



Australian Government  
Attorney-General's Department

# A Strategic Framework for Access to Justice in the Federal Civil Justice System

September 2009

*Report by the  
Access to Justice Taskforce  
Attorney-General's Department*



© Commonwealth of Australia 2009

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration, Attorney General's Department, National Circuit, Barton ACT 2600 or posted at <<http://www.ag.gov.au/ccca>>.

ISBN 978 1 921241 91 8

# Contents

|                                                                                        |            |
|----------------------------------------------------------------------------------------|------------|
| <b>Contents</b>                                                                        | <b>iii</b> |
| <b>Foreword</b>                                                                        | <b>ix</b>  |
| <b>Chapter 1: Overview – the scope of the review</b>                                   | <b>1</b>   |
| The federal civil justice system                                                       | 1          |
| Why is access to justice important?                                                    | 1          |
| What is access to justice?                                                             | 3          |
| The traditional view                                                                   | 3          |
| Justice in society                                                                     | 3          |
| Recent history of access to justice reviews                                            | 6          |
| This report                                                                            | 7          |
| Part I: Supply and demand – the empirical basis                                        | 8          |
| Part II: Strategic Framework for Access to Justice                                     | 8          |
| Part III: Supporting the Strategic Framework – specific discussion and recommendations | 8          |
| <b>PART I – SUPPLY AND DEMAND</b>                                                      | <b>9</b>   |
| <b>Chapter 2: The Demand for Justice</b>                                               | <b>11</b>  |
| Executive Summary                                                                      | 11         |
| Overt demand in the federal civil justice system                                       | 11         |
| What types of legal issues do people experience?                                       | 12         |
| Factors influencing whether a person experiences legal issues                          | 14         |
| Who experiences legal issues?                                                          | 14         |
| Impact of particular legal events on the incidence of future events                    | 15         |
| What do people do when they experience a legal issue?                                  | 16         |
| People who took no action                                                              | 17         |
| <i>Reasons for inaction</i>                                                            | 17         |
| <i>The type of legal issue</i>                                                         | 18         |
| <i>Demographic indicators</i>                                                          | 20         |
| People who handled legal events alone                                                  | 20         |
| People who sought assistance with their legal events                                   | 21         |
| <i>Who do people turn to for assistance, and why?</i>                                  | 21         |
| <i>How useful is that assistance?</i>                                                  | 23         |
| <i>Demographic indicators</i>                                                          | 23         |
| <i>How people find out about the assistance available, and how they make contact</i>   | 24         |



|                                         |    |
|-----------------------------------------|----|
| The outcome of legal events             | 26 |
| Resolution                              | 26 |
| Small business – the demand for justice | 27 |
| Conclusion                              | 28 |

## Chapter 3: The Supply of Justice 29

|                                                                          |    |
|--------------------------------------------------------------------------|----|
| Avenues to resolve disputes – the supply of justice                      | 29 |
| a. Advice, support and other personal pathways                           | 30 |
| b. Courts                                                                | 30 |
| c. Administrative law remedies                                           | 31 |
| d. Internal dispute resolution                                           | 31 |
| e. Ombudsmen and External Dispute Resolution (EDR)                       | 31 |
| f. Alternative Dispute Resolution                                        | 31 |
| g. Family Dispute Resolution Services                                    | 32 |
| Some types of dispute are better suited to certain methods of resolution | 32 |
| a. Disputes where there is a continuing relationship                     | 32 |
| b. Consumer disputes                                                     | 32 |
| c. Business disputes                                                     | 33 |
| d. Employment disputes                                                   | 33 |
| e. Administrative law disputes                                           | 33 |
| f. Native title disputes                                                 | 34 |
| Costs of the Commonwealth Justice System                                 | 34 |
| The entire federal civil justice system                                  | 34 |
| <i>Cost per sector</i>                                                   | 36 |
| <i>Cost to Commonwealth by type of service</i>                           | 36 |
| The cost to the individual of accessing the justice system               | 40 |
| <i>Free services</i>                                                     | 40 |
| <i>Cost of legal representation</i>                                      | 40 |
| <i>Legal aid and legal assistance</i>                                    | 42 |
| Cost recovery in the federal civil justice system                        | 44 |
| <i>A snapshot of the present</i>                                         | 45 |
| <i>Cost recovery policy considerations</i>                               | 46 |
| <i>Designing and funding a federal civil justice system</i>              | 47 |
| <i>Cost recovery in the federal civil justice system</i>                 | 47 |
| <i>The overseas experience</i>                                           | 51 |
| Conclusion: Lessons from the supply side                                 | 52 |

|                                                                                               |               |
|-----------------------------------------------------------------------------------------------|---------------|
| <b>Chapter 4: Conclusions about Access to Justice</b>                                         | <b>55</b>     |
| The justice system is in good shape                                                           | 55            |
| Key conclusions about areas for enhancement or reform                                         | 55            |
| The need for a system-wide perspective                                                        | 56            |
| Major implications for the justice system                                                     | 57            |
| <br><b>PART II – STRATEGIC FRAMEWORK FOR ACCESS TO JUSTICE</b>                                | <br><b>59</b> |
| <b>Chapter 5: An Access to Justice Framework</b>                                              | <b>61</b>     |
| The Access to Justice Principles                                                              | 62            |
| Accessibility                                                                                 | 62            |
| Appropriateness                                                                               | 62            |
| Equity                                                                                        | 62            |
| Efficiency                                                                                    | 63            |
| Effectiveness                                                                                 | 63            |
| The Access to Justice Methodology                                                             | 63            |
| How does the triage system work?                                                              | 66            |
| How they work – the Access to Justice Recommendations                                         | 68            |
| Case studies                                                                                  | 69            |
| Debt recovery                                                                                 | 69            |
| Improving Government decision making                                                          | 69            |
| Improved case management                                                                      | 70            |
| The meritorious defendant                                                                     | 71            |
| The way forward                                                                               | 71            |
| Justice system statistics                                                                     | 72            |
| Data requirements                                                                             | 73            |
| The Federal dimension                                                                         | 73            |
| <br><b>PART III – SUPPORTING THE STRATEGIC FRAMEWORK</b>                                      | <br><b>75</b> |
| <b>Chapter 6: Information about the law</b>                                                   | <b>77</b>     |
| No wrong number, no wrong door – improving access to information for people with legal issues | 79            |
| Direct engagement                                                                             | 81            |
| Collaboration between service providers                                                       | 82            |
| Access to legislation                                                                         | 85            |



|                                                                                         |           |
|-----------------------------------------------------------------------------------------|-----------|
| <b>Chapter 7: Non-court models of dispute resolution</b>                                | <b>87</b> |
| Consumer Disputes                                                                       | 88        |
| External Dispute Resolution                                                             | 88        |
| The Trade Practices Act as a foundation for resolving consumer disputes                 | 90        |
| Internal Complaint Mechanisms                                                           | 91        |
| Alternative Dispute Resolution                                                          | 92        |
| Family Dispute Resolution Services                                                      | 94        |
| Use of ADR by the Commonwealth                                                          | 95        |
| ADR and litigation                                                                      | 96        |
| <b>Chapter 8: Court based dispute resolution</b>                                        | <b>98</b> |
| The federal courts and access to justice                                                | 98        |
| The role of the courts in the federal civil justice system                              | 99        |
| The current picture                                                                     | 100       |
| <i>General federal law (Federal Court of Australia and Federal Magistrates Court)</i>   | 101       |
| <i>Family Law (Family Court of Australia and Federal Magistrates Court)</i>             | 102       |
| Resolving disputes better                                                               | 103       |
| Early and proportionate exchange of information and evidence                            | 103       |
| <i>Pre-action protocols and pre-trial examinations</i>                                  | 103       |
| <i>Discovery</i>                                                                        | 105       |
| Redesigning court procedures to ensure all steps in the process are aimed at resolution | 106       |
| <i>Active case management</i>                                                           | 106       |
| <i>Encouraging active case appraisal</i>                                                | 108       |
| <i>A case management approach – what we should expect from judges</i>                   | 109       |
| <i>Case management – fast track</i>                                                     | 110       |
| <i>Resolving disputes at the lowest appropriate level</i>                               | 110       |
| Specific types of litigants and litigation                                              | 111       |
| Self-represented litigants                                                              | 111       |
| <i>Case management pathways</i>                                                         | 111       |
| Public interest litigation and class actions                                            | 112       |
| <i>Cost barriers in public interest and discrimination matters</i>                      | 112       |
| <i>Class actions</i>                                                                    | 114       |
| Litigants imposing disproportionate costs                                               | 117       |
| <i>Vexatious litigants</i>                                                              | 117       |
| <i>Unmeritorious self-represented litigants</i>                                         | 118       |
| <i>Mega-litigation</i>                                                                  | 118       |

|                                                                           |            |
|---------------------------------------------------------------------------|------------|
| <b>Chapter 9: Costs</b>                                                   | <b>119</b> |
| The current picture                                                       | 119        |
| The need for more comprehensive data on costs in the civil justice system | 119        |
| <i>The apportionment of costs—costs to the Commonwealth Government</i>    | 120        |
| <i>Cost to the individual</i>                                             | 121        |
| Cost recovery                                                             | 122        |
| Transparency – legal fees                                                 | 124        |
| Advertising                                                               | 124        |
| Consistent cost disclosure rules                                          | 124        |
| Exchange of litigation budgets                                            | 125        |
| Event billing: Commonwealth legal services                                | 127        |
| <b>Chapter 10: Administrative Law</b>                                     | <b>129</b> |
| The role of administrative law in Australia’s civil justice system        | 129        |
| Administrative law generally                                              | 129        |
| The role of administrative law in promoting access to justice             | 130        |
| Improved primary decision-making                                          | 130        |
| Charter of Good Administration                                            | 130        |
| Agency cost incentives                                                    | 134        |
| Introducing robust feedback mechanisms – continuous improvement           | 135        |
| Specific agency and jurisdictional issues                                 | 137        |
| Improving external merits review processes                                | 138        |
| <b>Chapter 11: Legal Assistance</b>                                       | <b>139</b> |
| National coordination of legal assistance service provision               | 140        |
| Promoting early intervention by legal assistance services                 | 141        |
| ADR                                                                       | 144        |
| Duty Lawyers and advice services at courts                                | 145        |
| Legal Assistance services in regional, rural and remote Australia         | 146        |
| Funding                                                                   | 146        |
| <b>Chapter 12: Building Resilience</b>                                    | <b>147</b> |
| The current picture                                                       | 147        |
| Building resilience in the justice system                                 | 149        |
| The Legal Profession                                                      | 149        |
| <i>Legal education</i>                                                    | 149        |
| <i>Regulating the legal profession</i>                                    | 150        |
| <i>Enhancing the profession’s contribution to access to justice</i>       | 151        |



|                                                                                |            |
|--------------------------------------------------------------------------------|------------|
| Post-resolution support                                                        | 151        |
| Federal Justice Roundtable                                                     | 152        |
| Recognising diversity                                                          | 153        |
| Meeting the justice needs of Indigenous Australians                            | 155        |
| Building resilience in the community                                           | 156        |
| Conflict resolution                                                            | 156        |
| Civics                                                                         | 157        |
| The 2008 Melbourne Declaration                                                 | 158        |
| Social inclusion                                                               | 158        |
| <b>Appendices</b>                                                              | <b>161</b> |
| Appendix A – List of Recommendations                                           | 161        |
| Appendix B – List of Acronyms                                                  | 173        |
| Appendix C – Service Descriptions relevant to Table 3.3, and Figures 3.3 & 3.6 | 175        |
| Appendix D – The Access to Justice Taskforce                                   | 177        |



# Foreword



Access to justice is central to the rule of law and integral to the enjoyment of basic human rights. It is an essential precondition to social inclusion and a critical element of a well-functioning democracy.

I am proud that an accessible and effective federal civil justice system is a key priority of the Rudd Government's agenda for reform.

An effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than

ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the needs of those who require the assistance of the legal system.

While courts are an important aspect of the justice system, there are many situations where courts are the last place people will get the outcome they are looking for to resolve issues. Often a full blown court case will be completely disproportionate to the issues in dispute.

I know from my experiences as a lawyer, Member of Parliament and Attorney-General that some people are intimidated by the justice system, and others feel they don't have sufficient skills to navigate it. I have met many people who have been unable to address a small legal problem before it escalates. Often this is because they don't know what to do or where to go for assistance.

The critical test is whether our justice system is fair, simple, affordable and accessible. It is also important that the system provides effective early intervention to help people resolve problems before they escalate and lead to entrenched disadvantage. People must be able to understand the law if it is to be effective.

In January 2009 I established an Access to Justice Taskforce in my Department to undertake a comprehensive examination of the federal civil justice system with a view to developing a more strategic approach to access to justice issues. This report is the result of their examination of access to justice from a system-wide perspective.

I am releasing the Taskforce's report for public discussion and input. Issues highlighted and the Taskforce's recommendations will be considered by Government departments and agencies, and will assist the Government develop initiatives which appropriately address and improve access to justice for all Australians.

**Robert McClelland**  
ATTORNEY-GENERAL



# Chapter 1: Overview – the scope of the review

## The federal civil justice system

Australia's federal civil justice system encompasses the many institutions and services through which the Commonwealth helps people to resolve civil disputes, and prevent disputes from occurring. It includes:

- the laws and legal frameworks applying in the federal context
- services that provide information and advice in relation to legal problems and events that people might experience, including informing them of their legal rights
- providers of legal and related services, including legal advice, assistance, advocacy, dispute resolution and representation
- primary decision makers/public officials (including ministers) making decisions affecting rights (for example eligibility for benefits, concessions or licenses to carry on a business)
- dispute resolution services that help people negotiate their own solutions such as Family Relationship Services
- complaint handling bodies, including Ombudsmen
- administrative review tribunals, and
- courts.

## Why is access to justice important?

The rule of law is a central feature of a modern democratic society. It is a precondition for a flourishing civil society for people to be able to plan and live their lives as they choose. The rule of law is the fundamental protection that gives people and organisations confidence that the society's rules (laws) will be respected and upheld. This underpins economic and social cooperation.

*“The rule of law is a central feature of a modern democratic society.”*

Maintenance of the rule of law is fundamental to Australia's economy and prosperity. The rule of law frames the relationship between state and society, founded upon an accepted set of social, political and economic norms. A strong rule of law means that a country has less corruption, protected and enforceable legal rights, due process, good governance and accountable government.<sup>1</sup> The World Bank ranks Australia high on the quality of our rule of law,<sup>2</sup> having remained in the 95<sup>th</sup> percentile over the last decade.<sup>3</sup>

The link between the rule of law and economic prosperity is demonstrated by the World Economic Forum's Global Competitiveness index, which uses elements of the rule of law as part of the basic institutional requirements for global competitiveness (elements including the efficiency of the

<sup>1</sup> P Domingo, 'Why the rule of law matters for development', (May 2009) *Overseas Development Institute* 131.

<sup>2</sup> The World Bank Group, *Worldwide Governance Indicators 1996–2008*, Washington, 2008, viewed 17 August 2009, <<http://info.worldbank.org/governance/wgi/index.asp>>.

<sup>3</sup> Ibid.

legal framework, judicial independence, and the protection of property rights). The ‘institutional framework has a strong bearing on competitiveness and growth. It plays a central role in the ways in which societies distribute the benefits and bear the costs of development strategies and policies, and it influences investment decisions and the organization of production’.<sup>4</sup>

There is also a correlation between a weak rule of law and poor socio-economic performance.<sup>5</sup> Difficulties in obtaining access to justice reinforce poverty and exclusion.<sup>6</sup> Maintaining a strong rule of law is a precondition to protecting disadvantaged communities and helping people leave poverty behind. Research has found that improvements in governance that increase the rule of law in a country can be linked to increases in per capita GDP.<sup>7</sup>

*“Maintaining a strong rule of law is a precondition to protecting disadvantaged communities and helping people leave poverty behind.”*

Access to justice is an essential element of the rule of law and supports democracy. Justice institutions enable people to protect their rights against infringement by government or other people or bodies in society, and permits parties to bring actions against government to limit executive power and ensure government is accountable.<sup>8</sup> Continuing improvements in access to justice are important to maintaining a strong rule of law.

People have, and will continue to have, disputes. Mostly these are resolved without resorting to the machinery of formal justice (such as lawyers, courts or dispute resolution services). Access to justice should include resilience: reinforcing and enhancing the capacity of people to resolve disputes themselves. However, the Government has a role in ensuring that there are mechanisms available to resolve disputes lawfully, peacefully and fairly, and to reinforce the fundamental principles that are embodied in laws. An accessible and effective way of resolving disputes is therefore central to the rule of law. Without it, disputes are either unresolved or dispute resolution is driven underground. In either case, the outcome is a loss of confidence in the rule of law and the expectation that society has the capacity to ensure cooperation is respected and rewarded. In this scenario, those with resources or other strengths would tend to prevail, regardless of the fairness of the outcome, depriving people of the enjoyment of legitimate rights and interests and encouraging lawlessness. That has impacts for individuals in respect of immediate disputes, but is more generally damaging on social cohesion and the fundamental basis of the economic cooperation that is the basis of social progress.

*“Mostly disputes are resolved without resorting to the machinery of formal justice (such as lawyers, courts or dispute resolution services).”*

<sup>4</sup> World Economic Forum, *Global Competitiveness Report 2008–2009*, Geneva, 2009, viewed 18 August 2009, <<http://www.weforum.org/documents/gcr0809/index.html>>, 4.

<sup>5</sup> United Nations Development Programme, *Millennium Goals Report 2003*, accessed 17 August 2009, <[http://hdr.undp.org/en/media/hdr03\\_complete.pdf](http://hdr.undp.org/en/media/hdr03_complete.pdf)>.

<sup>6</sup> United Nations Development Programme’s Commission on Legal Empowerment of the Poor, ‘Making the law work for everyone’ (2008) 1, 33.

<sup>7</sup> D Kaufmann and A Kraay, *Governance and Growth: Causality which way? – Evidence for the World, in brief*, Washington, 2003, viewed 18 August 2009, <[http://info.worldbank.org/etools/docs/library/18034/growthgov\\_synth.pdf](http://info.worldbank.org/etools/docs/library/18034/growthgov_synth.pdf)>, 6.

<sup>8</sup> As summarised by Brennan J, ‘judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.’ *Church of Scientology v Woodward* (1982) 154 CLR 24 [70].

## What is access to justice?

### The traditional view

A traditional view is that courts are the central ‘suppliers’ of justice. To some extent that remains true. Courts are ultimately the arbiters of legal issues, able to declare what the law is, what the rights and obligations of parties are and enforce those declarations. Previous waves of reform to access to justice have been based around the courts as the central supplier of justice. The ‘waves’ of justice reform have been described in academic literature as follows:<sup>9</sup>

- **Wave 1.** Access to justice as equal access to legal services (that is, lawyers and legal aid) and courts. It should be achieved by providing financial assistance and other legal aid services.
- **Wave 2.** Access to justice as correcting structural inequalities within the justice system; that is, changing the law, court procedures and legal practice to make access to justice more meaningful. This includes, for example, changing court procedure to make it less traumatic for victims. It also includes improving court processes for resolving disputes—streamlining the civil litigation system. Also ‘de-mystifying’ the law through, for example, plain language drafting and community legal education.
- **Wave 3.** Access to justice as an emphasis on informal justice and its importance in preventing disputes from occurring and escalating—including greater use of non-adversarial alternatives to legal justice, such as alternative dispute resolution (ADR).
- **Wave 4.** Improving access to justice by focusing on competition policy: implementing competition policy in order to allocate access to justice resources, whether formal or informal, as efficiently as possible through market institutions, such as by reforming legal profession rules to lower the cost of legal services.

### Justice in society

The approach taken in this report may be seen as moving forward from the first four waves of reform towards a broader concept of justice. Courts are not the primary means by which people resolve their disputes. They never have been. Very few civil disputes reach formal justice mechanisms such as courts, and fewer reach final determination.

*“Courts are not the primary means by which people resolve their disputes. They never have been.”*

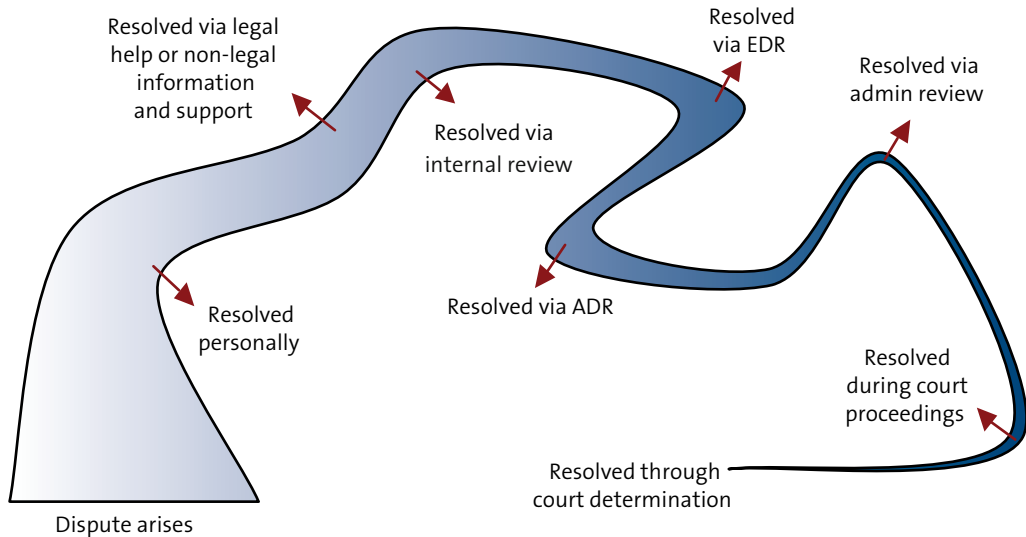
Most disputes are resolved without recourse to formal legal institutions or dispute resolution mechanisms. To improve the quality of dispute resolution, justice must be maintained in individuals’ daily activities, and dispute resolution mechanisms situated within a community and economic context. Reform should focus on everyday justice, not simply the mechanics of legal institutions which people may not understand or be able to afford:

Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.<sup>10</sup>

<sup>9</sup> C Parker, *Just Lawyers: regulation and access to justice*, 1999, p 31.

<sup>10</sup> Marc Galanter, ‘Justice in Many Rooms’ in M Cappelletti (ed.), *Access to Justice and the Welfare State*, 1981, Sijthoff, Alphen aan den Rijn, 147–81 pp 161–2.

