

# Productivity Commission Inquiry Access to Justice

## Interim Report 8 April 2014

**To**

Law Council of Australia

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## Introduction

The Law Society of Western Australia refers to the Productivity Commission's Interim Report on Access to Justice dated 8 April 2014 (Interim Report).

The Society comments below on the Recommendations referred to in the 'Summary of the Commission's main proposals' (commencing on page 36) and responds to some of the Information Requests.

In addition, the Society makes the following general comments concerning the discussion of family law and the lack of discussion about access to interpreters in the Interim Report.

1. Family law is an important area of civil law in Australia where legal assistance funding falls far short of need.

In chapter 21 (page 619) of the Interim Report, the Productivity Commission notes:

*"In the absence of lawyer assisted advice, family disputes can quickly escalate with adverse consequences for families (child custody and access arrangements and financial arrangements), which, in turn, can result in large costs to families, the justice system and society."*

Further, on the same page it is noted that:

*"A study by PricewaterhouseCoopers (2009) looking at the economic value of legal aid in the context of the family law system, estimated a cost benefit ratio of between 1.60 and 2.25 for every dollar invested in the legal aid system."*

However, throughout the report the Productivity Commission adopts an inconsistent and confusing approach as to whether family law is a subset of civil law or a separate area of the law somehow not covered by the Productivity Commission's terms of reference which, along with criminal law "competes" against civil law matters for funding.

The Society hopes that the Final report will adopt a consistent approach, recognising that family law is a very significant area of civil law that requires review and additional resources in order to address unmet need.

The problems faced by the Family Courts in promoting alternate dispute resolution in an adversarial system where parties have separated due to family violence and where severe power imbalance(s) may exist also need to be recognised and addressed in the Final Report.

2. Although interpreters are required to be provided in Courts, access to interpreters, including interpreters for the deaf, is not provided for pro bono lawyers in civil, including family law matters. Chapter 23 of the report fails to mention this problem at all even though it poses a significant access to justice barrier for affected applicants.

# **The Society's position/comments on the Draft Recommendations referred to in the *Summary of main proposals***

## **1 Many problems permeate both the informal and formal aspects of the system**

### **Consumers lack knowledge about whether and what action to take**

#### *Current problem*

For most individuals and businesses, legal problems arise irregularly. They can lack information on their legal rights and responsibilities, what action to take, or who to consult. A number of organisations currently provide legal information and referral services, which contributes to fragmentation and duplication.

#### *Proposed reform*

Each jurisdiction should have a centralised source of legal information, advice and referrals. The sponsoring organisation needs to be highly visible and be responsible for providing services across a range of telephone, online and print media. (5.1)

#### *Main benefits of change*

Individuals and businesses will be able to access information from a single entry point to determine whether they have a legal problem and be referred to an appropriate service to resolve their legal issue. Consolidation of current services provides potential for reallocation of existing funding to higher priority areas.

### **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 Law Access 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.***

### **COMMENT**

The Draft Recommendation is supported.

## **2 Consumers find it hard to shop around for legal services**

#### *Current problem*

The irregular, subjective and uncertain nature of legal services means that consumers find it hard to shop around and cannot easily compare value for money.

While legal service providers are required to provide an estimate of costs upfront, these can be poorly understood and expected costs can change depending on the nature of litigation. Consumers do not know if the cost estimate is likely to be accurate or reasonable.

*Proposed reform*

A central online portal, which provides consumers with information of typical prices for a range of legal services should be made available in each jurisdiction. (6.3)

Legal service providers should ensure that consumers understand the billing information presented and are informed of any changes when additional services are required. (6.1-2)

*Main benefits of change*

Consumers will be better informed about potential costs prior to engaging a legal professional. Better access to information will improve consumer choice and reduce the transactions costs of engaging legal services providers. Ultimately, greater information may lead to lower prices.

This will ensure that consumers are better informed about the expected and ongoing costs of their legal representation. This regulatory change should improve the competitive functioning of the legal service market, ultimately reducing costs to 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.***

**COMMENT**

The Society agrees with the intent and aim of the Draft Recommendation. The Society supports a harmonised approach.

The *Legal Profession Act 2008 (WA)* currently provides appropriate protection for clients.

