendation 11.1.

Draft Recommendation 11.4

Courts that do not currently utilise an individual docket system for civil matters should move to this model unless reasons to do the contrary can be demonstrated. In courts where adoption of a formal docket system is not feasible, other approaches to ensuring consistent pre-trial management should continue to be explored.

Draft Recommendation 11.5

Jurisdictions that have not already acted to limit general discovery to information of direct relevance should implement reforms to achieve this, in conjunction with strong judicial case management of the discovery process. In addition:

- court rules or practice directions should promote tailored discovery and clearly outline for practitioners and the court the discovery options that are available
- courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly
- court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate
- courts should be expressly empowered to make targeted cost orders in respect of discovery.

Information Request 11.3

The Commission seeks feedback on the effectiveness and access to justice implications of the approach to discovery in Practice Note No. SC Eq 11 of the Supreme Court of NSW under which the Court will not make orders for disclosure of documents until the parties to proceedings have served their evidence, unless there are exceptional circumstances necessitating discovery.

The discovery of documents in civil proceedings is an integral part of the litigation process. In some cases, it provides the only mechanism by which parties can uncover or clarify the factual issues in contention. This in turn can lead to early settlement, or narrow the issues in dispute, which can ultimately save costs in trial. That is not to ignore the fact that discovery can come at a high cost and it can, in some cases, be disproportionate to the benefits.

The ACLC would caution against taking a broad approach to limiting general discovery in all manner of cases. Particularly in larger scale commercial litigation and class actions, there are real advantages to undertaking discovery to limit issues in dispute, and the ACLC would have concerns over any measure to introduce prohibitive barriers to utilising discovery processes in such cases.

Furthermore, in support of retaining access to discovery processes, judicial case management over the discovery process can help to regulate the process to ensure that costs are not disproportionate to the information required to determine the claim, and thereby avoid any abuse of process.

Draft Recommendation 11.6

All courts should have practice guidelines and checklists which cover ways to use information technology to manage the discovery process more efficiently. All jurisdictions should ensure that, at a minimum, these checklists cover:

- **scope of discovery and what constitutes a reasonable search of electronic documents**
- **a strategy for the identification, collection, processing, analysis and review of electronic documents**
- **the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data**
- **a timetable and estimated costs for discovery of electronic documents**
- **an appropriate document management protocol.**

The ACLC supports draft recommendation 11.6.

Draft Recommendation 11.7

Court rules and practice notes should facilitate and promote the consideration by courts and parties of the option of the early exchange of critical documents, drawing on the practice direction used in the Supreme Court of Queensland's Supervised Case List.

The ACLC supports draft recommendation 11.7.

Draft Recommendation 11.8

Jurisdictions that have not adopted key elements of Part 31 of the Uniform Civil Procedure Rules (NSW) (or similar) should consider implementing similar rules, including:

- **a requirement on parties to seek directions before adducing expert evidence**
- **broad powers on the part of the court to make directions about expert evidence, including to appoint a single expert or a court appointed expert.**

The ACLC supports draft recommendation 11.8.

Chapter 18: Private funding for litigation

Draft Recommendation 18.1

Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.

- **The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.**

The ACLC supports draft recommendation 18.1.

A damages-based billing method or contingency fee arrangement promotes efficiency in the conduct of matters and encourages earlier resolution of matters as there is a risk that if the lawyers lose the case, they will not be paid for their time or expenses.

Third party litigation funding in Australia is an important vehicle for access to justice for people who otherwise would face prohibitive obstacles to making individual claims against powerful and well-resourced wrongdoers. Litigation funders can charge commissions of up to 40% (including lawyers' fees) of damages received by their clients. The ACLC submits that abolishing the existing prohibition on damages-based fees would open up the litigation funding market and promote competition with funders which will be of benefit to Australian consumers.

The ACLC rejects the argument made by some law firms that the charging of contingency fees gives rise to a greater risk of a conflict of interest as the lawyer has a vested financial interest in the outcome of the litigation. The current mechanism by which lawyers can charge an uplift fee in addition to their ordinary fees upon a successful outcome does not give rise to similar concerns of a conflict of interest. In the ACLC's view, the distinction between conditional billing practices in this regard and contingency fees is not credibly made out.