**Figure 1.1: The relationship between the number of disputes and method of resolution**



Access to justice is not only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve ‘everyday justice’; the justice quality of people’s social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved. Claims of justice are dealt with as quickly and simply as possible—whether that is personally (everyday justice) informally (such as ADR, internal review) or formally (through courts, industry dispute resolution, or tribunals).<sup>11</sup>

What happens in each of these spheres of justice influences the quality of justice in the others. Improving access to justice requires improving access to formal and informal justice mechanisms *and* improving the justice quality of daily life.<sup>12</sup> A strategic approach highlights the link between the demand for better information and the benefits of tailoring avenues that empower people to resolve disputes—or provide pathways that do not require a lawyer’s assistance. In addition to enhancing people’s capacity to understand their position and where possible, resolving matters themselves—providing a range of mechanisms to resolve disputes also increases access to justice.

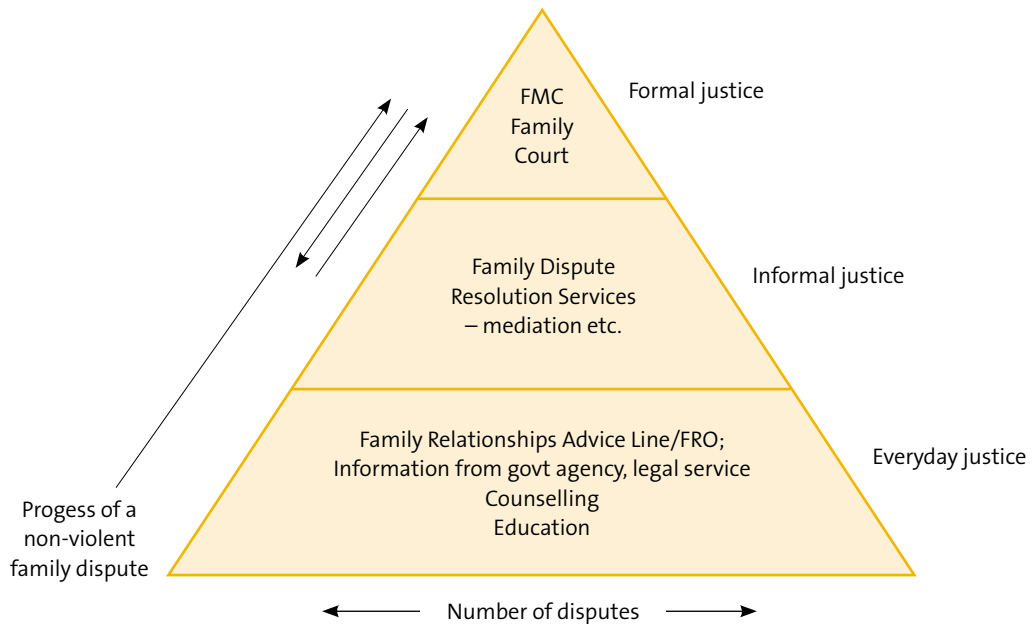
This approach recognises that a focus on formal justice, while important, is by itself not enough. An example of how these lessons apply can be found in recent changes in the family law context. To address family disputes which cannot be resolved between the parties, government intervention is directed towards a number of avenues. These range from targeted and accessible information, through to informal services such as mediation and, for a small number of cases, the formal justice mechanism of court-based dispute resolution. Each institution has its advantages and disadvantages. Courts tend to be more expensive for parties and government, but are well placed to resolve complex and/or violent family disputes. Family relationship services are potentially useful in minimising adversarial mind frames and helping parties that need to maintain ongoing family relationships. For minor disputes, useful and accessible information may be sufficient to guide them in their dispute.

<sup>11</sup> C Parker, *Just Lawyers: regulation and access to justice*, 1999, p 64.

<sup>12</sup> *Ibid* p 67.

For example, Government intervention in a non-violent family dispute focuses initially on improved access to information, to filter some disputes and assist all, then mandate the use of informal mechanisms to reserve the most entrenched disputes (and those involving violence) for the courts. **Figure 1.2** demonstrates how this operates.

**Figure 1.2: The relationship between number of family disputes and method of resolution**



Accordingly, the justice system is the totality of the institutions, agencies and services outlined at the start of this Chapter.

Access to justice has traditionally been seen as access to the courts or the availability of legal assistance, but this is a narrow view. Courts are not the primary mechanism through which people seek to resolve disputes or potential disputes. Legal assistance programs are only one part of a complex system.

Improving access to justice requires a broad examination of how the system and its various institutions influence each other and work together to support or limit people's capacity to address legal problems and resolve disputes. Reforming one or more of the individual institutions or programs might assist current clients or users, but will not provide sustainable access to justice benefits or increase the number or profile of beneficiaries. A whole of system examination is needed.

*“Improving access to justice requires a broad examination of how the system and its various institutions influence each other and work together to support or limit people’s capacity to address legal problems and resolve disputes.”*

## Recent history of access to justice reviews

In the past 15 years there have been several important reviews about access to justice.

### *Access to Justice: An action plan – The Access to Justice Advisory Committee Report (1994)*

In 1993, the then Attorney-General Michael Lavarch and Minister for Justice Duncan Kerr commissioned an advisory committee led by Ronald Sackville QC, later a judge of the Federal Court of Australia, to consider ways in which the legal system could be reformed in order to enhance access to justice and make the legal system fairer, more efficient and more effective. The Committee took a broad view of access to justice and looked at a range of court based and non-court based issues, including regulation of the legal services market, legal aid, ADR, court fees, case management, legislation and provision of information.

Possibly as a result of the wide focus of the report, released in May 1994, the Committee's recommendations in some areas were very broad. For example, recommendations on ADR were limited to:

- that a range of ADR options should be available to courts
- that ADR programs and issues should be the subject of further study.

Similarly, the Committee recommended that the reform of court procedures—including case management—be developed and further researched, but it made no recommendations on any particular case management techniques that could be adopted.

In response to the Report, the Government released a *Justice Statement* in May 1995. It noted that further improvements to the justice system—through the use of ADR and other mechanisms for resolving disputes—should be encouraged. The statement encompassed a wide-ranging national strategy to create a simpler, cheaper and more accessible justice system, and specifically endorsed, among other things, court charters, active management of litigation by courts and tribunals, benchmarking as a means of enabling courts to measure their efficiency and effectiveness, and professional development programs for judges.

### *Access to Justice: Final Report (United Kingdom) (1996)*

A major review of the rules and procedures of civil justice courts in England and Wales undertaken by then Master of the Rolls, the Right Honourable the Lord Woolf (later Lord Chief Justice of England and Wales). The Woolf Report (as it came to be known) was focused on access to justice issues in litigation and the court system. It made detailed recommendations on all aspects of case management and court rules and procedures.

### *Managing Justice: A review of the federal civil justice system – Australian Law Reform Commission Report No 89 (1999)*

The Managing Justice Report was the end product of a comprehensive inquiry by the Australian Law Reform Commission (ALRC) into access to justice. Specifically, the ALRC was to make recommendations with a view to developing a 'simpler, cheaper and more accessible legal system'.<sup>13</sup> The ALRC was charged under its terms of reference with focusing largely on court practices and procedures and case management in Commonwealth courts and tribunals, but the report also

<sup>13</sup> Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Terms of Reference, Report no 89, 1999.



looked at legal assistance—including pro bono work and legal aid commissions (LACs), model professional practice rules for the legal profession, legal costs and legal education.

*Federal Civil Justice System Strategy Paper (2003)*

The Federal Civil Justice System Strategy Paper was prepared by the Attorney-General's Department as a response to the ALRC's Managing Justice Report. The Strategy Paper's stated purpose was to make recommendations for short-term improvements to the federal civil justice system and to raise some longer term issues for further consideration.<sup>14</sup> The Strategy Paper looked at a broad range of access to justice issues, primarily looking at keeping disputes out of court and ensuring that disputes that do reach court are resolved as efficiently and cheaply as possible.

*Civil Justice Review – The Victorian Law Reform Commission Report (2008)*

In May 2004, the Victorian Government released a Justice Statement, which outlined directions for reform of Victoria's justice system. The Justice Statement set out broad directions for both the civil and criminal justice systems, including for the civil justice system that:

- courts be made more accessible, especially for those in regional areas and those from multicultural or Indigenous backgrounds
- technology be used more to improve the efficiency of service delivery and information provision
- civil disputes be able to be resolved earlier by increasing access to out-of-court dispute resolution and more low level intervention, and
- the legal profession be reformed to make it more efficient, accountable and responsive to consumer needs.

Following the Justice Statement, the Victorian Attorney-General Rob Hulls asked the Victorian Law Reform Commission (VLRC) to undertake a comprehensive review of access to justice in Victoria. The VLRC was given broad terms of reference to, amongst other things, 'identify the key factors that influence the operation of the civil justice system', with a particular view to modernising and simplifying the rules of civil procedure, reducing the cost of litigation and increasing the timeliness, transparency, efficiency and accountability of the civil justice system. The VLRC report was released in 2008 and made a large number of recommendations, focusing on court-based reforms with detailed recommendations on pre-trial procedures, case management issues and evidence rules.

## This report

The purpose of this report is to undertake a broad examination of the federal civil justice system. It has begun, in this introduction, with an examination of the importance and scope of access to justice. Part I sets up an empirical picture of access to justice through an analysis of supply and demand. This informs Part II, which outlines the report's Central Recommendation, the adoption of a Strategic Framework for Access to Justice. Part III contains specific discussion and Recommendations drawing on the Strategic Framework.

*“The purpose of this report is to undertake a broad examination of the federal civil justice system.”*

<sup>14</sup> Attorney-General's Department, Federal Civil Justice System Strategy Paper, Executive Summary, <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_FederalCivilJusticeSystemStrategyPaper-December2003](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_FederalCivilJusticeSystemStrategyPaper-December2003)>.

## Part I: Supply and demand – the empirical basis

A framework for access to justice should begin with establishing an empirical base. People experience a multiplicity of legal issues and disputes throughout their lifetime, ranging from the simple to the highly complex. To improve the way Australia's justice system functions and help people resolve their legal issues, governments need to understand:

- what sorts of disputes there are; their nature and number (demand), and
- the options for resolving those disputes and the costs and effectiveness of those options (supply).

This will help identify gaps in the justice system and inform and justify government intervention in the civil justice system.

Part I sets out an empirical basis; an assessment of the supply and demand aspects of the federal civil justice system—who uses the justice system and how; who is excluded from it; and what justice services, programs or institutions are 'supplied' to meet that demand. It identifies a mismatch in that demand and the available supply.

## Part II: Strategic Framework for Access to Justice

Arising out of the demand and supply conclusions, the report proposes, as its central Recommendation, a Strategic Framework to guide future reforms to the justice system and decisions relevant to access to justice (Chapter 5). The Strategic Framework is intended to be a tool for policy makers to ensure better and more integrated access to justice outcomes.

The Central Recommendation informs the specific recommendations contained in Part III but is also intended to encourage innovative policy initiatives, consistent with the Strategic Framework, to improve access to justice.

## Part III: Supporting the Strategic Framework – specific discussion and recommendations

Finally, the report proposes a number of Recommendations that illustrate how the Strategic Framework could positively influence justice reform by Government, courts and service providers. Chapters 6–12 consider access to justice in the following specific contexts:

- information about the law (Chapter 6)
- non-court models of dispute resolution (Chapter 7)
- the courts (Chapter 8)
- costs (Chapter 9)
- administrative law (Chapter 10)
- legal assistance (Chapter 11), and
- building resilience (Chapter 12).

Each Chapter examines an aspect of the justice system, and makes a number of Recommendations consistent with the Strategic Framework.

# Part I

## Supply and Demand





# Chapter 2: The Demand for Justice

## Executive Summary

This Chapter establishes an empirical base for the ‘demand’ for justice—an analysis of the nature and extent of the disputes which arise in society. This includes identifying some of the factors that influence how and why people experience disputes or legal problems that need to be resolved; and an analysis of the usage of the current justice services, such as legal advisers, government and information providers.

The Chapter will begin with a brief examination of overt demand for justice—approaches to service providers. This will be followed by an examination of the following issues:

- what types of legal issues people experience
- factors influencing whether a person experiences legal issues—including the demographic factors at play and the impact of particular legal events on the incidence of future events
- what people do in response to a legal issue—including people who do nothing, those who handle the issue alone and those who seek assistance
- the outcomes of legal events, and
- a brief consideration of demand issues in connection with small business.

In *Chapter 4: Conclusions*, the empirical data gathered in this Chapter in answer to these questions is compared with the material in Chapter 3 on supply to reach conclusions on the current state of access to justice in the federal civil justice system.

As will become clear, the scope of data available on access to justice is uneven, and where available is often difficult to compare effectively—Chapters 2 and 3 use the best available data, but further and better data collection is necessary to build a more complete picture.

## Overt demand in the federal civil justice system

Significant demand for federal civil justice services is shown by the numbers of justice services that are accessed. For example:

- Family Relationship Centres (FRCs) see almost 5000 clients each month
- Community Legal Centres (CLCs) provide over 250,000 Commonwealth funded advice and information services every year
- Indigenous legal aid services provided over 170,000 services in 2007–08
- in 2007–08, LACs provided, in relation to Commonwealth law matters, 579,000 legal information services, over 200,000 advice and assistance services (including duty lawyer services), around 30,000 grants of aid for litigation and over 16,000 grants for representation in family dispute resolution (FDR)
- 29,941 applications for review of government decisions were lodged with the Social Security Appeals Tribunal (SSAT), Refugee Review Tribunal (RRT)/Migration Review Tribunal (MRT), Veterans’ Review Board (VRB) and the Administrative Appeals Tribunal (AAT)

- the Commonwealth Ombudsman received 19,621 approaches and complaints about agencies within its jurisdiction in 2007–08
- the Telecommunications Industry Ombudsman (TIO) received 149,742 complaints in 2007–08
- 4579 matters were commenced in the Federal Court, 20,337 in the Family Court and 77,169 in the Federal Magistrates Court (FMC) in 2007–08, and
- the institutions that make up the justice system field millions of approaches and requests for information and assistance each year—in 2007–2008, these approaches totalled over 55 million.<sup>15</sup>

The economic downturn is likely to mean that more people will be making some contact with the justice system, or an agency that provides information or services relating to legal issues for help. For example:

- bankruptcies are up by 18 per cent
- CLCs are reporting that demand for help in tenancy, welfare and credit matters is up by as much as 25 per cent, and
- LawAccess NSW reports a 30 per cent increase in information and advice sessions concerning credit/debt matters in the last 12 months.<sup>16</sup>

*“The institutions that make up the justice system field millions of approaches and requests for information and assistance each year—in 2007–2008, these approaches totalled over 55 million.”*

## What types of legal issues do people experience?

The Law and Justice Foundation of NSW in its report *Justice Made to Measure*<sup>17</sup> found that 62.4 per cent of the people it surveyed had experienced a civil legal issue in the 12 months prior to the survey, and 8.5 per cent experienced a family legal event. Housing, consumer, government and accident/injury issues were the most common civil law issues that arose.<sup>18</sup> Over 45 per cent of the civil legal events experienced by people related to matters which, in whole or part, were within an area of Commonwealth responsibility. Four of the seven most common civil legal issues reported are issues with an aspect falling within Commonwealth responsibility or arising under Commonwealth law. These were: consumer (22 per cent of all participants), government (19.5 per cent), employment (12.1 per cent) and credit/debt (12.0 per cent).<sup>19</sup> A significant proportion of the family legal events were also matters within Commonwealth responsibility.<sup>20</sup>

<sup>15</sup> Compiled by the Access to Justice Taskforce from information provided by a range of service-providers including legal assistance providers, government agencies, ombudsmen and EDR providers.

<sup>16</sup> Submission by the NSW Legal Assistance Forum to the House of Representatives Inquiry into the impact of the global financial crisis on regional Australia and the role of the Commonwealth Government in ensuring that Australia is equipped to respond, 11 May 2009, <http://www.aph.gov.au/house/committee/itrdlg/financialcrisis/subs/sub148.pdf>

<sup>17</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006. People surveyed came from six local government areas in New South Wales, three metropolitan, one provincial and two rural/remote. Areas were selected having regard to geographic diversity, socioeconomic disadvantage, cultural and linguistic diversity and population size. While the survey was conducted in disadvantaged areas, it should not be assumed that individual participants were disadvantaged.

<sup>18</sup> Ibid p 73.

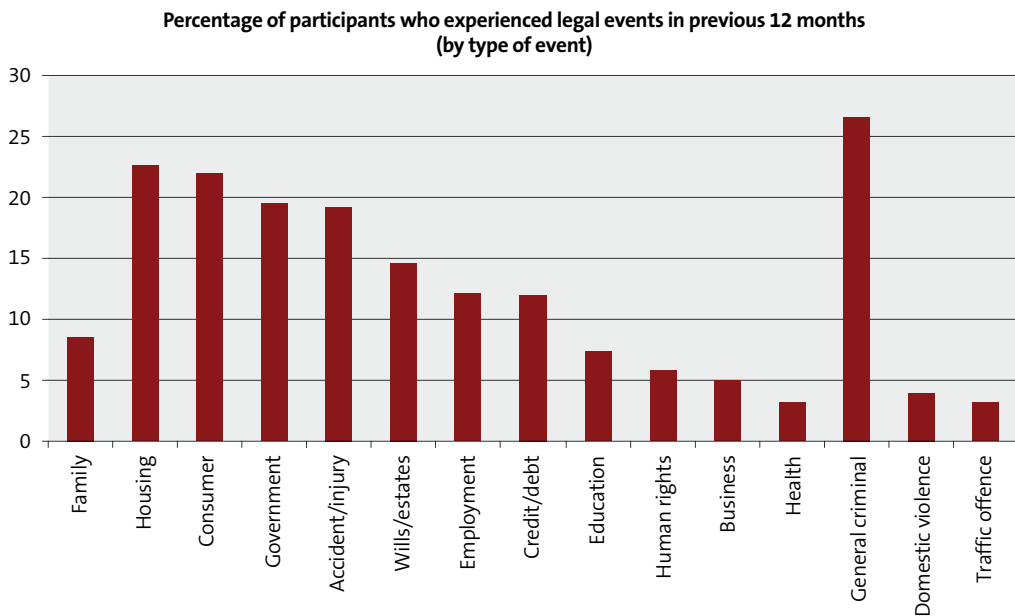
<sup>19</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006 p 47–49. Including consumer, credit/debt, education, employment, government and human rights.

<sup>20</sup> Ibid p 49. Including residence and contact arrangements, child support, divorce/separation and matrimonial property.

A dispute is a conflict or disagreement between two or more people or organisations, whereas a ‘legal issue’ does not require conflict or disagreement. The level of disputes experienced is lower than the level of legal issues more broadly. For example, some of the legal events reported in the NSW survey were relatively benign — in relation to housing, nine per cent of the events related to buying or selling a house.<sup>21</sup> The 2007 *Dispute Resolution in Victoria: Community Survey*<sup>22</sup> found that 35 per cent of Victorians had at least one dispute in the previous 12 months, with 18 per cent of Victorians having had one or more disputes with family, neighbourhood or associations, and 25 per cent with business or government.<sup>23</sup> Significantly, 37 per cent of respondents to a United Kingdom (UK) study reported having problems with local authorities.<sup>24</sup>

Figure 2.1 presents a breakdown of the type of legal events participants in the NSW survey had experienced in the previous twelve months.

Figure 2.1: Types of legal events experienced



This graph shows the percentage of participants who experienced each type of legal event. As some participants experienced no events and others experience a number of events, the numbers do not amount to 100 per cent. *Law and Justice Foundation, 2006.*

<sup>21</sup> Ibid p 74.

<sup>22</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007.

<sup>23</sup> Ibid p i.

<sup>24</sup> Department for Constitutional Affairs (UK), R Moorhead and M Robinson, *A Trouble Shared – legal problems clusters in solicitors' and advice agencies*, DCA Research Series 8/06, 2006, p 35.

## Factors influencing whether a person experiences legal issues

### Who experiences legal issues?

Research has identified that certain demographic factors become consistently observable and statistically significant in relation to the experience and reporting of legal events. Demographic factors may result in a generally higher or lower number of legal issues, but also may be indicative of the likelihood of specific types of legal issues arising.

The Law and Justice Foundation study found that ‘age, country of birth, disability status, personal income and education level were statistically independent predictors of reporting legal events (of any type)’.<sup>25</sup> Of these, there was a clear trend that disability was significant, with the finding that people with a chronic illness or disability have increased vulnerability for experiencing nine out of the 10 most frequently occurring legal issues.<sup>26</sup> Some demographic trends became important in relation to vulnerability to experiencing particular types of events. Indigenous status was reported as significant in relation to consumer, employment, wills and family events.

*“Age has been reliably linked to the incidence of legal events.”*

In relation to other demographic factors, empirical research both in Australia and internationally shows some trends:

- Age has been reliably linked to the incidence of legal events.<sup>27</sup> Australian research shows that a person’s age was relevant to their likelihood of experiencing consumer and credit/debt issues. For example, 15–24 year olds were 7.1 times more likely than over 65 year olds to report a consumer legal event, and vulnerability to a credit/debt legal issue was 8.5 times more likely for 25–34 year olds than over those over 65. Similar trends are apparent in relation to accident and injury, family, education, employment, government and housing legal issues.<sup>28</sup> This is consistent with research from the UK, United States of America (US) and New Zealand which tends to show that younger people tend to experience legal issues at a higher rate than older people.
- gender has not been reliably related to the overall incidence of legal events, but does occur in relation to particular types of legal events—studies indicate that females experience higher rates of family law issues, domestic violence, housing and loan issues, issues concerning government departments, and clinical negligence issues<sup>29</sup>
- As noted above, chronic illness or disability increased vulnerability for experiencing nine out of the 10 most frequently occurring legal issues. People with disability were: 2.1 times more likely than people without a disability to experience a consumer related legal event, 1.7 times more likely to experience a credit/debt legal issue, and 1.5 times more likely to experience an employment related legal event than a person without a disability respectively.

<sup>25</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 79.

<sup>26</sup> Ibid p 90; see also Table 3.6, p 91.

<sup>27</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006 p 26.

<sup>28</sup> Ibid pp 83–90.

<sup>29</sup> Ibid 26 (referring to studies in the UK, New Zealand and US).