**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.***

**COMMENT**

The Draft Recommendation is supported. The Society supports a uniform approach. The current requirements under the *Legal Profession Act 2008 (WA)* work well and provide appropriate protection for clients.

**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.*

## **COMMENT**

The Draft Recommendation is supported, in principle, for greater transparency. However, if data of this kind is able to be obtained, to be reliable it would have to be updated very regularly and it would not take into account the diversity of matters/law practices.

### **Quality is hard to judge**

#### *Current problem*

As one-off users of legal services are common, it is often difficult for them to judge quality.

#### *Proposed reform*

While existing entry restrictions ensure a high standard, training should be modernised and in some instances profession-specific restrictions such as those on advertising and indemnity insurance should be removed. (7.1-3)

#### *Main benefits of change*

Quality of service provision should increase through improved training. Consumers will directly benefit from having resolution options better matched to their dispute. There is potential to lower the regulatory burden on legal professionals in some areas.

### **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.*

## **COMMENT**

The Draft Recommendation is supported.

### **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.*

### **COMMENT**

The Draft Recommendation that bans on advertising be removed is supported but subject to statutory standards for advertising being included in regulatory legislation, not guidelines, so that compliance can be enforced.

### **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.*

### **COMMENT**

The Society does not support this Draft Recommendation.

Of particular concern is the potential effect on local schemes if multi-jurisdictional law practices, in accordance with the National Law, move their professional indemnity insurance arrangements into and out of jurisdictions on a regular basis.

Under the *Legal Profession Regulations 2009* (WA) the Society 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, recognising the public interest.

The stability and viability of a professional indemnity insurance scheme (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.

### **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.*

## **COMMENT**

The Society is aware of a paper on legal services insurance prepared on behalf of the Law Council of Australia in 1998. It is understood that the issue has not since been explored. The need for legal services insurance would appear to have increased over the past two decades with cutbacks in legal aid and the increase in the number of litigants in person, particularly in the Family Court.

In the United Kingdom, Greystoke Insurance has developed relatively wide coverage of an 'after the event' insurance policy. As at the year 2000 approximately 2000 law practices were involved in the delivery of legal services under these policies and in Germany approximately 40% of fees received by lawyers are paid under legal services policies.

The Society would support the exploration of the viability of legal services insurance in today's market. This could be done through the Law Council approaching the Federal government and the Insurance Council of Australia regarding fostering these policies.

### **Consumer redress options need to be more effective**

#### *Current problem*

The powers of complaints handling bodies need to be strengthened to ensure consumers of legal services are protected from wrongdoing.

#### *Proposed reform*

Complaints bodies in each jurisdiction should have consistent investigatory powers and more disciplinary powers in relation to consumer matters. (6.6-8)

#### *Main benefits of change*

By providing consumers an effective avenue for redress, this will ensure legal service providers have appropriate incentives to deter wrongdoing. This allows complaints bodies to exercise their functions more efficiently and effectively.

### **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.***

## **COMMENT**

The Draft Recommendation is supported and it would be helpful to the profession if decisions were published more often than annually; say monthly.

Western Australia does not have assessors. Publication of decisions of Taxing Officers (Court Registrars) is supported.



### **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.***

### **COMMENT**

The Draft Recommendation is supported. The Society supports a uniform approach.

The Legal Profession Complaints Committee in Western Australian already has these abilities eg. to require compensation, a refund of fees, the work to be re-done etc., Failure to comply can be the subject of further disciplinary action.

### **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.***

### **COMMENT**

The Draft Recommendation is supported. The Society supports a uniform approach.

The Legal Profession Complaints Committee in Western Australian already has these powers.

### **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.***

### **COMMENT**

The Draft Recommendation is supported. The Society supports a uniform approach.

The Legal Profession Complaints Committee in Western Australian already has these powers.

## **2 Big potential gains from early and informal solutions**

### **Ombudsmen provide a pathway with negligible cost to complainants**

#### *Current problem*

Many consumers are not well informed of the services that ombudsmen offer in resolving disputes. In some cases, the small scale of ombudsmen can contribute to a lack of visibility.

There is potential to resolve some disputes involving government agencies before they reach ombudsmen.