- Indigenous status, while not being a general indicator, was significant in relation to several specific types of legal events.<sup>30</sup> These include credit/debt and family and employment related legal issues where Indigenous people were twice as likely report such issues than non-Indigenous people (2.1 times as likely in relation to family events).<sup>31</sup>

There is a complex relationship between a person's socio-economic position and the levels of reporting of legal issues. The data from the Law and Justice Foundation report shows that the likelihood of reporting legal events tended to increase with income and education level.<sup>32</sup> However, there is general evidence that socially excluded or disadvantaged groups are more vulnerable to legal issues than others.<sup>33</sup> Previous studies have shown that unemployed people and homeless people appear to have a higher incidence of legal events. A study done in relation to a group known to be disadvantaged—defined as people living in temporary accommodation—found 'a much higher incidence [of legal events] than the general population' survey (84 per cent versus 36 per cent), supporting the argument that disadvantaged groups are particularly vulnerable to experiencing legal events.<sup>34</sup>

*“There is a complex relationship between a person's socio-economic position and the levels of reporting of legal issues.”*

### Impact of particular legal events on the incidence of future events

Legal issues do not arise in isolation. Nor are they experienced randomly or equally across society. Experiencing one legal issue may increase the likelihood of experiencing further issues because one triggers another, both arise out of the same circumstances or some individuals are vulnerable to experiencing more than one type of legal issue.<sup>35</sup> Each time a person experiences a problem they become increasingly likely to experience additional problems. Many legal issues co-occur, arising in clusters.

Studies have identified different clusters or co-occurrences of types of legal events. The Law and Justice Foundation identified a number of clusters (and sub-clusters), including for example a cluster comprising family, domestic violence, human rights and education events tending to co-occur, with family and domestic violence events forming one sub-cluster, and human rights and education events forming a second sub-cluster.<sup>36</sup>

<sup>30</sup> Ibid pp 83–90.

<sup>31</sup> Note that this relates to civil legal issues. Indigenous people continue to experience disproportionately higher levels of contact with the criminal justice system.

<sup>32</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 82.

<sup>33</sup> P Pleasence, A Buck, N Balmer, A O'Grady, H Genn & M Smith, *Causes of Action: Civil Law and Social Justice – the final report of the first LSRC survey of justiciable problems*, 2004, p 11. The report showed that 66 per cent of lone parents reported problems, while just 33 per cent of married or co-habiting respondents without children did so.

<sup>34</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, pp 27–29.

<sup>35</sup> Ibid p 25.

<sup>36</sup> Ibid p 77. Depending on the type of analysis undertaken the groupings included a broad range of legal event groups, comprising general crime, consumer, government, housing, accident/injury, employment and wills/estates events. A second grouping comprises family, domestic violence, human rights and education events, with family and domestic violence events forming one sub-cluster, and human rights and education events forming a second sub-cluster, and a third economic cluster comprising business, credit/debt and consumer events.

This is consistent with international studies, which have variously identified groupings of legal issues. A UK study in 2004 identified four main clusters of events: a family cluster (comprising domestic violence, divorce, relationship breakdown, children problems); a homelessness cluster (comprising rented housing, homelessness, unfair treatment by police, formal action against the respondent); a health and welfare cluster (comprising clinical negligence, mental health, immigration, welfare benefits); and an economic cluster (comprising consumer problems, money/debt, neighbours and employment problems). An earlier study in 1999 reported correlations between the different pairs of economic problems: money and employment, money and rented accommodation, consumer and owning property, and employment and owning property.<sup>37</sup>

Similarly, some types of issues may be more likely to occur with other legal issues. For example, the Law and Justice Foundation found that 34 per cent of people who reported an employment related legal issue also reported other legal issues. Similarly, 27.7 per cent of people who reported a human rights issue, and 23–24 per cent of people who reported a consumer, credit/debt or government related legal issue also reported another legal issue. In fact, the Foundation notes that a minority of participants accounts for a disproportionate number of the legal events reported:

...the third of participants who reported three or more legal events accounted for more than three-quarters (79.0 per cent) of the 5776 legal events reported. Less than one-quarter of the sample (23.9 per cent) accounted for two-thirds of the events (67.5 per cent) and about one-sixth of the sample (16.4 per cent) accounted for over half the events (54.9 per cent).<sup>38</sup>

This pattern is consistent with international research. For example, of the 37 per cent of respondents to one UK survey who reported one or more justiciable problem, 46 per cent reported two or more, and of those 47 per cent reported three or more. This pattern continued as the number of problems increased, culminating in 88 per cent of respondents who reported eight or more problems reporting nine or more.<sup>39</sup>

## What do people do when they experience a legal issue?

The Law and Justice Foundation of NSW found that 67.2 per cent of people faced with a legal issue took some action to resolve it, either seeking some assistance (51.2 per cent) or handling the legal issue on their own (16 per cent). Just under a third of people took no action (32.8 per cent).<sup>40</sup>

In the *Dispute Resolution in Victoria: Community Survey 2007*, 65 per cent of disputes were resolved without the assistance of a third party legal or non-legal service provider, while 15 per cent involved a third party and 25 per cent were not resolved.<sup>41</sup>

<sup>37</sup> P Pleasence, A Buck, N Balmer, A O'Grady, H Genn & M Smith, *Causes of Action: Civil Law and Social Justice – the final report of the first LSRC survey of justiciable problems*, 2004 and Genn (1999) in Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 25.

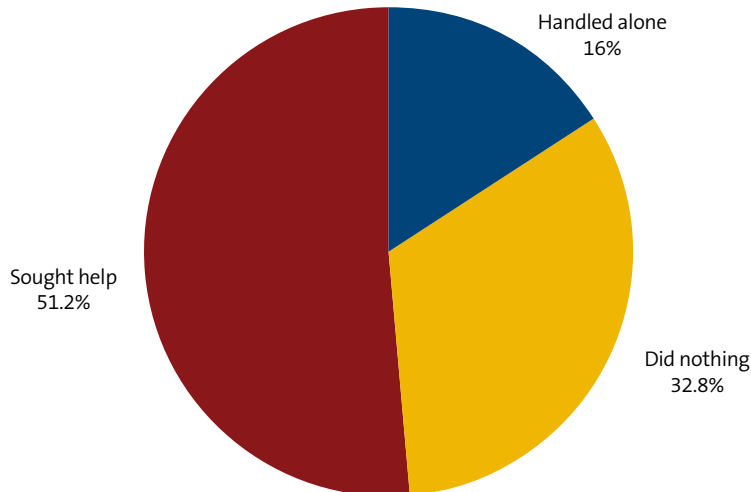
<sup>38</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 72.

<sup>39</sup> P Pleasence, A Buck, N Balmer, A O'Grady, H Genn & M Smith, *Causes of Action: Civil Law and Social Justice – the final report of the first LSRC survey of justiciable problems*, 2004, p 31.

<sup>40</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 93.

<sup>41</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007. NB: 'assistance' was characterised as assistance from a third party legal or non-legal service provider (and therefore did not encompass assistance from people such as family and friends).

Figure 2.2: Individuals' response to legal issues<sup>42</sup>



In the specific area of credit/debt and other financial issues, the 2009 Wesley Report indicated that only about one in four respondents (26 per cent) to the Wesley Mission Survey sought help after experiencing financial concerns, while 47 per cent sought no help at all.<sup>43</sup> Of the 26 per cent who did seek help, the majority turned to a family member (47 per cent) or spouse/partner (29 per cent) for guidance, and only 3 per cent of respondents turned to a professional financial counsellor for assistance.<sup>44</sup> Differences between those that sought financial advice and those that did not was most evident in the single-parent households surveyed, who were 30 per cent more likely to avoid a counsellor in times of financial worry.<sup>45</sup>

### People who took no action

A significant proportion (32.8 per cent) of people surveyed by the Law and Justice Foundation took no action when faced with a legal event.

#### *Reasons for inaction*

People cited a range of reasons for doing nothing in response to a legal issue—the most common reasons relate to lack of knowledge, lack of capacity, disempowerment or exclusion.<sup>46</sup> For example, 26 per cent of people thought action would make no difference or *make things worse*.

<sup>42</sup> Based on data from the Law and Justice Foundation of NSW, 2006.

<sup>43</sup> The Wesley Mission, *Financial Hardship, the Hidden Human Cost*, The Wesley Report, 2009, p 26.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid p 44.

<sup>46</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 94.

Table 2.1: Individuals' reason for doing nothing in response to legal events

| Reason                                                        | %          |
|---------------------------------------------------------------|------------|
| Problem not serious enough/did not realise how serious it was | 28.7       |
| Thought it would make no difference/make things worse         | 26.1       |
| Had bigger problems/too busy/thought it would take too long   | 11.1       |
| Did not know how to get help/could not get there              | 9.5        |
| Waiting it out/hoping it would resolve itself                 | 7.6        |
| Problem resolved before I got around to seeking help          | 6.7        |
| Could not afford it                                           | 3.9        |
| Thought it was my fault                                       | 3.7        |
| No internet access                                            | 1.5        |
| Did not trust anyone/embarrassed                              | 1.2        |
| <b>Total</b>                                                  | <b>100</b> |

Interestingly, while cost influences people's choice of where to seek assistance (see below), it does not appear to greatly influence the choice of whether or not to take action.

The high rate of inaction and pervasive belief that action was (in some form) either not an option or would make no difference suggests there is a need for interventions targeted to increasing the level of awareness and capacity to access information, advice and services.

Doing so could address up to 80 per cent of the stated reasons for not taking action in relation to legal issues.

Similar findings appear in international research. For example, of the respondents to the Continuous English and Welsh Civil and Social Justice Survey, 62 per cent reported that they did not know what their legal rights were relating to the problem when it arose. Further, 69 per cent of respondents stated that they did not know the types of formal processes—like court proceedings and mediation—were sometimes used to deal with the sort of problem they were facing. Importantly, awareness of rights and options increased in line with education and income levels. For example, 49 per cent of those earning £50,000 or more per annum indicated an awareness of their rights, compared with only 24 per cent of those earning £10,000 and less per annum.<sup>47</sup> Further, 50 per cent of those who earn £50,000 and over reported they did not know about the processes for resolving their problem, compared with 79 per cent of those earning £10,000 and less.<sup>48</sup>

### *The type of legal issue*

The research shows that the type of action, or inaction, varies by problem type. For example, people were more likely to do nothing in relation to human rights issues (63.6 per cent) and credit/debt issues (42.3 per cent) than they were in relation to issues surrounding wills or estates. The likelihood of seeking help was higher than average for employment issues (56.6 per cent), but lower than average for consumer (37.3 per cent) or credit/debt legal issues (42.3 per cent).<sup>49</sup>

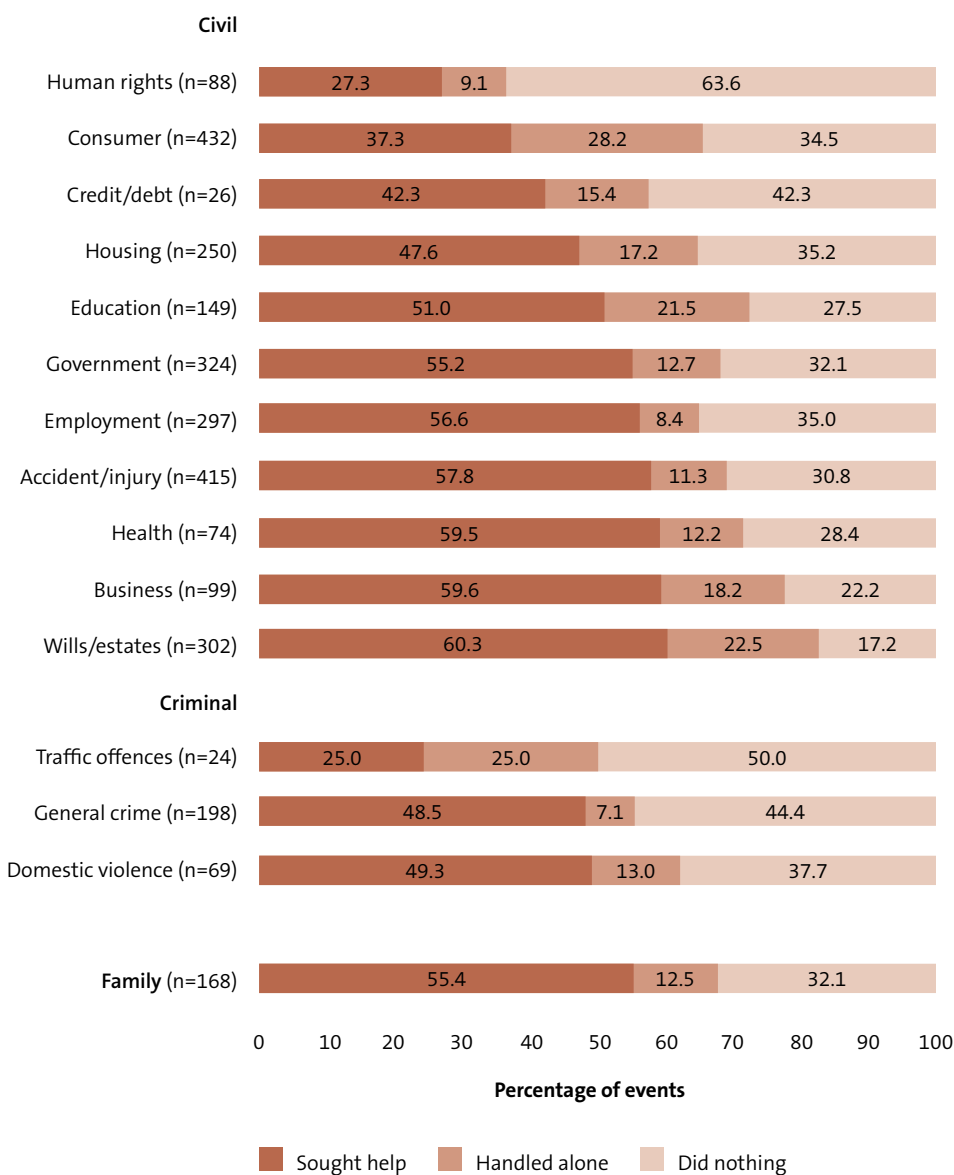
<sup>47</sup> A Buck, P Pleasence and N Balmer, *Education Implications for the English and Welsh Civil and Social Justice Survey*, 2007, pp 4, 22.

<sup>48</sup> Ibid p 26.

<sup>49</sup> Ibid p 99.

Results of the Law and Justice Foundation's survey about action taken in relation to legal events are summarised in the following figure:

**Figure 2.3: Action taken in response to legal events by legal event group, all six LGAs, 2003**



Reproduced from Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas, 2006*.

The findings from a UK survey on justiciable problems suggest that respondents who did not act to resolve their legal issue were most likely to think nothing could be done to resolve their issue if it related to mental health (64 per cent) and discrimination (52 per cent) problems, and least likely to believe nothing could be done to resolve problems regarding personal injury (23 per cent).<sup>50</sup>

### *Demographic indicators*

Indigenous Australians were the group most likely to take no action in response to legal events, doing so for 50.9 per cent of legal events, compared with 32 per cent for non-Indigenous people.<sup>51</sup>

Young people (15–24) were more likely to do nothing—taking no action in response to 41 per cent of legal issues, compared to 25 per cent for people 65 and over.<sup>52</sup> In one UK study, 15 per cent of 18 to 24 year olds surveyed did nothing to resolve their legal problems, and 58 per cent faced their issue without seeking advice.<sup>53</sup> When asked why they took no action, young respondents most commonly said that they thought advice would not alter the outcome.

### **People who handled legal events alone**

The Law and Justice Foundation of NSW reported that 16 per cent of people who experienced a legal issue handled it alone.<sup>54</sup> In the UK, 17.5 per cent of participants in one survey handled their problems alone, without ever seeking advice. In handling problems alone, these respondents most often simply talked or wrote to ‘the other side’ involved in a dispute, and attempted to negotiate a solution.<sup>55</sup> Such strategies are often the best way to proceed, and the most likely way to reach an amicable solution.

However, a concern must be that unless people who handle matters themselves have sufficient information, they may be less able to negotiate an outcome that reflects their legal rights, or might be more willing to accept an unsatisfactory outcome. This is particularly true having regard to the high proportion of reasons given for doing nothing that reflect a lack of knowledge, disempowerment or fear.

In terms of demographic indicators, people over 65 were more likely to try and handle legal issues alone, handling 25 per cent of events alone compared with an average across other age groups of 15.5 per cent.<sup>56</sup> People whose income was more than \$1000 per week are slightly more inclined to handle legal events on their own, doing so for 19.6 per cent of events, compared with an average of 15.4 per cent for lower income groups.<sup>57</sup>

<sup>50</sup> P Pleasence, A Buck, N Balmer, A O’Grady, H Genn & M Smith, *Causes of Action: Civil Law and Social Justice – the final report of the first LSRC survey of justiciable problems*, 2004, p 51.

<sup>51</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 97.

<sup>52</sup> Ibid.

<sup>53</sup> Legal Services Research Centre (UK), *Young People and Civil Justice: Findings from the 2004 English and Welsh Civil and Social Justice Survey*, 2004, p 10.

<sup>54</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 92.

<sup>55</sup> P Pleasence, A Buck, N Balmer, A O’Grady, H Genn & M Smith, *Causes of Action: Civil Law and Social Justice – the final report of the first LSRC survey of justiciable problems*, 2004, p 57.

<sup>56</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 97.

<sup>57</sup> Ibid.

## People who sought assistance with their legal events

Just over half the people surveyed by the Law and Justice Foundation of NSW sought help in response to a legal issue.<sup>58</sup> In the UK, when action was taken to resolve a legal issue, 51 per cent of respondents reported that they sought advice to assist them in the resolution process.

In Victoria, where the Ipsos survey characterised ‘assistance’ as assistance from a third party legal or non-legal service provider (and therefore did not encompass assistance from people such as family and friends), 65 per cent of disputes were resolved without the assistance of a third party legal or non-legal service provider, while 15 per cent involved a third party and 25 per cent were not resolved.<sup>59</sup>

### *Who do people turn to for assistance, and why?*

Demand for legal information is high. Yet people do not seek information from legal sources for their legal problems. Non-legal advisers are the primary providers of help for legal disputes. The Law and Justice Foundation of NSW measured demand in NSW and found that, of the people who sought assistance, 74.4 per cent saw a non-legal adviser.<sup>60</sup> Non-legal professionals were more likely to be consulted first, which is significant given that 78.4 per cent of people only use one adviser. Of the people who saw a non-legal adviser, 24.5 per cent saw a non-legal professional, such as a doctor, accountant, psychologist or counsellor.<sup>61</sup>

*“People do not seek information from legal sources for their legal problems.”*

Only 25.6 per cent used a legal adviser. Of these, 12 per cent used a ‘traditional’ legal adviser (most commonly a private solicitor or barrister) or a friend who happened to be a lawyer (7 per cent). One striking result is that 8 per cent used published sources such as the internet.<sup>62</sup>

This suggests that while there is demand for legal advice, information or assistance with legal issues—noting that 51 per cent of people sought some assistance—there seems to be a mismatch in the services supplied as the overwhelming majority of the relevant ‘supply’ was through non-legal sources. Even in cases where legal assistance was sought and written information was provided, approximately 20 per cent of that written information was books or leaflets (10.6 per cent), websites (6.1 per cent) and kits (1.2 per cent).<sup>63</sup> The quality of published legal information needs to be as high as possible as it is used so often.

Of those surveyed by the Law and Justice Foundation of NSW, 61.8 per cent encountered no barrier in accessing assistance when it was sought. However, 38.2 per cent of people encountered a barrier in seeking assistance, compromising their ability to access the justice system.<sup>64</sup>

<sup>58</sup> Ibid p 99.

<sup>59</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007, p i.

<sup>60</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 103.

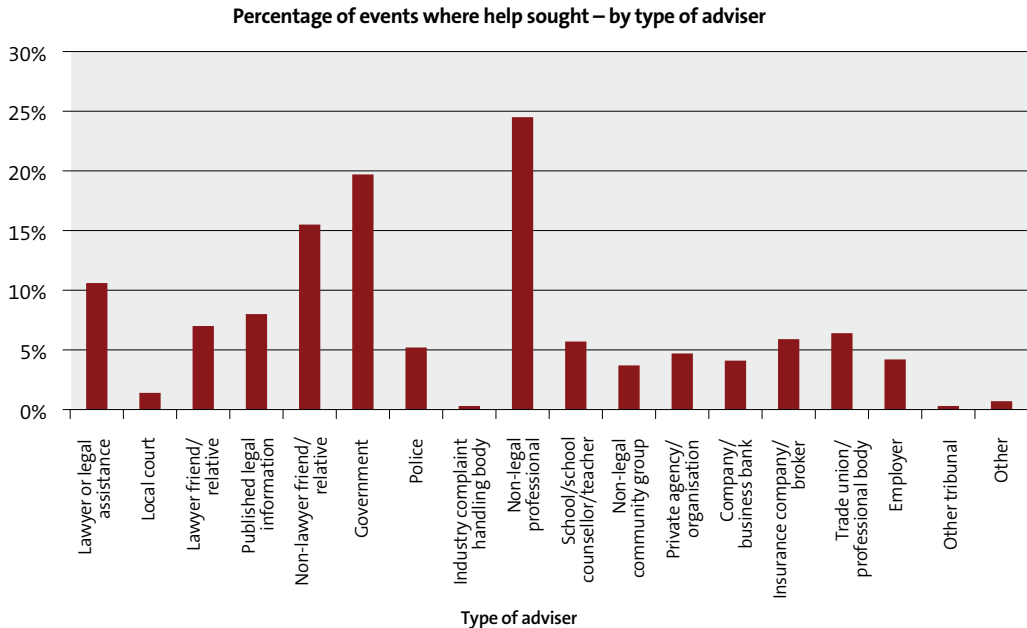
<sup>61</sup> Ibid 104.

<sup>62</sup> Ibid. NB: the private legal advisers were most often approached in relation to legal issues arising from wills/estates – 33.5 per cent of cases (see p 110).

<sup>63</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006 p 108.

<sup>64</sup> Ibid pp 115–116.

Figure 2.4: Type of assistance sought



'Non-legal professional' refers to professionals such as doctors, accountants, psychologists and counsellors. Data from the *Law and Justice Foundation of NSW, 2006*.

The 2007 Victorian Dispute Resolution Survey explored the factors that influenced people's choice of service, having regard to the factor that might encourage the use of an ADR service, and what might deter them from using such a service. The results showed that people were more likely to choose one pathway over another if it is cheaper (37 per cent), easier (24 per cent) and quicker (16 per cent).<sup>65</sup>

People were less likely to use a dispute resolution service based on the perceived cost (20 per cent) or the time involved in dealing with an outside agency (13 per cent).<sup>66</sup> The disadvantages of courts and tribunals that were most frequently cited were cost (52 per cent) and time (37 per cent).<sup>67</sup> Interestingly, concerns about cost and time were greater among university qualified and higher income groups than those that had less education or were from lower income groups.<sup>68</sup>

Time also appears as a significant barrier in the results of the Law and Justice Foundation of NSW survey. The primary barriers reported were the telephone line being engaged or being placed on hold for too long (18.4 per cent of events where help was sought), delays in getting a response (17 per cent), and difficulty in getting an appointment (11 per cent).<sup>69</sup> The lack of local services/not being

<sup>65</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, p 19–20. Note that the results are in terms of being cheaper, easier etc than court, VCAT or Tribunal process or of getting legal advice.

<sup>66</sup> Ibid p 22.

<sup>67</sup> Ibid p 24.

<sup>68</sup> Ibid p 23.

<sup>69</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 116.



able to get to a service was reported as a barrier in relation to 8.1 per cent of events, but higher (10.1 per cent) for traditional legal advisers.

*“The primary barriers reported were the telephone line being engaged or being placed on hold for too long (18.4 per cent of events where help was sought), delays in getting a response (17 per cent), and difficulty in getting an appointment (11 per cent).”*

Although difficulty in understanding the information was a relatively minor barrier in this survey, evidence from the US has previously suggested that many individuals who do not act to resolve their issue fail to understand the advice they are given or are too intimidated or overwhelmed to attempt the recommended action. One US study found that three to six months after phoning a hotline for advice and information on the next step to take, 21 per cent of callers had not acted on the advice they received. About a quarter of the clients who did not act on the hotline’s advice did not understand what they were supposed to do. Another 25 per cent were too afraid to try or lacked the time or initiative. An additional 10 per cent who did not act were told to hire a lawyer and reported that they could not afford or find one. Taken together, these three factors accounted for 60 per cent of the ‘no action cases’ in the sample.<sup>70</sup>

#### *How useful is that assistance?*

Most types of advisers were rated as useful in the majority of cases. For example, private solicitors were rated as useful in 65.7 per cent of cases where they were used and Legal Aid NSW was useful in 66.7 per cent of cases. However, the internet was rated as useful in 89.1 per cent of cases.

This suggests both that people seek and use information, but that direct and targeted assistance is also very useful. It would be wrong to conclude on the basis of the strong rating for the internet (as well as other sources of information) that direct assistance is less effective. This is because, when more than one adviser was used, the internet was rated as the most useful source in 34.6 per cent of cases (still a strong outcome), whereas a private lawyer was rated as the most useful in 72.7 per cent of cases—significantly higher than all other sources.<sup>71</sup>

#### *Demographic indicators*

Looking at the demographic factors and the choices people make:<sup>72</sup>

- people aged 15–24 were less likely to seek help than other age groups, seeking help for 43.2 per cent of legal events compared to an average of 52.4 per cent for other age groups
- Indigenous people were significantly less likely to seek help, seeking help in response to only 36.8 per cent of the legal issues they faced, compared with a non-Indigenous average of 52.1 per cent, and
- people at school or who did not finish school sought assistance in relation to 45 per cent of legal events, compared with 54.4 per cent for people who finished university.

<sup>70</sup> Center for Policy Research (US), *The Hotline Outcomes Assessment Study—Final Report – Phase III: full-scale telephone survey*, 2002, p 67.

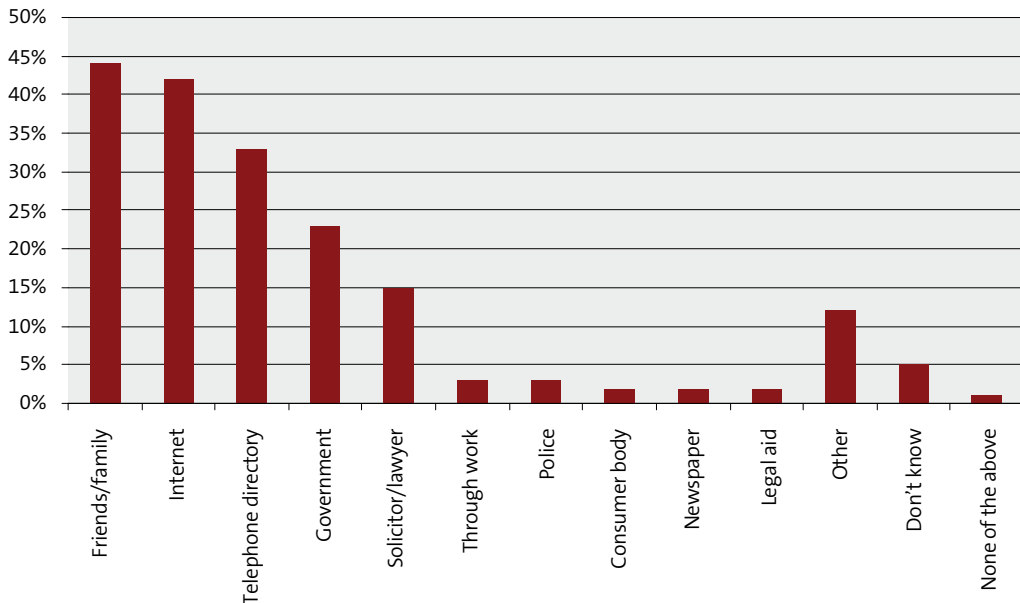
<sup>71</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 106, Table 5.2.

<sup>72</sup> Ibid p 97.

### *How people find out about the assistance available, and how they make contact*

Ipsos reported that the most common ways that people said they would look for assistance is through friends/family (44 per cent) and over the internet (42 per cent). Additionally, 23 per cent of people said they would contact government to find out about the dispute resolution services available.<sup>73</sup>

**Figure 2.5: Methods of finding assistance<sup>74</sup>**



A Customer Satisfaction Survey by LawAccess NSW found that most people found out about LawAccess through the Telstra White/Yellow pages (15.2 per cent), the internet (13.5 per cent), court (10.9 per cent), legal aid (10 per cent) and government (9.7 per cent).<sup>75</sup> Use of the internet had increased from 3.3 per cent in 2004 to 13.5 per cent in 2008. Many people experience 'referral fatigue', dropping out from the information cycle and doing nothing further after an incorrect (or even a correct) referral.<sup>76</sup> The more often a person is referred, the less likely it is that they will follow through the referral. Reasons given for members of the public not following through or seeking information or assistance include being put on hold, delays in getting a response and delays in getting an appointment.<sup>77</sup> This tendency becomes important in considering access to justice especially given the vast majority of people only approach one source of assistance (78.4 per cent of cases).<sup>78</sup>

<sup>73</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, p 19.

<sup>74</sup> Data sourced from Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007.

<sup>75</sup> LawAccess NSW, *Customer survey: monitoring satisfaction*, 2008, p 15.

<sup>76</sup> P Pleasence, A Buck, N Balmer, A O'Grady, H Genn & M Smith, *Causes of Action: Civil Law and Social Justice – the final report of the first LSRC survey of justiciable problems*, 2004, p 119; see also Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 225.

<sup>77</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 116.

<sup>78</sup> *Ibid* p 102.

Assistance is sought in a number of ways, including in person, over the telephone, using the internet and via videoconferencing. Data from government information services indicate that the telephone is still a major contact point for seeking and providing assistance. In 2007–08, Centrelink fielded 32.8 million approaches by telephone compared with 199,900 by email. The Office of the Workplace Ombudsman received over 56,000 phone calls, 1900 ‘live help’ chats and 2400 emails over the same period. Of all approaches to the Commonwealth Ombudsman, 77 per cent were made by telephone.

People can also access information in various formats over the internet. Websites provide information in a variety of styles and formats, often focusing on a particular subject or client group.<sup>79</sup> Some services are also provided electronically, for example the electronic lodgement of complaints with the Commonwealth Ombudsman or applications for legal aid online.<sup>80</sup> Some service providers offer information about legal issues by email, responding to queries from clients over email. Webex/webcam can also be used by organisations to provide information and virtual face-to-face assistance.

Four in five Australians now use the internet.<sup>81</sup> Convenience is a primary factor in Australians’ increased use of the internet, highlighting its potential utility as a way of providing legal information.<sup>82</sup> The internet is now the most common way people last made contact with government—whether to obtain information from, provide information to, or exchange information with government—from 25 per cent in 2006 to 38 per cent in 2008.<sup>83</sup> Numbers continue to increase, although this is slower than expected.<sup>84</sup>

*“Convenience is a primary factor in Australians’ increased use of the internet, highlighting its potential utility as a way of providing legal information.”*

Approaches to service providers by internet are on the rise, although the rate of increase depends on the types of service being accessed.<sup>85</sup> For example, 13 per cent of approaches and complaints made to the Commonwealth Ombudsman in 2007–08 were made electronically, compared with 11 per cent in 2006–07, 7 per cent in 2005–06 and 5 per cent in 2004–05. In the same period, telephone use has fallen slightly from 84 per cent to 77 per cent (however it is still overwhelming the main contact point) while written (8–7 per cent) and in person (2–3 per cent) complaints have remained relatively stable.<sup>86</sup>

In the UK, people aged 18 to 24 appear more likely than older people to contact first advisers in person initially (67 per cent compared to 40 per cent), and are less likely to make contact via the telephone (17 per cent compared to 27 per cent).<sup>87</sup> The age and social participation of an individual

<sup>79</sup> For example, the Law Handbook of Legal Aid South Australia, Australian Competition and Consumer Commission ‘for consumers’ information section.

<sup>80</sup> Such as the Commonwealth Ombudsman online complaint form, which allows electronic lodgement of Ombudsman applications; in 2002 Legal Aid NSW piloted the electronic lodgement of legal aid applications.

<sup>81</sup> Australian Government Information Management Office, *Interacting with Government: Australians’ use and satisfaction with e-government services*, 2008, p 4.

<sup>82</sup> *Ibid* p 6.

<sup>83</sup> *Ibid* p 25.

<sup>84</sup> *Ibid* p 4.

<sup>85</sup> *Ibid* p 41.

<sup>86</sup> Commonwealth Ombudsman, *Annual Report 2007–08*, p 18.

<sup>87</sup> Legal Services Research Centre (UK), *Young People and Civil Justice: Findings from the 2004 English and Welsh Civil and Social Justice Survey*, 2004, p 11.

is also likely to impact on the methods of contact available to them. For example, 62 per cent of 18 to 24 year olds in the UK had access to the internet, compared with 56 per cent of those aged 24 and older. Further, while only 39 per cent of those deemed 'socially isolated' had access to the internet, 71 per cent of non-isolated young respondents did.<sup>88</sup>

## The outcome of legal events

### Resolution

The majority of people surveyed in the Law and Justice Foundation research who had experienced a legal event felt that their issue had been resolved (60.6 per cent), 11.1 per cent were being resolved and 28.3 per cent were unresolved.<sup>89</sup> Very few—roughly 5 per cent—of disputes were resolved through legal proceedings. The majority (44.3 per cent) were resolved by participants on their own.<sup>90</sup> The Foundation reports that:

Interestingly, the odds of resolution were more than twice as high for legal events that participants handled on their own than for events where participants sought help...the highest resolution rate (75.8 per cent) was reported by participants who dealt with the event on their own, while the lowest resolution rate (53.5 per cent) was reported by participants who did nothing. Those who sought help reported a resolution rate of 60.1 per cent.<sup>91</sup>

The Law and Justice Foundation tempers this finding by noting it 'may reflect the possibility that participants tended to handle easier problems on their own, but tended to seek help for more difficult problems'. This caution is valid, but the results do show the value of enabling people to make their own judgements about how to proceed; as any action, even without assistance, is more likely to produce better outcomes than taking no action. It also shows that people are capable of conducting their own triage—and strategies can enhance that capacity for issue selection—which is an important aspect of keeping costs proportionate to the value of the matter.

*“Any action, even without assistance, is more likely to produce better outcomes than taking no action.”*

However, there will always be a need for external assistance and it is crucial that people who need assistance find the right assistance. The Victorian Community Survey found that the overwhelming majority (63–79 per cent depending on the nature of the dispute) of people who used a third party service provider to resolve their dispute believe they got a better outcome through that involvement and would be better able to deal with a similar matter in the future.<sup>92</sup>

Results consistent with this have been found in other research. In a UK study, 23 per cent of participants said they wished they had obtained advice. Of these, 41 per cent said they would have gotten a better outcome, 32 per cent said the issue was more serious than initially thought,

<sup>88</sup> Ibid.

<sup>89</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 134.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid p 142.

<sup>92</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007.

32 per cent thought their issue would have been resolved sooner, 27 per cent thought the other party/parties would have taken them more seriously, 23 per cent thought the situation would be less stressful and 12 per cent said they had difficulty addressing the problem alone.<sup>93</sup>

## Small business – the demand for justice

Businesses also experience a significant volume of disputes.<sup>94</sup> From the best available data, most small businesses tended to resolve matters themselves. The *Dispute Resolution in Victoria: Small Business Survey 2007* found that:

The majority (87 per cent) of serious disputes with customers, suppliers, contractors or employees were taken up directly with the other party involved. For one-fifth (19 per cent) of these disputes information or advice was obtained from a solicitor/lawyer, and for 5 per cent of cases information or advice was obtained from an 'industry body/professional association'.<sup>95</sup>

A similar dynamic is apparent in relation to disputes with government, and with neighbours or the local community. For government disputes, 79 per cent were taken up directly and 33 per cent involved information or advice from a lawyer. For community disputes, 90 per cent were taken up directly and 20 per cent involved the use of a lawyer.<sup>96</sup>

Cost and time are the greatest deterrents to third party involvement.<sup>97</sup> Where a dispute has been resolved, the majority of small businesses considered that the action that helped most was taking the matter up directly with the other party.<sup>98</sup> Seeking advice or information from a lawyer was not considered to be the most helpful in many cases (7 per cent for customer disputes and 13 per cent for government disputes, even though lawyers were contacted in 19 per cent and 33 per cent of cases respectively).<sup>99</sup> However, as with disputes experienced in the general population, this is likely to differ between different types of dispute and different industry sectors.

The use of third parties and ADR in particular for small businesses is low, with the majority of services being contacted by small businesses in less than 5 per cent of cases.

The survey found that, in general, relatively low proportions of small businesses contacted ADR services to help them handle a dispute. The majority of services were contacted by five per cent or less of small businesses at some stage in the past, while Consumer Affairs Victoria was contacted by 17 per cent and the TIO was contacted by eight per cent.<sup>100</sup>

<sup>93</sup> A Buck, P Pleasence and N Balmer, *Education Implications for the English and Welsh Civil and Social Justice Survey*, 2007, p 22.

<sup>94</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Small Business Survey 2007 Report*, 2007, p 9. This survey of 500 owners or operators of Victorian small businesses with fewer than twenty employees found that 37 per cent of Victorian small businesses had at least one dispute in the 12 months prior to the survey. The most common disputes were unpaid debts or late payments owed to the business (15 per cent) or the quality, timeliness or price of goods or services provided by the business (18 per cent).

<sup>95</sup> Ibid p 29.

<sup>96</sup> Ibid pp 33–35. For all disputes, disputes 69 per cent were resolved without the help of a third party – see p 9.

<sup>97</sup> Ibid p 26.

<sup>98</sup> Ibid. Taking up the matter directly with the other party was cited as the most helpful action for 53 per cent of customer disputes (see p 30) and 28 per cent of government disputes (see p 33).

<sup>99</sup> Ibid pp 31–34.

<sup>100</sup> Ibid p 20.

## Conclusion

While this is not a comprehensive picture, it is sufficient to suggest some strategic responses:

- Information failure is a significant issue: people do not understand legal events, what to do or where to seek assistance. People do not seek traditional legal advice, but rely on non-professional sources of advice and generally available information.
- People do not generally seek to use courts or formal justice mechanisms as a means of obtaining assistance in relation to legal issues.
- Legal events are experienced across all parts of society, although they are not experienced randomly. Some legal issues are particularly likely to arise for certain demographic groups, certain legal issues often appear in clusters, and people who have experienced one legal event are significantly more likely to experience further events. This suggests that relatively expensive, inflexible mechanisms that depend upon people actively seeking services (and having the resources and knowledge to do so) may be less appropriate to improve access to justice. Rather, flexibility and early intervention would be key features of a successful response. Such a response would enhance the system's capacity to reach people as they require services and unbundle the range of services to address the problems they experience.

A strategic response would emphasise better information and more accessible sources of information generally, and earlier on. There may be a benefit in promoting proactive strategies and tailored information to meet legal needs, early intervention, accessible legal services, better use of non-legal gateways and increased coordination.

*“A strategic response would emphasise better information and more accessible sources of information generally, and earlier on.”*

# Chapter 3: The Supply of Justice

This Chapter establishes an empirical base for the ‘supply’ for justice—the availability of solutions for the resolution of disputes.

The Government plays a key role in the supply of justice, both directly and indirectly, through the operation of courts, funding of legal assistance providers and establishing the legislative framework for a range of options including some forms of ADR. The level of control held by the Government in this sphere suggests that this is an area where decisions can have significant influence on access to justice.

This Chapter contains an overview of the mechanisms for the supply of justice, and an in-depth analysis of the role played by the Government, focusing on the investments made into the various justice mechanisms.

It begins with an examination of the avenues available to resolve disputes, including the suitability of different mechanisms to different types of dispute. It then looks at the costs of the various avenues including:

- cost to government of providing a service
- private cost to individuals of accessing justice, and
- cost recovery by government.

## Avenues to resolve disputes – the supply of justice

There is a spectrum of mechanisms available for dispute resolution. Some are better adapted to certain types of dispute. To some extent, parties have a degree of choice in how they resolve their disputes. Avenues for resolution include:

|                                 |                               |                                   |                             |              |     |        |
|---------------------------------|-------------------------------|-----------------------------------|-----------------------------|--------------|-----|--------|
| Information, advice and support | Internal complaint mechanisms | External dispute resolution (EDR) | Administrative law remedies | FDR services | ADR | Courts |
|---------------------------------|-------------------------------|-----------------------------------|-----------------------------|--------------|-----|--------|

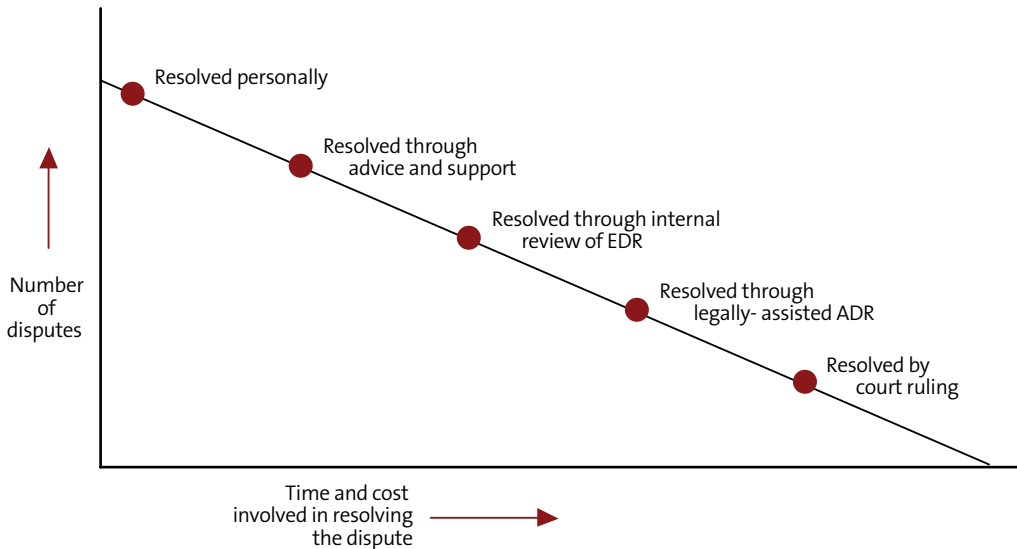
The extent to which people choose any given form of dispute resolution will depend on awareness of options, the time involved, whether they can get an appointment, cost (both the direct cost of the service and related costs such as legal representation) and suitability of the process to the dispute.<sup>101</sup> Currently, the Commonwealth provides much of the cost of courts and tribunals, as well as some advice and support services (which may be means tested). The Commonwealth subsidises some forms of ADR (through FRCs, conciliation through the Human Rights Commission (HRC), the National Native Title Tribunal (NNTT) and ADR conducted by courts and tribunals) but does not contribute to non-court ADR services in many contexts, including commercial disputes. EDR services tend to be funded through contributions from the industry.

In general, the longer a dispute takes to resolve and the further it progresses towards court determination, the higher the cost to the individual and public resources.<sup>102</sup>

<sup>101</sup> See generally Chapter 2.

<sup>102</sup> See Table 3.2 and Figure 3.3, below.

Figure 3.1: Relationship between the number of disputes and the time and cost of resolution by method



#### a. Advice, support and other personal pathways

A range of personal pathways are available to help people resolve their disputes, including negotiation by the parties, assistance by lawyers or other services to help reach an outcome, recourse to the media or the informed decision to take no action.

#### b. Courts

Courts are independent of the executive arm of government and determine disputes by conclusively declaring the state of law between the parties.<sup>103</sup> The decisions of courts are enforceable.

Courts have a role in resolving the most complex and entrenched disputes, and those where the amounts or issues at stake are significant and justify the high cost of litigation. However, the importance of the courts' role is not just limited to commercial litigation. Only courts have the capacity, by a judge's decision, to enforce the law irrespective of the power imbalance that might otherwise exist between the parties. In doing so courts provide the quintessential forum to achieve justice, and consequently have the capacity to not just declare the law in any particular matter before it but also change behaviour. Private informal mechanisms cannot do this:

Sometimes nothing less than court orders are needed to protect minorities, stigmatised groups and people who suffer from discrimination. Settling disputes behind closed doors involving those who repeat harassment or discrimination may not serve the purpose of preventing breach of the law, redressing legitimate grievances and educating the offender and the community.<sup>104</sup>

<sup>103</sup> *Harris v Caladine* (1991) 99 ALR 193, 197–198 per Mason CJ and Deane J; *Re Tracey; Ex parte Ryan* (1989) 84 ALR 1, 39 per Deane J; *New South Wales v Commonwealth (Wheat Case)* (1915) 21 ALR 128, 145 per Isaacs J.