#### *Proposed reform*

Government and industry should raise awareness of ombudsmen, including among providers of referral and legal assistance services. Governments should look to rationalise the ombudsmen services they fund to improve the efficiency of these services. (9.1-2)

Government agencies should be required to contribute to the cost of complaints lodged against them. (9.3)

#### *Main benefits of change*

Raising the profile of government and industry ombudsmen would promote relatively low-cost dispute resolution options. Greater visibility and use of ombudsmen could reduce the level of unmet legal need.

Government agencies will have incentives to resolve disputes quickly and efficiently, and make more use of internal dispute resolution options when it is more efficient to do so.

### **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.***

#### **COMMENT**

The Draft Recommendation is supported.

### **DRAFT Recommendation 9.2**

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

#### **COMMENT**

The Society supports a review of ombudsmen services but notes that reducing numbers does not necessarily improve efficiency even if costs are reduced.

### **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.*

### **COMMENT**

The Draft Recommendation is supported.

### **Alternative dispute resolution can be effective but not for all**

#### *Current problem*

More legal problems could be resolved through alternative dispute resolution processes.

Consumers who have disputes with government often do not know how the dispute will proceed and what the resolution process entails. Not all government agencies fully exploit opportunities to use alternative dispute resolution when it is appropriate to do so.

#### *Proposed reform*

Courts should continue to incorporate the use of appropriate alternative dispute resolution in their processes and provide clear guidance to parties about alternative dispute resolution options (8.1, 8.5, 12.1)

All government agencies should develop dispute resolution management plans that facilitate clear communication and use of low cost alternative dispute resolution mechanisms, where appropriate. (8.2)

#### *Main benefits of change*

Adopting processes that facilitate greater use of alternative dispute resolution will lower costs and lead to faster resolutions.

Consumers will be better informed of dispute resolution processes with government agencies, including options for resolving disputes through means other than litigation. This will also facilitate transparency within government and make agencies more accountable.

### **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.***

### **COMMENT**

The Society supports the Draft Recommendation. Western Australian courts have already made significant advances in this regard.

### **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.*

### **COMMENT**

The Draft Recommendation is supported. The Society also supports States' equivalent of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.

### **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.*

### **COMMENT**

The Society's view is that this Draft Recommendation is subject to the review proposed by Draft Recommendation 7.1.

### **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.*

### **COMMENT**

The Society agrees that the use of targeted pre-action protocols should be further explored.

## **3 Aspects of the formal system contribute to problems in accessing justice**

### **Tribunals have been accused of 'creeping legalism'**

#### *Current problem*

Tribunals are intended to be a low cost, less formal and more timely way to resolve disputes compared to courts. Outcomes do not always align with these objectives.

#### *Proposed reform*

Tribunals should enforce processes that enable disputes to be resolved in ways that are fair, economical, informal and quick. Restrictions on legal representation should be more rigorously applied. (10.1-2)

### *Main benefits of change*

Parties to disputes will be able to access justice through tribunals in the way they were intended. Improved processes will diminish the need for, and value of, legal representation.

### **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.***

### **COMMENT**

The Society does not agree with the underlying premise that lawyers are an impediment to access to justice. The Society's view is that lawyers should always be permitted to appear; but where there are guidelines as to who can appear the guidelines should be applied consistently.

### **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.***

### **COMMENT**

The Society agrees with the principle in the Draft Recommendation but only in so far as it applies to lawyers, and not "other professionals". "Other professionals" cannot provide legal representation.

### **Court processes have been reformed, but more could be done**

#### *Current problem*

Court processes have significantly changed to improve the efficiency of the litigation process, but there is scope for further reform.

#### *Proposed reform*

All courts should examine their processes to ensure that they are consistent with leading practice in relation to case management, case allocation, discovery and use of expert witnesses. (11.1-6, 11.8-10)

#### *Main benefits of change*

Adoption of leading practice processes will streamline the court system, thereby reducing costs and time associated with litigation.

### **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.*

#### **COMMENT**

The Society does not support the abolition of formal pleadings in all jurisdictions; only in cases when considered appropriate by the judge in consultation with the parties' legal representatives. It is essential that there be a means of knowing the issues.

Otherwise the Society supports the Draft Recommendation.

#### **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).*

#### **COMMENT**

The Draft Recommendation is supported.

#### **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.*

#### **COMMENT**

The Draft Recommendation is supported.

#### **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.*

#### **COMMENT**

The Draft Recommendation is supported.