<sup>104</sup> (1992) *Australian Dispute Resolution Journal* 139 at 146.



Unfair outcomes can potentially arise through the use of informal mechanisms due to the private nature of negotiation and the settlement process. Inequalities may not be brought to light or questioned in a system that relies too heavily on informal processes. For this reason, litigation is not only concerned with dispute resolution but also fulfils the important function of dispute prevention and creates binding precedents, so that parties can predict the likely outcomes in their choice whether to pursue disputes.

### **c. Administrative law remedies**

Commonwealth tribunals are independent bodies that review administrative decisions on the merits—standing in the shoes of the original decision maker.<sup>105</sup> Tribunals were originally established in the 1970s to improve government accountability and transparency, provide an informal alternative to judicial review and introduce a tier of administrative review before appealing to court.

### **d. Internal dispute resolution**

Internal review is the review of a decision or situation by the original decision maker or a more senior decision maker within the organisation concerned. It is one option for the early and proportionate resolution of a dispute.

### **e. Ombudsmen and External Dispute Resolution (EDR)**

The Commonwealth Ombudsman responds to enquiries and investigates complaints from people who believe they have been treated unfairly or unreasonably by a government department or agency. The Ombudsman also conducts investigations into public administration, helping to improve government decision-making and administrative processes.

EDR schemes offer cheap and flexible approaches to dispute resolution, as there are no costs to the customer if he/she is unsuccessful. There is a high level of acceptance by industry and consumer groups, with high levels of perceived fairness and satisfaction with the outcomes. Dispute resolution standards are maintained as a condition imposed by an industry regulator. Similar to statutory ombudsmen, industry ombudsmen can undertake systemic investigations, to address issues that may affect a large number or class of customers without the need for each to lodge a complaint.

### **f. Alternative Dispute Resolution**

ADR refers to those processes, other than a court hearing, where an impartial person helps the parties to a dispute resolve the issues between them. ADR options include arbitration, conciliation, mediation, negotiation, conferencing and neutral evaluation.

The potential benefits of ADR include:

- early resolution of disputes and identification of the real issues in dispute
- less adversarial processes for matters that involve ongoing relationships
- ownership of outcomes by parties who have participated in ADR
- flexible remedies, and
- proportionate cost in cases of early resolution.

---

<sup>105</sup> See, for example, *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, 943.

### g. Family Dispute Resolution Services

FDR Services help separating parents resolve disputes over issues such as parenting arrangements, finances and property. The practitioners of FDR Services are independent and impartial, assisting the parties to identify the issues in dispute, develop options and try to reach agreement. Their objective is to do so while ensuring the safety of all family members and maintaining the best interests of the children concerned.

## Some types of dispute are better suited to certain methods of resolution

### a. Disputes where there is a continuing relationship

Disputes where there needs to be (or will be) a continuing relationship are better suited to means of dispute resolution which promote agreement between the parties. For example, family disputes over the care of children have the best outcomes where the parties can focus on the needs of the children in determining the appropriate parenting arrangements, possibly with the assistance of a mediator, rather than having orders imposed judicially. This is because shared care arrangements must be undertaken on a continuing basis, with the ongoing cooperation of the parties. In any dispute over parenting arrangements, the paramount consideration must be the best interests of the child.

FRCs and private FDR practitioners are best placed to resolve low-conflict disputes. These services provide information and advice on relationship and separation issues, including supporting children after separation and co-operative parenting programs. They help people resolve disputes with each other without the need to go to court, over issues such as parenting arrangements, finances and property, where appropriate. They can also refer people to a range of services that can help improve ongoing family relationships.

Family courts are the most appropriate forum for disputes involving family violence, due to the imbalance of power between parties and risk of harm. Courts are obliged to deal with allegations of violence expeditiously.<sup>106</sup> Family courts have introduced multi-disciplinary systems of case management for matters where there are allegations of sexual abuse or serious physical abuse of a child. They are also available where there are allegations of relationship violence or levels of violence such that there are concerns for the safety of children.

### b. Consumer disputes

Evidence suggests that Australians experience a higher incidence of consumer disputes than other types of dispute.<sup>107</sup> At the same time, the Law and Justice Foundation found that people are less likely to take action to try to resolve a consumer-related matter than other types of legal events.<sup>108</sup> If they do take action, people appear most likely to seek help from a friend. Consumer disputes have lower rates of resolution than other types of disputes.<sup>109</sup>

Consumer disputes generally involve a disparity of resources between the consumer and the business. The subject matter of the dispute is generally of low value, but potentially significant to the consumer. Accordingly, less complex, more accessible means of dispute resolution are

<sup>106</sup> *Family Law Act 1975* (Cth), s 60K.

<sup>107</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 74.

<sup>108</sup> *Ibid* p 99.

<sup>109</sup> *Ibid* p 140.

necessary—such as small claims tribunals, and industry ombudsmen. Industry ombudsmen are also appropriate because there is an audience for their Recommendations (the business who has agreed to be bound by determinations and consumer who has brought the complaint), there often is not a clear winner and loser, and there is continuity of decision maker.

### c. Business disputes

Research suggests that for small businesses at least, the primary means of addressing disputes is to handle matters themselves—principally by taking the matter up with the other party.<sup>110</sup> The *Dispute Resolution in Victoria: Small Business Survey 2007 Report*, found that:

The majority of Victorian small businesses (91 per cent) indicated that they would always or mostly try and resolve a significant dispute by themselves, while 49 per cent would always or mostly seek information from business colleagues or associates to help decide how to resolve the dispute...Around one-quarter (24 per cent) said they would seek information from an external agency in an effort to resolve a dispute, however, just over a quarter of Victorian small businesses (28 per cent) indicated that they would never seek information from an external agency.<sup>111</sup>

This might suggest that services to assist small business, for example information services, could be directed to improving strategies for negotiated outcomes, given that is a method of dispute resolution that small businesses tend towards. For complex disputes involving the infringement of rights or large amounts of money, litigation may be the most appropriate way of resolving the dispute. However, given low usage of ADR type services, improving awareness of such services might also assist to improve access to justice. Some types of ADR are better suited to some forms of business dispute. For example, mediation is better suited to complex factual disputes, while neutral evaluation or arbitration may be more suited to legal/construction issues.

### d. Employment disputes

Where an ongoing relationship of employment is involved, disputes are usually best resolved quickly and informally by a flexible mechanism that can customise solutions to address the real concerns of the parties. Concerns about inequality of information and bargaining power are moderated by advice services for parties, such as unions and employer/small business groups. Services like the Workplace Ombudsman—which can provide legal information and advice, are well suited to these matters.

### e. Administrative law disputes

Administrative disputes involve an exercise of statutory discretion rather than assessment of commercial liability. Often, but not always, the applicant has far less expertise than the decision maker.

Provided that the decision maker has exercised powers according to law, intervention by a court is generally unnecessary. Less formal approaches can be more effective, such as statements of reasons, internal review, ombudsmen and tribunals.

<sup>110</sup> See generally Chapter 2.

<sup>111</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Small Business Survey 2007 Report*, 2007, p 21.

## f. Native title disputes

Mediation in native title matters has historically been facilitated by both the NNTT and the Federal Court. The Court's mediation process is backed by the Court's inherent coercive powers. Feedback from stakeholders questions whether NNTT mediation has been effective.<sup>112</sup>

The Government recently introduced the Native Title Amendment Bill 2009 to empower the Federal Court to take responsibility of the management of native title claims from start to finish. This includes deciding who, or what body, is the most appropriate to conduct mediation. The Federal Court's case management powers will help to put pressure on parties where they are deadlocked or unwilling to act in a reasonable manner.

The Federal Court has demonstrated that it is proactive and creative in its approach to native title mediation, as evidenced by its innovative approach in recent consent determinations in South Australia. This more flexible approach should also create efficiencies in the system.

The Federal Court has indicated a number of steps will be taken to ensure more effective management of claims, including:

- making orders in relation to the handling of claims, including orders about reporting dates, case management conferences and issues to be mediated
- reviewing every case before the court
- managing native title cases in a national and coordinated way
- identifying highest priority cases more actively and nationally
- using native title experts within the court, and
- issuing a practice note and holding user group meetings to explain the new approach to managing native title cases.

Native title claims are not amenable to a traditional adversarial approach. Changes to this jurisdiction show a positive shift by courts to accommodate the needs of litigants in particular types of dispute. Justice Mansfield, Native Title List Judge for the Northern Territory and South Australia, outlined the Federal Court's role as being to assist parties to identify the real issues in dispute and bring outstanding claims to finality.<sup>113</sup> This is to be achieved 'as expeditiously and as fairly and economically as possible', shifting from a strict rights-based approach to one that focuses on the broad resolution of all matters in dispute.<sup>114</sup>

## Costs of the Commonwealth Justice System

### The entire federal civil justice system

Cost is a factor in assessing both the demand and supply aspects of access to justice. That in turn should inform the development of the strategic framework for access to justice. Where possible, matters should be directed to the least cost option that produces a fair outcome.

<sup>112</sup> The Australian Human Rights Commission (then the Human Rights and Equal Opportunity Commission) Indigenous and Torres Strait Islander Social Justice Commissioner stated that: 'I am concerned that the tribunal may not be an efficient and effective mediator of native title claims; and that the interests of native title claimants will be adversely affected by the curtailment of the Federal Court's mediation role'; Human Rights and Equal Opportunity Commission, 2007 *Native Title Report*, Report No 2, 2008, p 40.

<sup>113</sup> Mansfield J, Re-thinking the Procedural Framework, speech to the Native Title User Group, 9 July 2008.

<sup>114</sup> Ibid.

The justice system is supported by a substantial investment of Commonwealth funds. In 2007–08, over \$1 billion in Commonwealth funding was committed to the various institutions of the Commonwealth civil justice system—including courts, tribunals, and legal assistance providers.

In 2007–08, \$1.009 billion was spent on maintaining key dispute resolution and governance bodies, as well as on programs intended to enhance access to justice through the provision of information, advice and legal aid (see **Figure 3.2**).

**Table 3.1: Gross Commonwealth Justice System Expenditure 2007–08 to 2008–09**

|                                             | 2007–08              | 2008–09<br>(estimated actual) |
|---------------------------------------------|----------------------|-------------------------------|
| <b>Institutions</b>                         | <b>\$(thousands)</b> |                               |
| High Court                                  | 19,603               | 21,060                        |
| Federal Court                               | 93,546               | 93,537                        |
| Family Court                                | 117,479              | 117,925                       |
| WA – Family Court contribution              | 13,265               | 13,360                        |
| Federal Magistrates Court                   | 73,789               | 74,740                        |
| Administrative Appeals Tribunal             | 32,545               | 32,641                        |
| Social Security Tribunal <sup>^</sup>       | 26,770               | 26,770                        |
| Migration/Refugee Review Tribunals          | 37,871               | 39,897                        |
| Veterans' Review Board                      | 7,944                | 9,045                         |
| National Native Title Tribunal              | 32,970               | 32,156                        |
| Human Rights & Equal Opportunity Commission | 14,980               | 13,550                        |
| Australian Industrial Relations Commission  | 56,820               | 58,780                        |
| Privacy Commissioner                        | 6,900                | 6,440                         |
| Commonwealth Ombudsman                      | 17,880               | 17,737                        |
| Insolvency & Trustee Service Australia      | 36,920               | 36,500                        |
| <b>SUB TOTAL</b>                            | <b>589,282</b>       | <b>594,138</b>                |
| <b>Key Programs<sup>#</sup></b>             |                      |                               |
| Commonwealth Legal Aid                      | 178,580              | 171,607                       |
| Commonwealth Indigenous programs            | 76,740               | 78,149                        |
| Community legal Centres                     | 32,980               | 30,210                        |
| Family Relationship Services program        | 131,791              | 166,384                       |
| <b>SUB TOTAL</b>                            | <b>420,091</b>       | <b>446,350</b>                |
| <b>TOTAL</b>                                | <b>1,009,373</b>     | <b>1,040,488</b>              |

Source: Court Annual Reports 2007–08; relevant Portfolio 2009–10 Budget Statements.

Figures show gross revenues received from Government sources, including resources provided free of charge and liabilities assumed by other Government bodies. High Court and Federal Court figures include estimated pension liabilities (accrued over one year) under the *Judges Pensions Act 1968* (Cth). High Court figures also include remuneration, allowances and long leave expenses payable by the Attorney-General's Department under the *Remuneration Tribunal Act 1973* (Cth) and the *High Court Justices' (Long Leave Payments) Act 1979* (Cth). Income for other non-government sources and revenues returned to the Government are not shown \*\*

<sup>^</sup> SSAR 2008–09 estimated actual finding not available and is assumed consistent with 2007–08 levels.

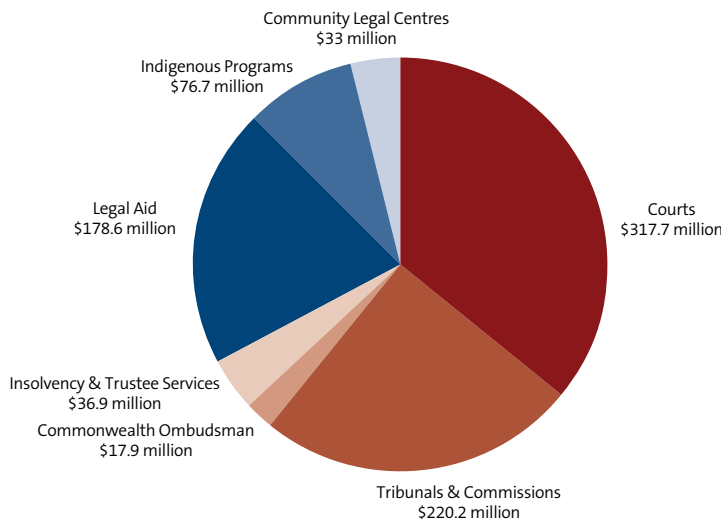
<sup>#</sup> Indigenous programs include Indigenous legal aid and Indigenous Family Violence prevention programs. Funding for Family Relationship Services programs refers to the Attorney-General's Department component only.

While already significant, it is important to note that this does not represent the full cost to Government as it does not include the broader range of costs related to the provision of justice. For instance, there are additional costs borne by agencies involved in responding to complaints about primary decisions, such as mechanisms for the internal review of administrative decisions or for responding to appeals against such decisions in external review tribunals or courts. In addition, legal services expenditure by Government agencies was over \$510m in 2007–08.<sup>115</sup>

#### *Cost per sector*

**Figure 3.2** (below) divides the total cost of the federal civil justice system by sector. Significant sectors include the federal courts (\$317.7m), legal aid (\$178.6m), and tribunals and commissions (\$220.2m).

**Figure 3.2: Commonwealth Government investment in the justice system 2007–08**



#### *Cost to Commonwealth by type of service*

The cost to Government of providing dispute resolution services varies according to the component of the justice system used and, as a general rule, increases in line with the formality and complexity of the services provided and the institutional arrangements used (see **Figure 3.3**).

The provision of information, advice, and counselling services by CLCs, FRCs and legal aid for instance, is relatively inexpensive and can be an efficient means of avoiding or quickly resolving disputes. Formal adversarial proceedings on the other hand, such as hearings before the AAT and the Federal Court, tend to involve the greatest costs to Government due to the significant resources involved.

<sup>115</sup> The Attorney-General announced a review of legal services procurement arrangements on 20 March 2009, which is expected to report in October 2009.

Table 3.2: Cost to Government of Service Provision 2007–08

| Body                                              | Service Type*                            | Government Appropriations [A] | Other Gains (including resources free of charge) [B] | Net Fees Collected (to consolidated revenue) [C] | Net Cost [A+B-C] | Number of Services [D] | Gross Cost per Service [A+B/D] | Net Cost per Service [(A+B-C)/D] | Number of Services per \$1m |
|---------------------------------------------------|------------------------------------------|-------------------------------|------------------------------------------------------|--------------------------------------------------|------------------|------------------------|--------------------------------|----------------------------------|-----------------------------|
| High Court                                        | matters finalised                        | \$13.79m                      | \$5.82m                                              | \$1.125m                                         | \$18.48m         | 1,034                  | \$18,961                       | \$17,870                         | 55.96                       |
| Federal Court                                     | matters finalised                        | \$78.46m                      | \$15.08m                                             | \$7.13m                                          | \$86.42m         | 4,913                  | \$19,074                       | \$17,590                         | 56.85                       |
| Family Court                                      | matters finalised                        | \$129.38m                     | \$-11.90m**                                          | \$1.24m                                          | \$116.24m        | 13,184^                | \$8,911                        | \$8,817                          | 113.42                      |
| Federal Magistrates Court                         | matters finalised                        | \$54.27m                      | \$19.5m^                                             | \$16.89m                                         | \$56.9m          | 38,336#                | \$1,925                        | \$1,484                          | 673.85                      |
| Administrative Appeals Tribunal                   | matters finalised — hearing              | \$19.04m                      | \$0.323m                                             | \$0.167m                                         | \$19.12m         | 1,489                  | \$12,895                       | \$12,839                         | 77.89                       |
|                                                   | matters finalised — before hearing       | \$14.29m                      |                                                      |                                                  | \$14.37m         | 5,690                  | \$2,540                        | \$2,525                          | 396.04                      |
| Social Security Appeals Tribunal                  | matters finalised                        | \$26.77m                      | —                                                    | —                                                | \$26.77m         | 12,343                 | \$2,169                        | \$2,169                          | 460.99                      |
| Veterans' Review Board                            | matters finalised                        | \$7.94m                       | —                                                    | —                                                | \$7.94m          | 4,303                  | \$1,846                        | \$1,846                          | 541.71                      |
| Migration Review Tribunal/Refugee Review Tribunal | matters finalised                        | \$37.82m                      | \$0.056m                                             | \$4.52m*                                         | \$33.35m         | 7,537                  | \$5,025                        | \$4,425                          | 225.99                      |
| Commonwealth Ombudsman***                         | complaints addressed within jurisdiction | \$19.39m                      | —                                                    | —                                                | \$19.39m         | 19,126                 | \$1,014                        | \$1,014                          | 986.18                      |

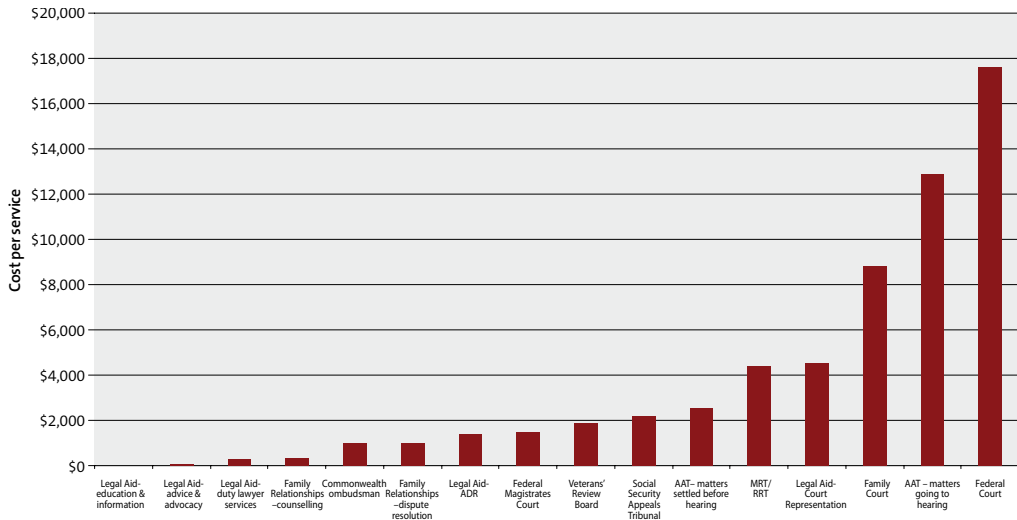
Table 3.2: Cost to Government of Service Provision 2007–08 (continued)

| Body                         | Service Type*                           | Government Appropriations [A] | Other Gains (including resources free of charge) [B] | Net Fees Collected (to consolidated revenue) [C] | Net Cost [A+B-C] | Number of Services [D] | Gross Cost per Service [A+B/D] | Net Cost per Service [(A+B-C)/D] | Number of Services per \$1m |
|------------------------------|-----------------------------------------|-------------------------------|------------------------------------------------------|--------------------------------------------------|------------------|------------------------|--------------------------------|----------------------------------|-----------------------------|
| Legal aid services           | legal education & information provision | \$9.45m                       | —                                                    | —                                                | \$9.45m          | 579,346                | \$16.32                        | \$16.30                          | 61,274.51                   |
|                              | advice & advocacy                       | \$12.75m                      | —                                                    | —                                                | \$12.75m         | 128,195                | \$99.50                        | \$99.50                          | 10,051.26                   |
|                              | dispute resolution services             | \$23.05m                      | —                                                    | —                                                | \$23.05m         | 16,183                 | \$1,424                        | \$1,424                          | 702.01                      |
|                              | client litigation funding               | \$134.86m                     | —                                                    | —                                                | \$134.86m        | 29,843                 | \$4,519                        | \$4,519                          | 221.29                      |
|                              | duty lawyer services                    | \$4.38m                       | —                                                    | —                                                | \$4.38m          | 16,966                 | \$258                          | \$258                            | 3,872.97                    |
| Family Relationship Services | counselling                             | \$26.91m                      | —                                                    | —                                                | \$26.91m         | 76,927                 | \$350                          | \$350                            | 2,858.69                    |
|                              | family dispute resolution               | \$15.09m                      | —                                                    | —                                                | \$15.09m         | 14,810                 | \$1,019                        | \$1,019                          | 981.44                      |

Source: Court, Tribunal and Ombudsman data: Portfolio Budget Statements, and Court, Commonwealth Ombudsman & Tribunal Annual Reports 2007–08; Family Relationship Services: funding for individual Family Relationship Service Provider services – Department of Families, Housing, Community Services and Indigenous Affairs, *Family Relationship Program (FRSP) National Report 2007–08 p5*. Client numbers reflect 2007–08 registered & unregistered client numbers for each service drawn from FRC database. \* Note: Services differ in nature. A description of the different dispute resolution services is attached. # FMC data excludes divorce finalisations which are typically straight-forward and involve minimal resources. Bankruptcy finalisations were note available so the number of filings has been used. ^ Family Court finalisations exclude those matters finalised by consent orders which involve minimal resources. \*\*Reflects the sum of resources provided free of charge to the FMC (-\$19.5m) and judicial pensions (+\$8.13m) \*\*\*Ombudsman figures assign the full cost of the office to addressing complaints due to financial data being reported in aggregate. In reality, significant resources are also directed towards undertaking own motion and major investigations consistent with its statutory role.