### **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.*

### **COMMENT**

The Society supports the principle in the Draft Recommendation.

### **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.*

### **COMMENT**

The Draft Recommendation is supported.

### **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.*

### **COMMENT**

The Draft Recommendation is supported.

### **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.*

### **COMMENT**

The Draft Recommendation is supported. A similar procedure already applies in Western Australia (Order 36A of the Supreme Court Rules).

### **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.*

### **COMMENT**

The Draft Recommendation is supported. This procedure is applied in Western Australia.

### **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.*

### **COMMENT**

The Draft Recommendation is supported.

### **The system is adversarial so there is little incentive to cooperate**

#### *Current problem*

The adversarial nature of most court-based dispute resolution means parties and their representatives have few incentives to cooperate or facilitate the early transfer of information.

Parties do not always fully exploit opportunities to resolve their disputes before or during the litigation process.

Parties have little control over the amount of activity undertaken by their opponent and, as a result, little ability to predict potential liability for costs.

Restrictions on costs awards reduces the ability of self-represented litigants and parties who are represented pro bono to meet their legal expenses and reduces their opponents’ incentives to cooperate.



### *Proposed reform*

Courts should facilitate and promote options for the early exchange of critical documents. (11.7)

Where appropriate, costs awards by courts should take into account whether a dispute could have been resolved prior to litigation. (13.1)

Lower-tier courts should award costs based on fixed scales. Higher-tier courts should introduce processes for cost management and capping. (13.2-3)

Self-represented litigants and parties represented who are pro bono should be eligible to seek an award for costs, subject to the cost rules of the relevant court. (13.4-5)

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

### *Main benefits of change*

Facilitating early exchange of information has the potential to reduce the costs and time associated with some litigation processes. It will also help determine whether alternative dispute resolution may be appropriate.

This will create incentives for parties to take genuine steps to resolve disputes early through low-cost and efficient means.

Parties will have greater certainty about their potential cost liability and have more information on which to base their litigation decisions.

This change will remove distortions in the incentives faced by differently resourced parties in making decisions about whether to settle or continue litigation.

### **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.***

### **COMMENT**

The Draft Recommendation is supported subject to the amendments shown below:

*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~~ a 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:***

- *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.***

#### **COMMENT**

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

A fixed scale should not be used because it fails to take into account the individual complexity of cases.

### **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.***

#### **COMMENT**

The Draft Recommendation is supported.

### **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.***

#### **COMMENT**

The Draft Recommendation supported.

In Western Australia this is already the case.

Order 66 Rule 8A of the Rules of the Supreme Court of Western Australia:

- |         |  |
|---------|--|
| O66 R8A | <i>Lawyer acting pro bono, costs in case of</i>  |
| (1)     | <i>In an action or matter in which a practitioner provides free legal services to a party, the party shall be entitled to recover costs in the same manner and to the same extent as if the services were provided for reward.</i> |

- (2) *If an order is made for the payment of the party's costs, the practitioner may recover the amount ordered to be paid in respect of —*
- (a) *fees for the practitioner's services; and*
  - (b) *disbursements incurred by the practitioner on behalf of the party.*

### **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.***

#### **COMMENT**

The Draft Recommendation is not supported. By definition an unrepresented litigant has no legal costs to recover. Disbursements are and should continue to be recoverable.

### **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.***

#### **COMMENT**

The Society supports the Courts having 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.***

#### **COMMENT**

The Society supports the concept but the Draft Recommendation needs to be explored for detail.

Public interest litigation should not be funded by depriving successful public interest litigants from recovering costs.

### **Not all parties are on an equal footing**

#### *Current problem*

Some parties, including many self-represented litigants, do not understand the processes involved in undertaking litigation and appearing in court.

Power imbalances mean that less experienced and/or resourced parties can be disadvantaged in disputes with government and their agencies.

Self-represented litigants can be disadvantaged.

### *Proposed reform*

Courts and tribunals should further develop plain language forms and guides, and should assist self-represented parties to understand time-critical events. (14.1)

Governments and their agencies should be subject to model litigant guidelines. More effort is needed to ensure that model litigant guidelines are adhered to. (12.2)

Self-represented litigants should be better assisted by judges and court staff; consistent rules and guidelines are needed to give them the confidence to assist, while remaining impartial. Lawyers who deal with self-represented litigants also require clearer guidelines on how to simultaneously meet their duties to their client and to the court. Clearer rules on when assistance can be sought from non-lawyers are also required. (14.2-3)

### *Main benefits of change*

Developing such resources will reduce complexity associated with accessing the court system, and will give parties a clearer understanding of the process. In some cases, this will involve reassessing existing case management processes to improve outcomes where self-represented litigants are involved.

Supporting less-resourced parties will promote fairness and equality before the law. There are potential cost savings for governments by more fully exploiting opportunities to resolve disputes as early as possible.

Self-represented litigants will be better supported in the court and tribunal systems. Clear guidelines and rules can make case management more responsive to self-represented litigants.

### **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.***

### **COMMENT**

It is the Society's view that court and tribunal staff should not be involved in providing legal advice or assistance with the running of litigation. Otherwise the Draft Recommendation is supported.

### **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.***

**COMMENT**

The Draft Recommendation is supported.

**DRAFT Recommendation 14.3**

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

**COMMENT**

The Draft Recommendation is not supported.

Assistance for litigants should be provided by lawyers. Self-representation benefits neither the litigant nor the courts. Representation by parties other than lawyers carries certain risks that are not to the advantage of the self-represented litigant or to the Court: see eg Harrington-Smith on behalf of the *Wongatha People v Western Australia* [2002] FCA 871 (4 July 2002)

The Society supports exploring mechanisms through the courts and the government to provide legal representation for litigants and notes the current Commonwealth funded programme for a self-represented litigants' scheme operating in the Federal Court.

**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.***

**COMMENT**

The Draft Recommendation is supported.

**Prices do not always reflect the balance of public and private benefits**

*Current problem*

Court and tribunal fees do not reflect the private benefits to users of the court system and do not provide an appropriate signal for parties to attempt to resolve disputes through alternative means in the first instance.

*Proposed reform*

Court and tribunal fees should be set to recover a relatively high proportion of costs depending on the characteristics of parties and the dispute. Fee waivers should continue to be provided to disadvantaged litigants. (16.1-4)

*Main benefit of change*

*Higher and differentiated fee structures will provide parties with an incentive to resolve disputes informally, and increase the fiscal sustainability of courts and tribunals, while still providing a safety net. Extra fee revenue has the potential to improve court and tribunal services.*

### **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.***

### **COMMENT**

The Society strongly opposes the Draft Recommendation.

### **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.***

### **COMMENT**

The Society strongly opposes the Draft Recommendation.

### **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.***

### **COMMENT**

The Society supports tribunal fees appropriate to the nature of the matter/their jurisdiction but strongly opposes Draft Recommendations 16.1 and 16.2.

#### **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.*

#### **COMMENT**

Conceptually the Society agrees with the Draft Recommendation; subject to its strong opposition to Draft Recommendations 16.1 and 16.2.

#### **Some public benefits are poorly accounted for**

##### *Current problem*

Some disputes that have significant public interest considerations do not proceed to litigation because parties have concerns about liability for adverse costs orders.

While formal resolution of cases with public interest elements can benefit broader society, these benefits are not realised if the costs of litigation are too high for private parties.

##### *Proposed reform*

Courts should grant protective costs orders to parties involved in matters against governments, which are considered meritorious and in the public interest. Courts should outline and adhere to criteria to ensure that these orders are applied in a consistent and fair manner. (13.6)

Governments should establish a public interest litigation fund to pay for any costs awarded against public interest litigants. (13.7)

##### *Main benefits of change*

Extending the use of protective costs orders for cases against governments will ensure matters in the public interest are formally determined. This may also improve incentives for governments to consider early resolution, if appropriate.

Legal disputes that are determined to be meritorious and in the public interest would be insured against adverse costs awards. It is anticipated that the public interest litigation fund would be funded by costs awards from successful cases.

### **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.***

#### **COMMENT**

As previously stated, the Draft Recommendation is not supported. By definition an unrepresented litigant has no legal costs to recover. Disbursements are and should continue to be recoverable.

### **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.***

#### **COMMENT**

As previously stated, the Society supports the Courts having 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.***

#### **COMMENT**

As previously stated, the Society supports the concept but the Draft Recommendation needs to be explored for detail.