Figure 3.3: The Commonwealth Justice System: net cost per service – 2007–08



Care needs to be taken in interpreting **Figure 3.3** as the services shown differ in their nature (see Appendix C). While a court or tribunal process will, if finalised by adjudication, resolve a dispute, there are significant public and private costs incurred as a result of formal court processes. Much of the current focus of justice sector reform is to empower courts to become more active in encouraging parties to work to resolve the dispute as quickly and efficiently as possible, including by using non-court options such as ADR. Other less formal services such as the provision of legal advice and advocacy, if accessed early, are able to resolve many matters that people experience in their day to day lives and can prevent issues from escalating to more serious ones. However, such services will not necessarily resolve all matters, particularly those that are complex.

Placing more emphasis on earlier less formal services as a means of resolving disputes also aligns with the evidence regarding how people currently access, or are prevented from accessing, the civil justice system. As noted in Chapter 2, the Law and Justice Foundation of NSW survey found that:

- People respond to legal problems in different ways. While some are more resilient and able to cope, others let the issue overwhelm them. The study found that assistance in relation to a legal event was sought in only around 50 per cent of cases, with the remainder handling the issue alone (16 per cent) or doing nothing (32.8 per cent).
- Of the 50 per cent of cases where assistance was sought, only 12 per cent sought assistance from traditional legal services, including lawyers and courts. Instead, assistance and advice was most commonly sought from non-legal entities, including friends, relatives, non-legal professionals and government, and
- The most commonly reported barriers to obtaining assistance or advice was not cost, but rather issues regarding the ability to access available services, such as being put on hold and delays in getting a response or appointments.<sup>116</sup>

<sup>116</sup> The issue of cost as an impediment cannot, however, be discounted as a barrier. The survey focused on disadvantaged LGAs, where it is unlikely that people would consider engaging a lawyer in the first instance.

### Case Study: FDR services

An evaluation of legal aid FDR services by KPMG<sup>117</sup> found that the benefits-cost ratio of such spending was 1.48, resulting from the avoided court costs arising from matters being settled via FDR.

Since 2006 in relation to family law matters, parties wishing to litigate a family dispute are required to first undertake FDR (provided by both FRCs and LACs). Early evidence strongly suggests that this arrangement has resulted in significantly more family disputes being resolved by agreement without the need for court proceedings, notably:

- FDR services provided by LACs are resulting in full settlement in nearly 55 per cent of disputes, and partial settlement in 25.9 per cent of cases.<sup>118</sup> Analysis of dispute resolution services provided by community and family relationship centres also indicates strong outcomes.<sup>119</sup>
- Total applications made for family law final orders in the Family Court and the FMC have declined by nearly 20 per cent from 2006–07 to 2007–08.<sup>120</sup>

In 2007–08, the cost to Government of providing FDR averaged \$1000–\$1,500 per service. By comparison, the average cost of finalising a dispute in the family court was in the order of \$9,000 per finalisation, with the average cost of a legal aid grant for litigation being \$3,837.

## The cost to the individual of accessing the justice system

The cost to the individual of accessing services varies depending on the service in question, and in particular whether legal representation is required.

### *Free services*

Services provided by CLCs and ATSILSs are provided free of charge. FRCs and legal aid also provide some services free of charge, but may require a contribution from individuals for other services, normally depending on the individual's capacity to pay. EDR schemes are usually provided free of charge to consumers but a cost to business. The Department of Immigration and Citizenship (DIAC) funds legal assistance programs for certain classes of visa applications; the Legal Advice Scheme (LAS), Immigration Advice and Application Assistance Scheme (IAAAS) and Community Assistance Support (CAS) program provide assistance at various stages of the application, decision and appeals processes. Many, but not all, free services are subject to a means test.

### *Cost of legal representation*

Notwithstanding the long-standing concerns regarding the cost of legal representation, there has been no systematic collection of legal costs data to date in Australia. That said, the last large scale survey undertaken in 1998–99 by the ALRC found that the costs of legal professional services, while varying consistent with the complexity of the issues involved, were significant (see **Table 3.3**).

<sup>117</sup> KPMG, Family dispute resolution services in legal aid commissions: Evaluation report, 2008, p 77.

<sup>118</sup> Legal aid reporting initiative database, Legal Aid Commission data.

<sup>119</sup> Federal Magistrates Court, *Annual Report 2006–07*, p 68.

<sup>120</sup> Family Court of Australia, *Annual Report, 2006–2007 and 2007–08*, Federal Magistrates Court, *Annual Report, 2006–07 and 2007–08*.

While there is a lack of empirical evidence, it is clear that legal costs have risen since the ALRC study was undertaken. A 2004 study<sup>121</sup> found that the cost of services for metropolitan, regional and country law firms had on average increased by around 15 per cent over the period 1998–2002, which is consistent with the increase in the Wage Price Index (WPI) over the same period.<sup>122</sup> On the assumption that legal costs have continued to increase in line with the WPI, and with other factors remaining constant, extrapolation of the 1997–98 data suggests the average cost for an individual to undertake a federal court action would now be around \$74,000 – \$84,000 and the median cost would be in the order of \$11,000 – \$14,000 in professional fees alone. These costs do not include disbursements, which would add an additional \$25,000 (see Table 3.3A).<sup>123</sup>

Table 3.3: Total private legal costs incurred – 1997–98<sup>124</sup>

|                                   | \$ (1997–1998)      |                     | \$(2007/08) – extrapolated <sup>#</sup> |                     |
|-----------------------------------|---------------------|---------------------|-----------------------------------------|---------------------|
|                                   | Costs (applicants)  | Costs (respondents) | Costs (applicants)                      | Costs (respondents) |
| <b>Federal Court</b>              |                     |                     |                                         |                     |
| <i>Professional fees</i>          | N=100               | N=103               |                                         |                     |
| Mean                              | \$62,134            | \$55,343            | \$83,605                                | \$74,467            |
| Median                            | \$10,361            | \$8,294             | \$13,941                                | \$11,160            |
| Range                             | \$600 – \$1,000,042 | \$300 – \$1,129,684 | \$807 – \$1,345,619                     | \$404 – \$1,520,060 |
| <i>Disbursements</i>              | N=102               | N=97                |                                         |                     |
| Mean                              | \$20,456            | \$18,831            | \$27,525                                | \$25,338            |
| Median                            | \$4,500             | \$2,150             | \$6,055                                 | \$2,893             |
| Range                             | \$20 – \$464,590    | \$8 – \$558,600     | \$27 – \$625,135                        | \$11 – \$751,631    |
| <b>Family Court<sup>125</sup></b> |                     |                     |                                         |                     |
|                                   | N=363               | N=252               |                                         |                     |
| Mean                              | \$4,830             | \$6,545             | \$6,499                                 | \$8,807             |
| Median                            | \$2,209             | \$2,090             | \$2,972                                 | \$2,812             |
| Range                             | \$40 – \$126,361    | \$8 – \$160,532     | \$54 – \$170,027                        | \$11 – \$215,764    |
| <b>AAT<sup>125</sup></b>          |                     |                     |                                         |                     |
|                                   | N=173               | N=117               |                                         |                     |
| Mean                              | \$5,463             | \$6,525             | \$7,351                                 | \$8,780             |
| Median                            | \$2,585             | \$4,006             | \$3,478                                 | \$5,390             |
| Range                             | \$50 – \$131,696    | \$375 – \$29,586    | \$67 – \$177,205                        | \$505 – \$39,810    |

Source: # Costs figures represent an extrapolation of 1997–98 data, based on WPI index growth for private, personal and other services.

<sup>121</sup> Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System*, 2004, p 28. The survey found that the cost increases for an experienced solicitor had increased over the period by: Mid-CBD: \$134/hr to \$155/hr; small CBD: \$128/hr to \$155/hr; regional: \$135/hr to \$140/hr; and Country: \$116/hr to \$132/hr.

<sup>122</sup> ABS Cat 6345.0 Series A2248254C Private, Personal and other services. The WPI increased 15.4 percent over the period 97/98 to 2002–03.

<sup>123</sup> Table 3.3A combines the extrapolated 2007–08 private costs of litigation for both applicants and respondents from the figures reported in Table 3.3.

<sup>124</sup> T Martruglio, *The costs of litigation in the Family Court of Australia, The costs of litigation in the Federal Court of Australia* 1999; Australian Law Reform Commission, *Empirical information about the Administrative Appeals Tribunal*, 1999

<sup>125</sup> \* Cost figures for Family Court and AAT are inclusive of the cost of legal representation and disbursements.

Table 3.3A: Extrapolated private costs of litigation in 2007–08

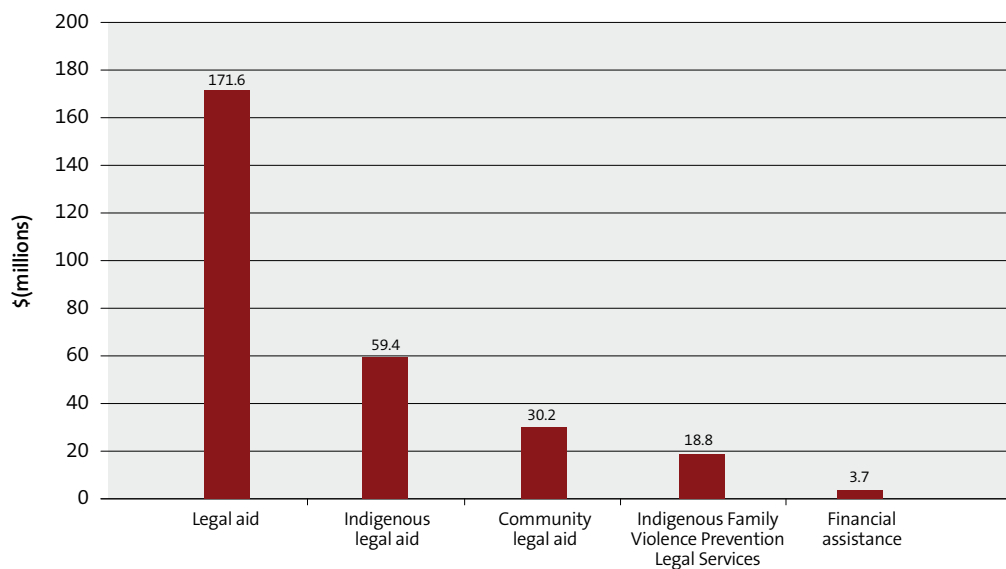
| Extrapolated Private Costs of litigation in \$2007–08 | Federal Court (Average costs) | Federal Court (Median costs) |
|-------------------------------------------------------|-------------------------------|------------------------------|
| Professional Costs                                    | \$79,036                      | \$12,551                     |
| Disbursements                                         | \$26,432                      | \$4,474                      |
| <b>Total Costs</b>                                    | <b>\$105,468</b>              | <b>\$17,025</b>              |

### *Legal aid and legal assistance*

In 2007–08, LACs spent \$196.7m on legal aid services, drawing on the Commonwealth’s allocation of \$178.5m in Commonwealth payments (including \$15.3m on expensive Commonwealth criminal cases) and \$18.2m from Commonwealth program related revenue (for example, cost recovery and interest) and operating reserves (see **Figure 3.4**).

Of this, around 75 per cent (\$147m) was used to provide means-tested grants for legal representation in litigation, overwhelmingly in relation to family law matters. The remaining funding was directed towards supporting non-litigation services:

- \$23m was provided in means-tested grants of aid for FDR services to assist people in resolving their dispute without judicial intervention, and
- \$26.7m was for the provision of advice, minor assistance and community legal education services, as well as duty lawyer services for family matters.

Figure 3.4: Commonwealth funded legal assistance 2008–09<sup>126</sup>

<sup>126</sup> These figures refer to the Commonwealth legal aid program and do not include other specialised legal aid programs, such as the DIAC LAS, IAAAS and CAS. These programs received approximately 8.4 million in funding in the 2007–2008 budget.

In 2007–08, legal aid service levels were cut by 6 per cent (from 2006–07 levels) across the board.<sup>127</sup> This was primarily due to an increase in the costs of service provision—for example, the average cost of a grant of legal aid for a family law matter increased by 25 per cent from the 2006–07 level.<sup>128</sup> The service cuts are happening differently in different states, but generally LACs are no longer providing the full range of services contemplated in the legal aid agreements. There is now very limited availability of legal aid for civil law matters as commission focus on family and criminal law matters—a reduction of 78 per cent since 1995–96.

As an example, Victoria Legal Aid has introduced a quota system on the appointment of Independent Children’s Lawyers (ICLs) in the FMC. Previously, in 2006–07, Victoria funded 1,785 court appointed ICLs, including 1264 in the FMC and 521 in the Family Court of Australia. Victoria will now only pay for 40 appointments in the FMC per month, an effective reduction of 62 per cent from 1,264 to 480 per year. This is a significant cut to one of the most important services funded by legal aid.<sup>129</sup>

The Commonwealth relies on the private sector to deliver services for around half of all grants of legal aid for Commonwealth law matters. However, independent research in 2006 showed that a third of private providers had ceased to do legal aid work, and that providers would continue to withdraw because legal aid remuneration (less than 50 per cent of private sector fees) does not cover costs.<sup>130</sup> Most critical is the situation in regional, rural and remote Australia where there are few providers and the average age of those undertaking legal aid work is rising. CLCs report being unable to assist one in five people who approach them for help.<sup>131</sup>

In 27 per cent of all Family Court cases in 2007–08, at least one party was not represented,<sup>132</sup> and of those cases that proceeded to trial, 36 per cent had at least one party without representation. A 2003 study<sup>133</sup> of 500 self-represented litigants (SRLs) found a clear relationship between the unavailability of legal aid and the number of self-represented parties, with only 50 per cent of SRLs having applied for legal aid and of those who did apply, less than half being successful. Further, of those who were successful, more than a third had subsequently had the grant terminated or not extended before final hearing, or the grant had not covered court proceedings in the first place.

*“In 27 per cent of all Family Court cases in 2007–08, at least one party was not represented, and of those cases that proceeded to trial, 36 per cent had at least one party without representation.”*

Statistics provided by LACs indicate that in 2008, 98 per cent of legal aid recipients were receiving an income that could be considered below the poverty line.<sup>134</sup>

<sup>127</sup> Calculated from data provided by LACs to the LARI database.

<sup>128</sup> Calculated from data provided by LACs to the LARI database.

<sup>129</sup> Victoria Legal Aid, *Annual Report 2007–08*, p 3.

<sup>130</sup> TNS Social Research, *Legal Aid Remuneration Review: final report*, 2007.

<sup>131</sup> Australian Council of Social Services, *Community Sector Survey: 2007 National Report, Paper 145*.

<sup>132</sup> Family Court of Australia, *Annual Report 2007–08*, p 58. In 2007–08, neither party was represented in 10 per cent of cases and only one party was represented in 17 per cent of cases. Of those cases going to trial, six per cent had neither party represented, with only one party represented in 30 per cent of cases.

<sup>133</sup> R Hunter R, J Giddings, A Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia*, 2003.

<sup>134</sup> Based on the income level calculated to be the poverty line for a household with housing costs and two children published by the Melbourne Institute of Applied Economic and Social Research for the December 2008 quarter, <<http://www.melbourneinstitute.com/labour/inequality/poverty/Poverty%20lines%20Australia%20Dec%202008.pdf>>.

There is a significant and continuing shortfall in legal aid for civil law matters. A comparison of the number of legal aid grant applications in Commonwealth civil law matters approved in 1995–96 and in 2007–08 shows a 78 per cent drop in the number of services provided (a decrease from 4,215 in 2007–08 to 917 approvals in 1995–96).<sup>135</sup> The matters funded in 2007–08 include Commonwealth matters across the Federal Court, FMC, administrative tribunals and State and Territory courts. Court fee waivers and exemptions can be a strong indicator of financial hardship and an inability to afford legal services, yet of the volume of fees waived or exempted in the Federal Court in 2007–08, only two per cent total, or nine per cent in first instance matters represented legal aid exemptions.<sup>136</sup> This demonstrates that the vast majority of litigants who might be expected to meet the socio-economic criteria for legal aid were not, in fact, legally aided.

The global financial downturn will further increase pressure on the legal aid system, both through an expected increase in the number of legal matters such as family breakdown and bankruptcy, as well as an increased number of individuals eligible for legal representation services under the legal aid means test. To keep within budget, LACs are beginning to tighten their already strict means tests to further limit the amount of equity in their home a person may have before being deemed ineligible for legal assistance. This may force many people to use that equity to meet legal costs, and may put some at risk of homelessness.

Reforms to the justice system that better facilitate the early, cost-effective resolution of disputes would reduce the number of matters proceeding to courts and tribunals and consequently assist in relieving pressures on the legal aid system. Similarly, further streamlining court processes would also assist in reducing the quantum of legal aid funding required for those more complex cases that do require court intervention.

*“Reforms to the justice system that better facilitate the early, cost-effective resolution of disputes would reduce the number of matters proceeding to courts and tribunals and consequently assist in relieving pressures on the legal aid system.”*

### Cost recovery in the federal civil justice system

Courts and tribunals are state sponsored mechanisms for dispute resolution and the enforcement of rights—a fundamental element for the maintenance of the rule of law. These mechanisms also provide significant benefits to the Australian community. However, the specific functions of a court in any particular matter are performed at the request of the parties who have the immediate and almost exclusive interest in the conduct and outcome of the litigation.

While the existence of courts and other justice services has public benefits that clearly deserve public funding, it remains legitimate to explore the extent to which specific activities in particular matters, which are of more limited interest to the parties, might be appropriate subjects of assessing cost recovery.

Specific Recommendations about cost recovery are contained in Chapter 9.

<sup>135</sup> Data provided by LACs.

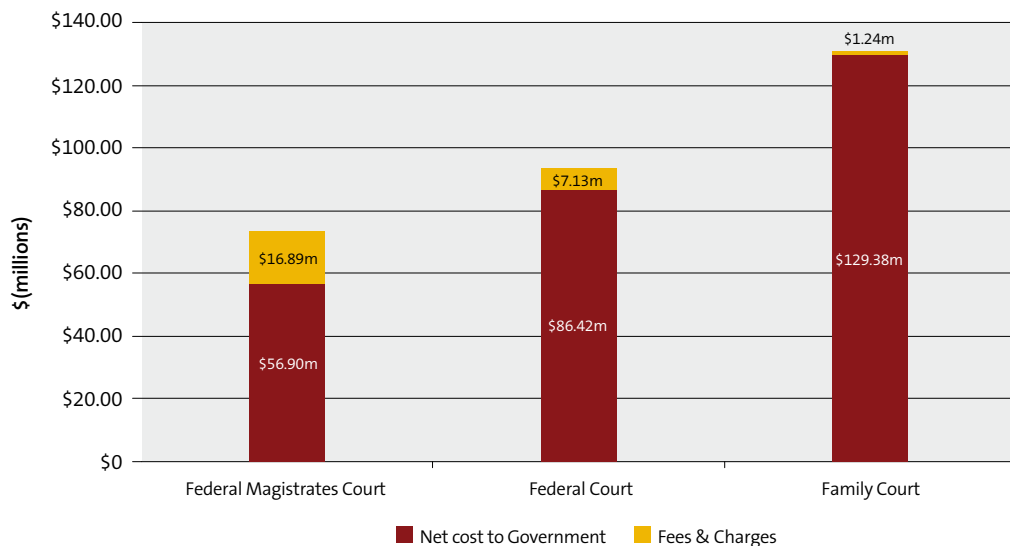
<sup>136</sup> Derived from data provided by the Federal Court.

### *A snapshot of the present*

All the federal courts charge a fee for some or all applicants. While the fees vary between courts and jurisdictions, the collection of fees falls well short of full cost recovery. In 2007–08, fees paid in the Federal Court of Australia amounted to only 9.3 per cent of the Government’s expenditure on the Court. The figure for the FMC is 22.4 per cent, while the Family Court, where fewer fees are charged, recovers only 0.9 per cent.<sup>137</sup> Fees are subject to exemption and waiver provisions, which apply to those in receipt of legal aid or income support payments and others who would suffer financial hardship if they had to pay fees.

In 2007–08, around \$58m was returned to consolidated revenue from fees and charges that could be described as justice related (including tribunals, courts and the Insolvency & Trustee Service Australia (ITSA)). Around half of fees returned came from ITSA which operates on a cost recovery basis, and the remainder from courts and tribunals. Fees returned by the FMC, the Federal Court and Family Court amounted to \$16.89m, \$7.13m and \$1.24m respectively (see Figure 3.5).

**Figure 3.5: Cost Recovery by Commonwealth Courts 2007–08<sup>138</sup>**



The higher rate of cost recovery in the FMC than in the superior courts arises from the fact that, while the fees are lower in the FMC, the matters are also simpler and quicker, leading to a greater proportion of costs being recovered.

Australian federal courts and tribunals have set fee structures for filing fees. The Federal Court and High Court also charge daily hearing fees. This daily rate is independent of the length of the hearing. In its report *Managing Justice*, the ALRC recommended that the Commonwealth consider the introduction of staged fees, where the fees increased along a sliding scale as case progresses to hearing. The ALRC considered that this would provide an incentive for litigants to settle matters at an earlier stage.

<sup>137</sup> Productivity Commission, *Report on Government Services*, 2009.

<sup>138</sup> Federal Court, Family Court and Federal Magistrates Court, *Annual Reports 2007–08*.

A range of services and types of matters do not impose fees, either through general exclusions or exemptions/waivers for particular litigants. Both the SSAT and the VRB do not impose a fee on those seeking merits review, reflecting the disadvantaged nature of those using their services. Similarly, the AAT and federal courts provide fee exemptions for individuals receiving welfare payments or where the fee may present a barrier to access. These include applicants who:

- have been granted legal aid
- hold a health care card
- hold a pensioner concession card
- hold a Commonwealth seniors health card
- hold another card issued by the Department of Family and Community Services or the Department of Veterans' Affairs
- are an inmate of a prison or are otherwise lawfully detained
- are a child under the age of 18 years
- are in receipt of Youth Allowance or Austudy, or
- are receiving benefit under ABSTUDY.