Public interest litigation should not be funded by depriving successful public interest litigants from recovering costs. The administration required to co-ordinate Pro Bono assistance programmes and pro bono assistance represent a real cost burden borne by members of the profession who view this work as part of their professional obligation. Precluding public interest litigants from recovering costs in successful matters will act as a disincentive to lawyers who may otherwise undertake pro bono work in the civil jurisdiction.

The disincentive effect will likely be greater for sole practitioners and those from small or medium sized firms. The significant amount of pro bono assistance currently delivered by these groups is not currently properly tracked and recorded due to a lack of resources and reporting systems.



## **Greater use could be made of technological innovations**

### *Current problem*

Opportunities to use technology in the court system to improve access to justice have not been fully exploited.

### *Proposed reform*

Courts should examine opportunities to use technology to facilitate more efficient and effective interactions with users, reduce administrative cost and support improved data collection and performance measurement. (17.2)

### *Main benefits of change*

Improving the use of information technology will improve accessibility and case management. Increases in court fees could be used to fund upgrades to information technology systems.

## **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.***

## **COMMENT**

The Draft Recommendation is supported.

## **4 Assisting consumers to cope with ‘lumpy’ costs**

### **Unbundling legal services would help**

#### *Current problem*

Legal services are generally provided on a ‘full-service’ basis with limited opportunity to purchase discrete task assistance.

#### *Proposed reform*

Governments, in collaboration with legal services providers, should develop a single set of rules to offer consumers the option of purchasing unbundled assistance. (19.1-2)

#### *Main benefits of changes*

Consumers can choose which legal services they want, and can access services from which they would otherwise be excluded.

## **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.*

### **COMMENT**

The Society supports exploring the unbundling of legal services. Unbundling of legal services could potentially provide greater opportunities for pro bono lawyers to provide discrete task assistance where for various reasons they are unable to commit to remaining solicitor on the record for the duration of a matter. The four dot points listed in the Draft Recommendation raise important practical issues for practitioners that need to be carefully considered.

### **DRAFT Recommendation 19.2**

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

### **COMMENT**

The Draft Recommendation is dependant on the outcome of consideration of the issues that need to be addressed in exploring the unbundling of legal services.

### **Private sources of funding are important**

#### *Current problem*

Not all consumers can afford the upfront costs of legal actions. While some forms of billing alleviate this, restrictions on damages-based billing mean some meritorious claims may not be pursued.

Litigation funders are not appropriately regulated. This leaves consumers at risk of potential default.

#### *Proposed reform*

Governments should remove the restriction on calculating lawyers' fees as an agreed share of the amount recovered through legal action, for most civil matters. (18.1)

Litigation funders should be regulated as licensed financial services providers, subject to ethical standards and monitored by the Australian Securities and Investment Commission and the courts. (18.2)

#### *Main benefits of change*

Removing these restrictions can encourage legal professionals to take on more cases. This may lead to more litigation but only where legal professionals consider a case to have merit.

Regulating litigation funders will safeguard consumers from potential defaults or serious misconduct.

### **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.*

#### **COMMENT**

The Society is unable to comment as it is noted that this issue is subject to resolution by the Directors of the Law Council after consideration by constituent bodies.

#### **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.*

#### **COMMENT**

The Recommendation is supported. As a credit provider litigation funding companies should have a financial services licence and consideration of prudential regulation should also be considered.

## **5 Legal assistance services for disadvantaged Australians**

### **General comment on legal assistance services**

The Interim Report explains that total annual Commonwealth and State and Territory legal assistance funding including allocation of PPF monies (Legal Contribution Trust and Public Purposes Trust in Western Australia) amounts to \$735 million per annum.

Page 620 of the Interim Report discusses evidence of cost benefits of Legal Aid funding concluded from various Australian and international studies. However at page 637:

*“As the Attorney-General’s Department stated, the volume of Commonwealth funding for legal assistance services is set through the Budget process and there is no link between the volume of funding and the cost associated with providing specified services. Funding is indexed annually using ‘Wage Cost Index 1’, which is based on 75 per cent of a wage cost factor and 25 per cent of consumer price index (sub. 137). The budgets for legal assistance are not set on the basis of identified legal need and/or who should be entitled to what assistance. (Society’s emphasis). Within this constraint, which services the LACs and the CLCs provide (and the ATSILS and FVPLS, chapter 22), and where they provide them, should be informed by ‘justice gap’ mapping exercises to identify gaps between legal need and available services.”*

And at page 665:

*“While participants to the inquiry have shed light on where there are ‘mismatches’ between the demand for legal assistance and services available, the additional dollars needed to fill these gaps, and the return on any additional funding, is less clear.”*

Information Request 21.4 on page 665 of the Interim Report requests feedback on the extent of, and the costs associated with, meeting the civil legal needs of disadvantaged Australians, and the benefits that would result.

The Society’s view is that the Australian and international evidence canvassed in the Report clearly demonstrates that there is a proven high return on Legal Aid Funding dollars (eg. refer to evidence discussed on page 620 of the Report.)

In the Society’s view the Productivity Commission’s final report needs to use the Law and Justice Foundation’s most recent report (released October 2012) on unmet Legal Need in Australia in order to extrapolate the answer to Information Request 21.4 due to a lack of other more reliable data sources.

The Productivity Commission’s final report should also address the issue of how to better target assistance to applicants for legal assistance suffering from multiple, complex disadvantage. These applicants are very resource intensive posing problems for legal assistance services, pro bono practitioners and the Courts who tend to operate in narrow defined areas. To properly assist these clients the Productivity Commission’s Interim Report notes that a special “joined-up” service approach which includes co-operation with health and disability and social services providers needs to be provided. The Interim Report notes that some CLCS and Legal Aid Commissions are already doing this. More attention needs to be devoted by the Productivity Commission to this important high cost area of legal assistance service delivery and the evidence as to which methods of addressing this problem are most effective.

### **There is scope to improve how governments intervene**

#### *Current problem*

The capacity of legal assistance providers to assist disadvantaged Australians is constrained, including by funding arrangements. Access to legal assistance grants for civil matters is highly restricted.

#### *Proposed reform*

Governments should ‘ earmark’ a specified amount of legal assistance funding for civil matters. (21.1)

#### *Main benefit of change*

Access to legal assistance for civil matters will be improved. This may assist in preventing legal problems from escalating. This in turn will reduce costs to the justice system, and the community more broadly.

### **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.***

### **COMMENT**

The Recommendation is supported in principle. A further recommendation is required to ensure sufficient additional funding is allocated to provide legal assistance for civil law matters. Significant social costs are attached to poor access to justice in the civil sphere. For example, protracted family law disputes have far-reaching social costs which often include adverse inter-generational effects. The report needs to recognise that additional funding is required to address unmet need in civil law including family law, not just a re-allocation of current funding. For example at page 619 the Interim Report notes that:

*In the absence of lawyer assisted advice, family disputes can quickly escalate with adverse consequences for families (child custody and access arrangements and financial arrangements), which, in turn, can result in large costs to families, the justice system and society.*

### **The distribution of funds could be better matched to need**

#### *Current problem*

The Community Legal Services Program funding model does not link needs with services and is not responsive to demographic changes or changes to need.

#### *Proposed reform*

The Commonwealth Government should reform the Community Legal Services Program funding model to be more responsive to legal need and resources should be reallocated accordingly. (21.4)

#### *Main benefit of change*

Legal assistance services will be better targeted to areas of need and the funding model will be able to adapt to changing needs. Reallocation of existing funding will deliver better value for money.

### **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 model currently used by Legal Aid to deliver legal assistance funding.***
- ***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.***

## **COMMENT**

The Productivity Commission notes that community legal centre funding has been distributed on a historical basis rather than reviewed and distributed according to need. The Draft Recommendation proposes a reallocation of existing CLSP funding rather than additional funding. The Interim Report does not properly recognise the significant cost benefits delivered by Community Legal Centres compared to other legal assistance service providers whose operating costs are higher.

Recommendation 21.4 seems to propose that the current CLSP be scrapped and that the existing funds would then be wrapped into the current Legal Aid bundle of money and presumably distributed through Legal Aid Commissions using the current Federal Criteria for distribution of legal assistance dollars from the Commonwealth.

The Society concurs that historical approaches to funding should be reviewed and that legal assistance funding including CLSP funding should be allocated on a needs basis.