In addition to fee exemptions, fee waivers are also provided in cases of financial hardship subject to an income and assets test—although a waiver may still be granted in exceptional circumstances. The income test applied by the courts (\$800 per fortnight after-tax for singles; \$1,200 per fortnight after-tax for a single with two dependents) is broadly consistent with the income cut-off applied in relation to welfare support payments. AAT fees are refunded if the applicant's appeal is successful. In 2007–08, the Commonwealth courts reported that nearly 4,900 exemptions and waivers were granted in relation to federal law matters, and around 32,000 granted for family law matters.<sup>139</sup>

### *Cost recovery policy considerations*

If we were starting with a blank slate, the design of a justice system may take any number of forms. In theory, a government can take an approach to civil justice system design that leaves the resolution of disputes entirely to the market, or choose to provide all dispute resolution services to all disputants. Neither of these approaches may be considered at all practical or desirable. The first provides an ineffective system with a high risk of lawlessness, characterised by insufficient support for the rule of law and insufficient protection to those seeking to enforce rights. At the other end of the spectrum, government intervention and funding for all aspects of dispute resolution is not affordable—nor is it desirable for government to intervene in matters that can be resolved satisfactorily by disputants without intervention.

Decisions about designing and funding the federal civil justice system are not currently based on any overarching conceptual framework. Fees for the federal courts are currently excluded from cost recovery arrangements.<sup>140</sup> The design and funding of most aspects of the system may be better seen as an accident of history and prevailing politics rather than a deliberate system-wide approach to avoiding disputes and resolving disputes better. Evaluating the existing system is made difficult by limited statistical analysis of individual institutions, and an inadequate level of comparability of data across the system or analysis about how changes to one part of the system affect other parts.

<sup>139</sup> Federal Court, Family Court and Federal Magistrates Court, *Annual Reports 2007–08*.

<sup>140</sup> Commonwealth Department of Finance and Deregulation, *Cost Recovery Guidelines*, 2005, p 11.



*“The design and funding of most aspects of the system may be better seen as an accident of history and prevailing politics rather than a deliberate system-wide approach to avoiding disputes and resolving disputes better.”*

### *Designing and funding a federal civil justice system*

It goes without saying that costs can only be recovered if something is provided in return. In the case of the justice system, what is provided is essentially what we have discussed as the ‘supply’ side of the justice equation. This includes the following general elements (in whole or combination):

- providing the infrastructure for handling legal controversies. This would include the courts, tribunals, access to ADR services (current examples include FDR, native title mediation, human rights discrimination conciliation)
- designing a dispute resolution mechanism but leaving it to the market to provide it (for example, the Financial Ombudsman Service—an EDR mechanism mandated by legislation but provided and funded by industry participants)
- leaving the design and provision of the mechanism entirely to the market (such as negotiation, ADR in commercial disputes)
- providing legal information, advice and representation services to all or some disputants (like legal assistance), or subsidising such services (for example, the tax deductibility of legal costs), and
- mechanisms to prevent disputes from occurring, for example through clearer and more accessible laws, building resilience in individuals.

Decisions about whether to provide, or to continue to provide, such services are affected by cost to the service provider, the costs required to use the service effectively (including legal representation), the accessibility of the service (including knowledge about the service and how to access it), and the effectiveness of the service (including issues of timing and delay, and enforceability of outcomes).

It is important to recognise that many legal issues and disputes are handled by individuals, or resolved between disputants or through non-formal community channels (family, friends, trusted members of the community and community leaders) without ever engaging more formal methods of dispute resolution. This form of resolution is often low-cost or free for the disputants, and does not require government funding.

### *Cost recovery in the federal civil justice system*

Designing a coherent policy on cost recovery in the civil justice sphere is complicated. When considering access to justice broadly, and the range of factors that influence what mechanisms are available for people to resolve disputes (supply) and what choices people make about how, when and for how long they access those mechanisms (demand), cost is a relevant factor. If we accept that government should be involved in providing certain justice services, the next question is whether government should recover the costs of the service from the person using that service. An outline of some relevant factors is at **Table 3.4**.

Persons accessing services to assist with a civil justice problem, whether legal services, ADR services, administrative tribunals or court services, are generally seeking a private gain. As a general

principle, a person purchasing a service on the market for the purpose of obtaining a private gain can expect to pay the full cost of that service. Should the same rule apply to services provided by government? However, there is also a public benefit in the existence of effective mechanisms for the fair resolution of disputes, determination of legal rights and enforcement of decisions.

**Table 3.4: Factors relevant to cost recovery in the civil justice system**

| Factor                                   | Issue                                                                                                                                                                                                                                                                               | Consideration                                                                                                                                                                                                                                                                                                                                                                                          |
|------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Public good or private benefit           | <p>People access the justice system for private gain.</p> <p>However, the existence of a functioning justice system is central to the rule of law, which is a significant public benefit.</p> <p>Identifying the ‘user’ is difficult in mixed public/private benefit scenarios.</p> | <p>Full cost recovery is not appropriate for public benefits.</p> <p>However, only the parties have standing in any particular matter, and they have the most direct interest, and influence on the conduct and outcome (and therefore cost) of the process.</p>                                                                                                                                       |
| The type of dispute                      | There may be a greater public interest in the resolution of certain types of disputes (such as matters involving children, native title and human rights matters).                                                                                                                  | Cost recovery may not be appropriate for certain types of matters as a question of policy.                                                                                                                                                                                                                                                                                                             |
| Is the justice system a monopoly         | Cost recovery may not be appropriate in a monopoly situation where services are not contestable and the market cannot operate to allow optimum allocation and use of resources.                                                                                                     | <p>The essential judicial functions involve the use of coercive powers, declaring the state of the law and enforcing decisions. Similarly, Tribunals have a monopoly on certain statutory and/or coercive powers.</p> <p>However, there is a ‘market’ for dispute resolution services and other services relevant to dispute prevention (including the provision of legal information and advice).</p> |
| Price should not be a barrier            | Access to the justice system should be equitable.                                                                                                                                                                                                                                   | Measure to ensure access (including direct support, exemptions and waivers) will be required.                                                                                                                                                                                                                                                                                                          |
| Full cost pricing can provide incentives | <p>If people had to pay the full cost of services, rather than have the majority of costs subsidised, they may be more likely to choose less expensive options. This could encourage use of cheaper, quicker alternatives (such as ADR).</p>                                        | Court fees are small in comparison to the private costs of litigation. The effect on users may be marginal.                                                                                                                                                                                                                                                                                            |

As noted in Chapter 1, access to justice is an essential element of the rule of law which supports civic and economic life. Maintaining the rule of law is fundamental to equity and economic prosperity in Australia, and requires the provision by government of civil justice services. Two simple examples show this—the provision of goods and services to consumers is dependent upon the expectation

that the provider will be paid, and that what is being supplied is of the quality described. Equally, aspects of the court system such as the capacity of citizens to challenge government decisions, and for courts to ensure that the exercise of statutory powers is lawful, are an important characteristic of accountable government and therefore have great public benefit.

Full cost recovery is not appropriate where the provision of the service is substantially or entirely for public benefit—the person required to pay the fee will effectively be paying for other's benefit, which is properly the function of government. However, the specific functions of a court in any particular matter (orders, processes, hearings, decisions) are performed at the request of the parties who have the immediate and exclusive interest in the conduct and outcome of litigation. The laws of standing require this. The justice system therefore represents a mixture of public and private benefits.

'User pays' is difficult to apply in cases of mixed public and private benefit—as there are both public and private users. Notwithstanding this, while the existence of justice services has public benefits that clearly deserve public funding, it remains legitimate to explore the extent to which specific services or activities might warrant fees charged on a cost recovery basis.

*"The specific functions of a court in any particular matter (orders, processes, hearings, decisions) are performed at the request of the parties who have the immediate and exclusive interest in the conduct and outcome of litigation."*

As a general principle, one of the purposes of cost recovery is to improve the efficiency and inform the market about the true cost of a service so that decisions about consumption and production can be made.<sup>141</sup> However, this does not apply in a monopoly or where functions cannot be provided by the market. In this context it is clear that only a court can perform judicial functions—to finally declare the state of the law and enforce decisions. These features of the courts are fundamental to the rule of law and cannot be outsourced, nor granted to the private sector. Similarly, the coercive and statutory powers of administrative tribunals cannot be provided by the market.

However, not all of the functions of a court are judicial. There is a market in dispute resolution and 'justice' services. Many of the justice services demanded (whether or not currently supplied), such as dispute resolution and better information, may be better supplied by the market. The corollary of this is that it is legitimate to consider which services are the most efficient, and price them accordingly. For example, this would also mean that finite court resources should be directed to those things that courts do best or that only a court can do.

Proper pricing of services should provide some capacity for better incentives about how people resolve disputes. For example, imposition of court fees could encourage people to resolve disputes directly, or through cheaper market provided services (such as industry complaint or EDR schemes).<sup>142</sup> Incentives could also operate in relation to the use of court services—for example fees that reflect the true costs of litigation currently borne by the taxpayer could encourage litigants to more fully utilise other options, such as court-based ADR. However, it should also be noted that

<sup>141</sup> Commonwealth Department of Finance and Deregulation, *Cost Recovery Guidelines*, 2005, p 11.

<sup>142</sup> Note for example that the Dispute Resolution Surveys conducted in Victoria in 2007 cited the perception that ADR was perceived as being cheaper and easier than a court as a factor that would encourage the use of ADR.

court fees themselves are likely to be a relatively minor cost for litigants given the private costs of litigation (including legal fees and disbursements) are often very high.

Pricing a service beyond the reach of a disputant provides an inequitable barrier to justice. For a well-functioning justice system, access to the system must not be dependant on capacity to pay.

*“For a well-functioning justice system, access to the system must not be dependant on capacity to pay.”*

This may be achieved through providing universal services, or through exemptions and waivers for those who cannot afford to pay. As noted earlier, universal provision of justice services is not sustainable, and inefficient. On the other hand, some types of matters (and the means for their review) are generally not suitable for cost recovery—for example it might completely undermine the objectives of the SSAT if fees were charged, given its jurisdiction is dealing with income support applications.

This reflects the key factors that apply to cost recovery policy—the balancing of the public good and private gain in deciding whether cost recovery is appropriate and if so, what level of cost recovery should apply.

A range of other factors should further nuance cost recovery policy decisions.

- *competition and the federal context*: the existence of competing institutions that take a different approach to cost recovery make it more difficult to create an effectively priced range of options where there are relevant drivers that are outside the Commonwealth’s control (a typical example being the availability of State and Territory courts that do not engage in cost recovery). The last significant increase in Federal Court fees occurred in 1996, where fees were raised to a level comparable to State and Territory courts. This was followed by a significant reduction in the number of filings in the Court for matters under the *Corporations Law*, where the Court had concurrent jurisdiction with State and Territory courts. The Court attributes this reduction to the increase in fees.<sup>143</sup>
- *prioritising finite resources*: where it has been identified that it is desirable to fund a particular service, some cost recovery may be appropriate when considering that service within a broader range of priorities and a finite amount of resources. Partial cost recovery may be appropriate where, for example, it is identified that funding of a dispute resolution service is in the public interest but funding that service is not as high a priority as funding another service. Rather than not providing the service at all, a policy of partial cost recovery in certain circumstances provides a means to continue a service which might otherwise not be available.
- *services not institutions*: an equitable policy of cost recovery must focus on services not institutions. A person should not be responsible for covering the costs of a service that they did not use, simply because they are the most convenient person to recover the cost from. Where it is not appropriate to recover costs from a particular party (for example, where a means test has been applied) or for a particular type of proceeding (such as native title) the cost of running such a proceeding would be recovered from unrelated parties if cost recovery sought to cover the cost of an institution rather than services.

<sup>143</sup> Federal Court of Australia, *Annual Report 1996–97*, p 18.

Additional factors include:

- *type of dispute*: the particular public interest in the resolution of certain types of disputes (such as native title and human rights matters)
- *encouraging desirable behaviour*: the extent to which funding certain services would promote desirable dispute resolution behaviour. Certain forms of resolution are in the public interest for some cases—for example, in family law disputes involving children, a mediated outcome is preferable to a more acrimonious litigated outcome. Similarly, fees in administrative tribunals could encourage better practice by government agencies if they provided incentives for better primary decision-making or communication with clients to resolve disputes before formal review is sought, and
- *public interest litigation*: where resolution of a dispute will prevent other disputes from occurring or where it may result in behaviour change (such as through settling legal principle).

Consequently, determining appropriate circumstances for cost recovery and the scope of that cost recovery will depend on a range of factors, not least the balancing of public good and private gain aspects of providing the service in question. Consideration of the various factors noted in the preceding paragraphs will not pinpoint a particular number, but provide useful guidance for a coherent and justifiable cost recovery policy across the federal civil justice system into the future.

*“Determining appropriate circumstances for cost recovery and the scope of that cost recovery will depend on a range of factors, not least the balancing of public good and private gain aspects of providing the service in question.”*

#### *The overseas experience*

The courts in England and Wales impose fees on a full cost pricing basis, subject to a set of fee concessions. This means that where a fee is imposed, it is set at a level which will recover 100 per cent of the costs of the use of the Court system. The collection of these fees recovers 80 per cent of the cost of the court system. This policy was introduced in 1992, replacing a longstanding policy that all costs other than judicial salaries be recovered. The policy has been the subject of criticism, including from the Civil Justice Council on the basis that it ‘fails to recognise the significant element of collective benefit in the administration of civil justice’ and ‘there is a further public benefit in those cases which contribute to the clarification and development of the law’.<sup>144</sup>

The UK Civil Justice Council has put forward the view that proportionality should be the primary factor in setting court fees. The Council argued that small claims were subject to a filing fee representing a much higher proportion of the value of the claim than was the case for higher value claims. A similar dynamic can be seen in the federal courts, where cost recovery in the lower courts is significantly higher than in the higher courts. This effectively puts the burden of cost recovery disproportionately on simpler disputes and matters that are resolved earlier. It is inequitable for disputants with simple disputes, or who resolve their disputes without a final hearing, to make a greater percentage contribution to the cost of the courts service than do litigants with complex disputes that capture significant court resources.

<sup>144</sup> Civil Justice Council (UK), *Civil and Family Court Fee Increases response by the Civil Justice Council*, London, 2005, viewed 18 August 2009, <[http://www.civiljusticecouncil.gov.uk/files/nov05\\_civil\\_family\\_fees.pdf](http://www.civiljusticecouncil.gov.uk/files/nov05_civil_family_fees.pdf)>, p 1.

## Conclusion: Lessons from the supply side

Looking at the justice system currently, a prospective user is confronted with a collection of disparate institutions and services largely operating independently. This includes the courts, tribunals, legal assistance service providers, ADR providers, and ombudsmen.

Traditional thinking about access to justice has been limited to issues affecting the introduction and expansion of legal aid schemes.

In 1973, the Commonwealth took action to provide legal assistance services nationally to address the absence of adequate and comprehensive legal aid arrangements throughout Australia. The ultimate objective of the Commonwealth Government was that legal aid should be readily and equally available to citizens everywhere in Australia. The legal assistance landscape has evolved since then and the main providers of legal assistance services in Australia are State and Territory LACs, Indigenous legal services programs and CLCs augmented by the private legal profession through pro bono services. There is a great deal of cooperation between these providers, and together they can be extremely effective at providing disadvantaged people with various avenues for gaining access to justice.

*“Traditional thinking about access to justice has been limited to issues affecting the introduction and expansion of legal aid schemes.”*

As noted above, the direct legal assistance sector—a key aspect of the Australian justice system, and a significant investment at \$283m in 2008–09—is operating in an environment of rising demand and increases in the cost of service provision.

Viewing access to justice solely as a legal assistance issue is incomplete because it is only part of the solution. Even massive increases in legal aid budgets will not provide any assistance to the vast majority of people who experience legal issues in their day to day lives. Statistics provided by LACs indicate that in 2008, 98 per cent of legal aid recipients were receiving an income that could be considered below the poverty line.<sup>145</sup> This leaves much of Australia unable to afford legal representation but nevertheless ineligible for legal aid.

A system-wide approach can identify options for governments as to how resources might be allocated. A strategic framework should enable identified demand issues to be better addressed by available supply, and identify opportunities to modify demand for different services—for example more information and advice could reduce demand for legal aid representation. For example, in 2007–2008:

- LACs provided 579,346 legal information and education services at a net cost per service of \$16.
- The Commonwealth Ombudsmen provided 19,126 services, at a net cost per service of \$1014.
- LACs provided 16,966 duty lawyer services at a net cost per service of \$258.
- Dispute resolution services provided by LACs (16,183 services) and FRCs (14,810 services) had a net cost per service of around \$1,400.
- The FMC finalised 38,336 matters with a net cost per service of \$1484.

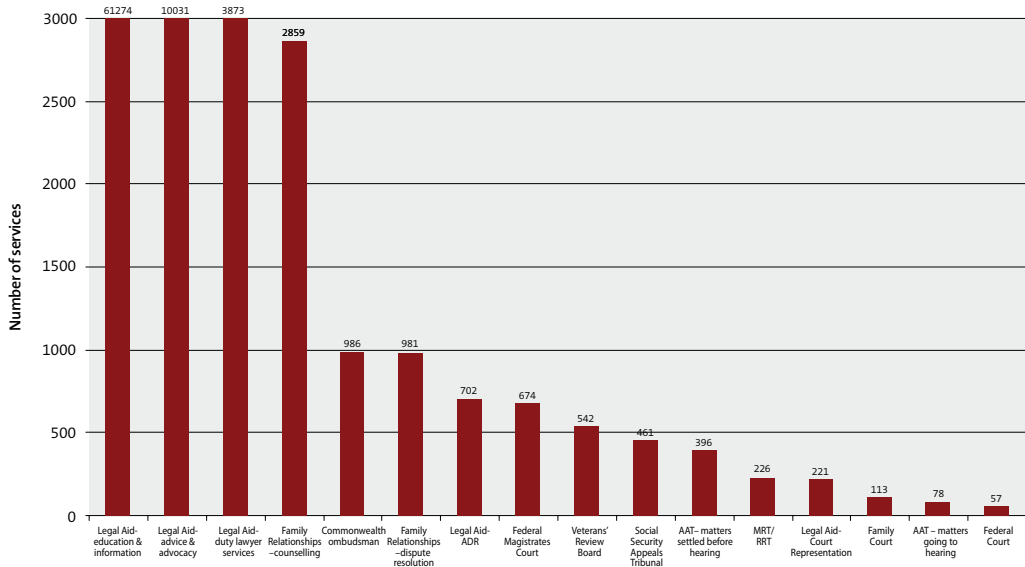
<sup>145</sup> Based on the income level calculated to be the poverty line for a household with housing costs and two children published by the Melbourne Institute of Applied Economic and Social Research for the December 2008 quarter.

- Matters finalised by the Federal Court (4,913 matters) and the Family Court (13,184 matters) cost \$17,590 and \$8,817 per service respectively.

Taking the current net cost per service as a starting position, we can extrapolate what additional services might be able to provide from an injection (or reallocation) of resources. On this basis, an allocation of \$1m could enable:

- 62,500 services of legal information to be provided
- LACs to deliver an extra 3800 duty lawyer services or 700 dispute resolution services
- the Ombudsman to resolve 1000 matters, or
- the FMC to finalise 670 matters, the Federal Court to finalise 56 matters or the Family Court to finalise 113 matters

Figure 3.6: Services provided per \$1m net Commonwealth expenditure – 2007–08<sup>146</sup>



There is some evidence that there is potential for increasing the availability of some options. This may not necessarily reflect current demand—as that is to some extent conditioned by the current state of knowledge and expectation of the parties (for examples, lawyers used to adversarial litigation might be sceptical of the value of ADR, and research indicates a low uptake of available ADR services).<sup>147</sup>

<sup>146</sup> Care needs to be taken with this figure. The costs are not the actual costs of finalised matters but are derived from the costs to Government, offset by fees or other income collected and the number of services provided. They are the best figures available, reinforcing the need for a better empirical basis. In addition, it should be understood that as more matters are redirected from courts to other pathways (such as FRCs or the FMC), the matters remaining in the Federal Court are going to be the most complex, time consuming and expensive to resolve. Accordingly, the figures cannot be taken to compare efficiency between institutions. In addition the figures contain a range of assumptions and may not account for all services provided by each institution.

<sup>147</sup> See Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Small Business Survey 2007 Report*, 2007, p 20; see also Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007, p 13.

*“There is evidence that court based mediation takes place significantly after filing—about 76 per cent of the way through an expected full case duration.”*

Supply in this context should not just respond to current demand, but each should influence participants toward the most appropriate method to get a fair outcome in the most timely and cost effective way. Evidence supporting this view includes:

- There is potential to expand the use of ADR processes in cases involving SRLs, but it may also be necessary to better adapt ADR services to their needs. While there is a high success rate for simpler non-court ADR,<sup>148</sup> ADR in more complex litigation involving SRLs tends to have a lower success rate.<sup>149</sup> However, surveys of SRLs suggest they were not offered the options of mediation or conciliation at any stage.<sup>150</sup> Similarly, of a sample of cases involving SRLs, only 19 per cent had attempted mediation.<sup>151</sup>
- Despite an increased interest in ADR on the part of the business, the level of use of ADR and recognition of mediation services in commercial disputes remains relatively low.<sup>152</sup> Court-based ADR can also help parties reach agreement or narrow the issues in dispute. Experience in State courts suggests that court-based ADR can have relatively strong settlement rates—or example, around 45 per cent of mediations were settled in the Western Australian (WA) Supreme Court.
- However, mediation practices need to improve. There is evidence that court based mediation takes place significantly after filing—about 76 per cent of the way through an expected full case duration.<sup>153</sup> Evidence suggests that earlier action means that disputes are more likely to be finalised at mediation than for older disputes and before significant costs have been incurred.
- In relation to consumer disputes, people are less likely to take action to try to resolve a consumer-related matter than other types of legal events.<sup>154</sup> If they do take action, people appear most likely to seek help from a friend, and have lower rates of resolution of consumer disputes than other types of disputes.<sup>155</sup> As consumer disputes generally involve a disparity of resources between the consumer and the business, and as the subject matter of the dispute is generally of low value, but potentially significant to the consumer, simpler means of dispute resolution are likely to be more effective—such as small claims tribunals, and industry ombudsmen. Such mechanisms are also appropriate because they have the flexibility to achieve an outcome that satisfies all parties.

<sup>148</sup> For example, agreement was reached in 80 per cent of matters where mediations were held in Community Justice Centres in New South Wales during 2006–07. See Community Justice Centres, *Annual Report 2006–07*, p 6.

<sup>149</sup> T Sourdin, *Mediation in the Supreme and County Courts of Victoria*, Report to the Victorian Department of Justice, pp 84–85.