However Recommendation 21.4 is opposed on the basis that current funding for community legal services is wholly inadequate to address the unmet legal needs of disadvantaged Australians and a review must envisage not just a re-allocation of existing funds but an increased allocation of funding to community legal services.

### **There is also scope for better targeting of services**

#### *Current problem*

Eligibility criteria for legal assistance are not consistently applied.

#### *Proposed reform*

Eligibility for grants of legal aid should take into account the client's circumstances and the impact of the legal problem on the client and the community more broadly. (21.2)

#### *Main benefit of change*

Eligibility tests would be more transparent and equitable. Services would be better targeted towards disadvantaged Australians.

### **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.***

## **COMMENT**

The Recommendation is supported.

### **Culturally tailored services are essential but need improvement**

#### *Current problem*

There is unmet need for legal assistance among Aboriginal and Torres Strait Islander Australians, particularly in civil and family matters.

#### *Proposed reform*

Funding for Family Violence Prevention Legal Services should be allocated to areas of 'highest need' and the funding allocation model revised to reflect differences in need and service cost across geographic areas. (22.2)

#### *Main benefit of change*

For Aboriginal and Torres Strait Islander Australians, access to justice for civil matters will improve as services are better targeted to fill services gaps and are more efficient.

### **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.***

### **COMMENT**

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

The word "population" is added to the Draft Recommendation. The FVPLS is only funded federally for regional and remote locations and not capital cities. More Aboriginal and Torres Strait Islander people live in capital cities than anywhere else and mainstream services are often not accessible or suitable. For example in Western Australia, the FVPLS Djinda has started up which is providing a much needed service in Perth but the WA Government is funding that and only as a result of constant lobbying.

Regardless the Draft Recommendation cannot be supported without qualification because the current funding for Aboriginal and Torres Strait Islander legal services and family violence prevention legal services is wholly inadequate to address the unmet legal needs of these groups and a review of the current funding model must envisage not just a re-allocation of existing funds but an increased allocation of funding to these services.

### **Pro bono can play a small but important role in bridging the gap**

#### *Current problem*

There are limitations on the quantity and effectiveness of lawyers seeking to provide pro bono services.

### *Proposed reform*

Where possible, barriers should be removed by adopting conflict of interest coordinators, and by all jurisdictions allowing free practising certificates limited to pro bono provision. Pro bono providers should be required to evaluate their programs. (23.1-2, 23.4)

### *Main benefit of change*

The provision of pro bono services will be improved by making the best use of the available capacity of volunteers within the legal profession.

### **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.***

### **COMMENT**

The Draft Recommendation is supported. This is already the position in Western Australia.

### **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.***

### **COMMENT**

The Society supports this suggestion but suggests that improved coordination of pro bono service delivery through bodies such as the Society's Law Access Pro Bono Referral Scheme should be accorded funding priority.

### **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?*

### **COMMENT**

The Society suggests banking and finance would be a priority area and that the remaining questions require more research and consultation with key industries.



### **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.***

#### **COMMENT**

The Draft Recommendation is supported.

### **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?*

#### **COMMENT**

The Society supports this approach as it has led to a significant increase in pro bono service delivery by large law firms in Victoria.

### **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.***

#### **COMMENT**

The Draft Recommendation is supported subject to the provision of necessary funding by State and Commonwealth Governments. Currently the resources available to administer pro bono coordination are so limited and thinly stretched that conducting regular robust independent evaluations of service providers is impossible.

### **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?*

#### **COMMENT**

The Society's view is that pro bono referral agencies such as Law Access in WA should be funded to conduct the administrative task of collecting, reporting on and sharing the data from lawyers and clients with funding bodies and other key stakeholders.

## **6 Steps to understand how the system is functioning**

### *Current problem*

Evaluation of informal resolution services, formal institutions and legal assistance services is poor and does not provide a robust evidence base to determine what is working and where improvements can be made.

### *Proposed reform*

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data that can be used for policy evaluation and research purposes. (24.1-2)

### *Main benefit of change*

Improving the reliability and quality of data collected about the sector's activities will facilitate robust policy evaluation, lead to more evidence-based policy, and help better target government spending.

### **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.***

### **COMMENT**

The Draft Recommendation is supported.

### **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.***

### **COMMENT**

The Draft Recommendation is supported.



Konrad de Kerloy  
**President**

14 May 2014