<sup>150</sup> Queensland Public Interest Law Clearing House, *Self-representation Civil Law Service – Evaluation 2007–08*, p 13.

<sup>151</sup> T Sourdin, *Mediation in the Supreme and County Courts of Victoria*, Report to the Victorian Department of Justice, p 84.

<sup>152</sup> T Sourdin, *Alternative Dispute Resolution*, 2008 (3<sup>rd</sup> Edition), p 320. Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007, p i.

<sup>153</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007, p vi.

<sup>154</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 99.

<sup>155</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 140.



## Chapter 4: Conclusions about Access to Justice

A properly functioning justice system is of fundamental importance to Australia's society and economy. This Chapter draws together the key conclusions that may be drawn from Chapters 2 and 3, and makes the case for a more strategic, system-wide approach to access to justice. It concludes by describing the major implications of the recommendations contained in Parts II and III for the federal civil justice system.

### **The justice system is in good shape**

Overall, the justice system functions well. Most people are able to resolve their legal issues, either by themselves or with assistance. There are a wide range of services available and the justice system is robust and accountable, maintaining and promoting the rule of law. However, there is a continuing need for more empirical material to accurately measure the accessibility and effectiveness of the justices system.

### **Key conclusions about areas for enhancement or reform**

There are a huge number of legal issues arising across society. Given the vast number of people affected by legal issues (whether major or minor), options for dispute prevention will form a critical aspect of improving access to justice.

In many cases, people are capable of resolving disputes themselves or with limited assistance.

Timely access to good information can provide significant benefits in allowing people to resolve disputes early and effectively. There is evidence that people are not always accessing the information they need.

Recent technological advances have, and will continue to, significantly change the information and dispute resolution landscape. This presents both opportunities and challenges.

When people experience legal issues, they often do not know where to go. Given people often approach only one service or adviser, the assistance they receive and the method used to resolve their dispute can be as much by accident as any assessment of appropriateness. If people go to the wrong place for assistance at first, they may get no assistance at all, or referral fatigue means that they are given good information but do not act on it.

Different demographic groupings experience legal issues differently, and take different action in response to legal issues. For some groups or types of legal issues, tailored solutions may be required.

Disputes with government are a large category of total legal issues reported. A substantial proportion of people do nothing in response to a legal issue and a significant number of disputes are unresolved. As decision maker and participant in these disputes, the capacity of government to influence access to justice in these areas is considerable.

Statistically, if a person experiences one legal event, they are significantly more likely to experience further legal events in the future. In addition, legal events often occur in clusters of event types. This emphasises the need for early intervention to prevent disputes from escalating or compounding with further events.

The clustering of legal problems also indicates a need for flexibility of services to assist people with multiple problem types to deal with the underlying issues (legal or otherwise) that lead to the occurrence of legal problems.

Government investment in the justice system is significant and covers a wide range of services. The cost varies widely on a per-service basis, from very low-cost options such as information, simple advice and family relationship counselling, through to the very high cost to Government of litigation in the superior courts and legal aid court representation.

*“Government investment in the justice system is significant and covers a wide range of services.”*

Costs, particularly the cost of legal services and taking matters to court, are significant factors in the accessibility of advice and services. However, cost is not the only barrier to justice, and many legal issues are able to be resolved without resort to high-cost solutions.

The use of low-cost and simple services has not been optimised. There are a wide variety of effective, low-cost options for dispute prevention and resolution that represent excellent value for money and prevent the escalation of disputes.

Knowledge of, and engagement with, less adversarial dispute resolution options, particularly ADR and EDR, continues to be too low, particularly given the high rate of effectiveness of these options.

Statistically, most disputes are resolved without assistance from a court of a lawyer. However, those disputes requiring legal assistance and/or judicial attention are often the most complex and it is appropriate to direct attention to them.

Given the high cost of legal services, and the continuing need for legal representation in dealing with the most complex disputes, legal assistance schemes remain a crucial aspect of access to justice.

## **The need for a system-wide perspective**

All of this means that simply providing more money to the justice system will not solve the problem. Importantly:

- it will remain Government’s responsibility to appropriately resource the justice system, and
- more resources—directed to the early provision of legal assistance, information, advice and support services, particularly for Indigenous legal services—would clearly have significant benefits.

The Commonwealth Government needs to identify ways to increase resourcing when possible, noting current financial circumstances. Part of this will involve recognising the savings that can come from supporting measures to address legal problems early and prevent them from imposing greater costs on individuals and society.

Almost all of the conclusions in this Chapter are applicable across a range of system participants and service providers, and are as much about the interaction between elements of the system as they are about any particular element. Reforming one or more of the individual institutions or programs might assist current clients or users, but will not provide sustainable access to justice benefits or increase the number or profile of beneficiaries. What is needed is an overarching framework; a new strategic approach to the justice system as a whole.

## Major implications for the justice system

This Part outlined the supply and demand factors that influence access to justice. Based on the conclusions from the analysis of those factors, the major implications for the federal civil justice system are:

1. There is a need for a Strategic Framework for Access to Justice (the Framework). The current approach is ad hoc and historical. There is no underlying principle which guides government decisions in relation to reforming and resourcing the justice system (Central Recommendation, Chapter 5).
2. An immediate priority underpinning the implementation of the Framework will be the identification and collection of meaningful statistics about the justice system. This will involve the federal courts, tribunals, agencies and service providers. The Taskforce recommends a reference to the Productivity Commission directed towards this objective (Recommendation 5.1 – 5.2).
3. The distinctions between Federal and State powers and institutions can seem artificial to a person's day to day life and business, but have a significant effect on the quality of justice a person receives, and the navigability of the justice system. The division of responsibility between the levels of government also leads to duplication and inefficiency. The Taskforce recommends a review be conducted of the interrelationship of the Commonwealth and State and Territory justice systems by a small panel with representatives from Federal and State levels and from court and non-court backgrounds (Recommendation 5.3).
4. Governments provide significant but finite public resources to fund aspects of the justice system. There are both public and private benefits flowing from the maintenance of an effective justice system (not least the maintenance of the rule of law which underpins economic and social advancement). Governments have a responsibility to ensure that resourcing of the justice system maximises access to justice and leads to more effective outcomes. In that context, the Taskforce recommends that consideration of issues and options relating to cost recovery would be appropriate. As this would be an issue where all jurisdictions would have an interest, this should be considered by Attorneys-General through the Standing Committee of the Attorneys-General (SCAG) (Recommendation 9.1).
5. Better information about the law is essential. Information failure is a significant barrier to justice—people do not understand legal events, what to do or where to seek assistance. People who mistakenly approach the 'wrong' service can feel they have been rejected by the justice system. The Taskforce recommends an achievable but fundamental change in approach to ensure that people have seamless access to information and services, and a vehicle to get to the most appropriate service. This includes:
  - an obligation on all relevant government agencies and service providers as well as courts and tribunals to direct people to a more appropriate service (the *no wrong number; no wrong door* policy – Recommendation 6.1)
  - collaboration between service providers to reduce duplication and present joined up solutions to service delivery (Recommendation 6.7)
  - greater emphasis on technology to expand the cost effective provision of services (Recommendation 6.8), and
  - clearer laws and flexible mechanisms for reviewing the clarity and effectiveness of legislation (Recommendations 6.9–6.10).

*“People who mistakenly approach the ‘wrong’ service can feel they have been rejected by the justice system.”*

6. Most disputes are not resolved by judicial adjudication, yet most resources are directed to courts. The Strategic Framework allows Government to develop, promote and resource effective non-court mechanisms for the prevention and resolution of disputes. The Taskforce recommends examining opportunities for industry based dispute resolution schemes (such as EDR) (Recommendation 7.1), enhanced ADR services that have regard to the diverse range of disputes (Recommendation 7.4), court based ADR to resolve litigation more quickly (Recommendation 7.5) and specific and continuing obligations on government agencies to work to resolve disputes without the need for people to exercise formal appeal rights (Recommendation 10.1).
7. Courts and court processes need more aggressive approaches to change the adversarial culture of litigation and ensure parties and their lawyers accept the importance of early and substantive attempts to resolve disputes. This includes more active case management and early identification of the real issues in dispute, without imposing disproportionate costs (Recommendation 8.1 and 8.5).
8. In the area of administrative law, improving the quality of primary decision-making, the level of communication between agencies and applicants and the quality assurance mechanisms agencies develop will improve access to justice outcomes and reduce costs associated with unnecessary or prolonged disputes. The Taskforce recommends a range of measures including a Charter of Good Administration oversighted by the Ombudsman to ensure that improvements are actuated by agencies which are not dependent on individuals having to exercise their review rights (Recommendation 10.1).
9. Legal assistance continues to be a fundamental to achieving access to justice, ensuring that people can access legal advice and representation where they need it but cannot afford it. The Taskforce recommends a more strategic approach to legal assistance, including greater collaboration between service providers and a stronger emphasis on early intervention and dispute prevention services. The Taskforce recommends the creation of a national coordination group for legal assistance to facilitate this approach (Recommendation 11.1).
10. The justice system will never replace the need for people to act responsibly and moderately in their dealings with others. Teaching people skills for conflict resolution and equipping them with the information to understand and access the justice system, when necessary, to avoid small problems escalating is vital to ensuring a strong community. To that end, the Taskforce recommends a number of strategies to build resilience in the Australian community and the justice system, including through improved tertiary legal education (Recommendation 12.2), continuing to explore innovative opportunities for improving general conflict resolution skills, including through school education (Recommendation 12.3) and ongoing monitoring and reform of the justice system (Recommendation 12.5).

*“The justice system will never replace the need for people to act responsibly and moderately in their dealings with others.”*

## Part II

# Strategic Framework for Access to Justice





# Chapter 5: An Access to Justice Framework

## Central recommendation

### A strategic framework for access to justice

Policy makers should take a system-wide approach to access to justice issues by applying the strategic framework, as set out in this Chapter, to all decisions affecting access to justice in the federal civil justice system.

The strategic framework comprises:

- **Principles** for access to justice policy-making, and
- **Methodology** for achieving the principles in practice.

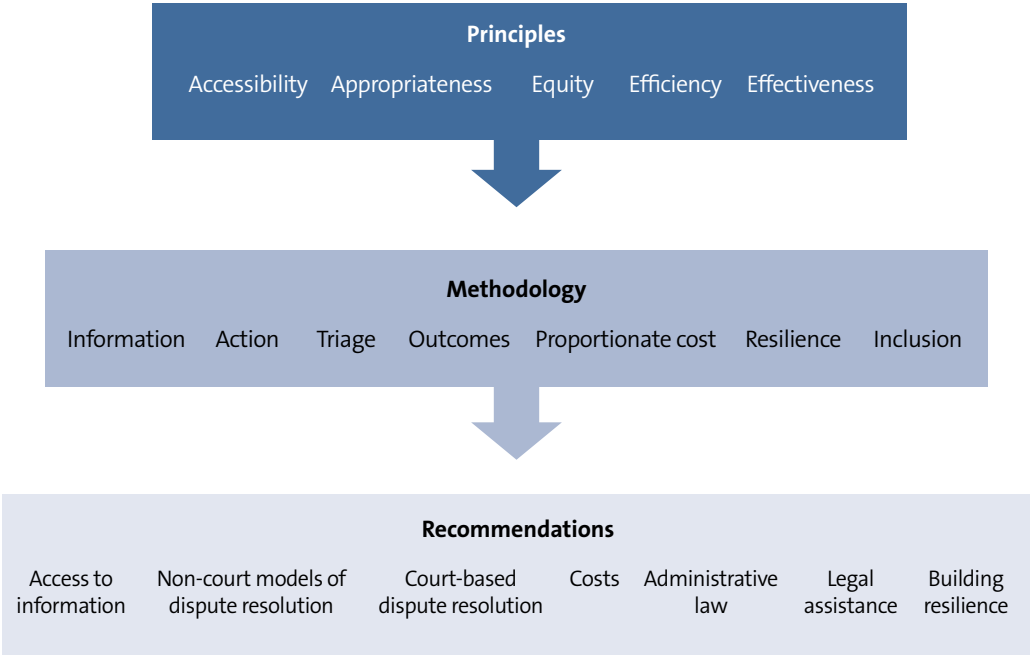
Application of the strategic framework will ensure that new initiatives and reforms to the justice system best target available resources to improving access to justice.

Improving access to justice requires a broad examination of how the whole legal system, and its various institutions, are influenced by each other and work together to support (or limit) people's capacity to address legal problems. The current approach to justice is ad hoc; there is no underlying principle behind decisions on Government intervention. The new Strategic Framework for Access to Justice will guide the consideration of future justice reforms and introduce strategic discipline to ensure the more effective allocation of resources. The following Principles establish a framework to ensure that the justice system is accessible and appropriate.

The Framework's Principles set out the objectives of the Australian civil justice system. The Methodology is designed to provide a basis for policy makers to develop proposals that translate the Principles into action. The Recommendations in this report reflect the Access to Justice Taskforce's view of actions that will implement the Principles. Government has the responsibility for implementation of the Framework, and will make decisions on which Recommendations to implement and when. Of course, the Recommendations are not the only proposals that will give effect to the Framework. As the Principles and Methodology are designed to be enabling rather than prescriptive, the Framework will support the development of other proposals that will provide improvements to access to justice.

The interrelationship of the elements of the Framework is outlined in **Figure 5.1**.

Figure 5.1: The relationship of the elements of the Strategic Framework for Access to Justice



The Access to Justice Principles

Accessibility

Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.

Appropriateness

The justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level.

Legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.

Equity

The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.



## Efficiency

The justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating.

The costs of formal dispute resolution and legal assistance mechanisms—to Government and to the user—should be proportionate to the issues in dispute.

## Effectiveness

The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis.

All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.

## The Access to Justice Methodology

The Methodology is designed to assist policymakers translate the Principles into action. The elements of the Methodology are:

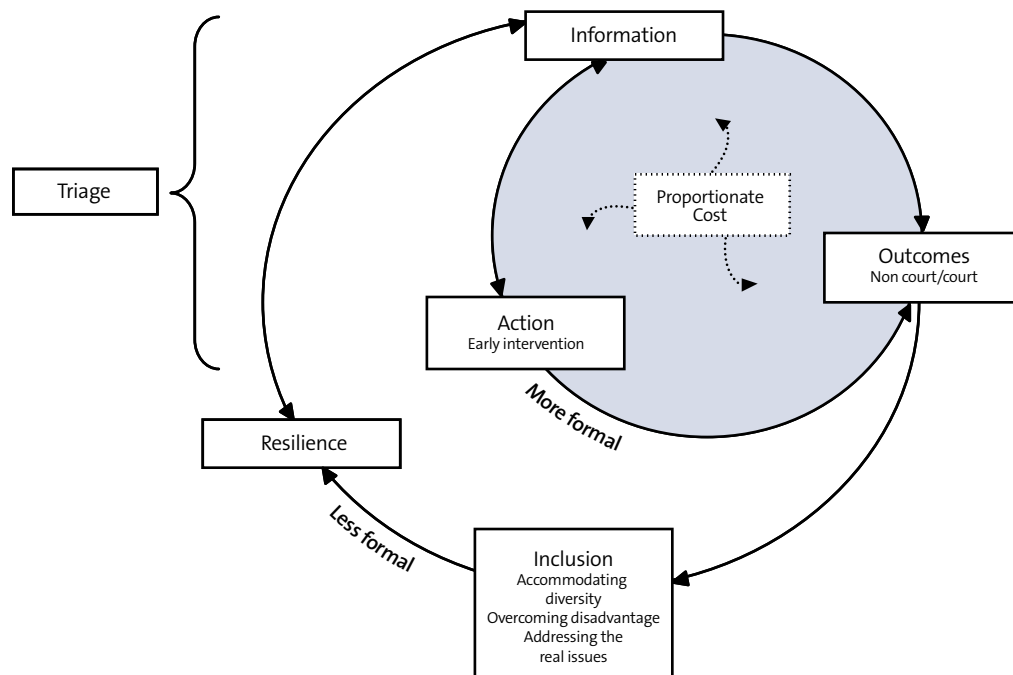
|                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|--------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Information</b> | <p><b>Enabling people to understand their position, the options they have and deciding what to do</b></p> <p>Provision of information about the law or legal rights, including Government services and benefits is a central means of influencing access to justice. The three most commonly reported barriers to obtaining help with legal issues are difficulty getting through on the phone, delay in getting a response and difficulty in getting an appointment. Many experience ‘referral fatigue’, dropping out after an incorrect referral. An effective information strategy needs to ensure not only that the information is available, but that people can reach that information when they need it.</p> |
| <b>Action</b>      | <p><b>Intervening early to prevent legal problems from occurring and escalating</b></p> <p>Early intervention will prevent legal problems from occurring and escalating. In many situations, early action can resolve a matter or identify the best course of action. However, if a person does nothing—which often happens when there is not enough assistance available or it is not clear to a person where to turn to for help—it can be much harder and more costly to rectify the problem. Failure to address legal problems has been shown to lead to entrenched disadvantage.</p>                                                                                                                           |
| <b>Triage</b>      | <p><b>Enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system</b></p> <p>All elements of the justice system need to have an inbuilt capacity to direct people to the most appropriate form of resolution. Without a triage capacity people’s attempts to approach the justice system may be unsuccessful and they may be rejected; or the pathway through the justice system may not be the most appropriate pathway, being determined by how they first made contact with the system (or how the system made contact with them).</p>                                                                                           |

| <b>Outcomes</b>                                                                                 | <p>Providing a pathway to fair and equitable outcomes:</p> <ul style="list-style-type: none"> <li>• resolving disputes without going to court</li> <li>• when court is necessary, ensuring processes are accessible, fair, affordable and simple</li> </ul> <p>A good justice system should provide a pathway to fair and equitable outcomes. Where possible, the justice system should focus on resolving disputes without going to court. Where court is necessary, the Framework can ensure the courts are accessible, fair, affordable and simple. The traditional adversarial system is no longer relevant or sustainable for most disputes.</p> <table> <tr> <th data-bbox="330 597 431 620">Non court</th><th data-bbox="696 597 753 620">Court</th></tr> <tr> <td data-bbox="330 635 659 776">           Dispute prevention<br/>           Ombudsmen<br/>           (including Industry Ombudsmen)<br/>           Community mediation<br/>           ADR         </td><td data-bbox="696 635 1177 750">           Culture change—focus on resolving the dispute<br/>           Better and earlier identification of the real issues<br/>           Active case management<br/>           Greater use of ADR         </td></tr> </table> | Non court | Court | Dispute prevention<br>Ombudsmen<br>(including Industry Ombudsmen)<br>Community mediation<br>ADR | Culture change—focus on resolving the dispute<br>Better and earlier identification of the real issues<br>Active case management<br>Greater use of ADR |
|-------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|-------|-------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| Non court                                                                                       | Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |           |       |                                                                                                 |                                                                                                                                                       |
| Dispute prevention<br>Ombudsmen<br>(including Industry Ombudsmen)<br>Community mediation<br>ADR | Culture change—focus on resolving the dispute<br>Better and earlier identification of the real issues<br>Active case management<br>Greater use of ADR                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |           |       |                                                                                                 |                                                                                                                                                       |
| <b>Proportionate Cost</b>                                                                       | <p>Ensuring that the cost of and method of resolving disputes is proportionate to the issues</p> <p>Cost can be a significant barrier to justice. The cost to disputants and the cost to Government of resolving disputes should be proportionate to the issue in dispute.</p> <p>Adequate information about costs is essential in assessing proportionality. The provision of greater information regarding the costs of the justice system allows better identification of the most appropriate pathway to resolution and, in particular, whether litigation is the most appropriate course.</p> <p>Case management of litigation will help to ensure that costs incurred are directed to resolving the dispute, and limit costs from collateral actions.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |           |       |                                                                                                 |                                                                                                                                                       |
| <b>Resilience</b>                                                                               | <p>Building resilience in individuals, the community and the justice system</p> <p>The focus on helping to build resilience in individuals, the community and the justice system by reinforcing access to information and supporting the cultural changes necessary to ensure improvements in access to justice are continuing. This includes equipping people with the basic skills necessary to resolve their own issues (including by accessing appropriate information and support services).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |           |       |                                                                                                 |                                                                                                                                                       |
| <b>Inclusion</b>                                                                                | <p>Directing attention to the real issues that people who experience legal events have</p> <p>Legal issues are often symptomatic of broader problems in people's lives. The justice system needs to have the capacity to direct attention to the real issues that people might be facing, and what they need to do to address them.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |           |       |                                                                                                 |                                                                                                                                                       |

The elements of the Methodology are designed to have a reinforcing and dynamic effect. The links between the elements of the methodology are explored in **Figure 5.2**.

It shows, for example, that better information can lead to earlier action and better outcomes. Similarly, inclusion and resilience are supported by better information and more appropriate outcomes. Better access to cost effective information and early action enables effective triage; people will be better able to achieve fair outcomes through the most appropriate means at a proportionate cost.

Figure 5.2: Interaction of elements of the Access to Justice Methodology



A justice system based upon this Framework:

- promotes access to appropriate mechanisms for the early resolution of problems and disputes
- establishes a triage function, enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system
- provides capacity for resources to be best directed to reflect where and how people access the justice system
- promotes fair outcomes
- promotes social inclusion by targeting the resolution and identification of broader issues which may be the cause of specific legal problems, and
- empowers individuals to resolve disputes between themselves when appropriate, without recourse to the institutions of the justice system.

The Strategic Framework for Access to Justice means that every individual will have improved access to effective resolution opportunities, irrespective of how they make contact with the system. Implementation of the Strategic Framework will involve continued consultation and coordination between Government agencies, legal assistance and other service providers, the legal profession, courts and tribunals, and users of the justice system.

### How does the triage system work?

A critical element of the framework approach is the emphasis on a triage capacity.

Without this capacity:

- people either do not make contact with the justice system, or their approaches are unsuccessful and they are rejected, or
- the pathway through the justice system may not be the most appropriate pathway, but is determined by how they first made contact with the system (or how the system made contact with them). This accidental approach is likely to impose costs, limit opportunities for resolution and cause further problems.

A single triage station is not feasible. Unlike a hospital emergency department, not all people enter through the same door.

Previous attempts to identify a sole triage point have been specific to individual institutions, for example multi-door courts. But these are focused on the particular court as having the central role.

The interrelationship between providing better information (on issues, services and options to progress matters) and an emphasis on early intervention ensures that people are helped to achieve outcomes (outcomes include understanding, negotiation, initiating actions such as complaints or formal legal processes, or deciding to do nothing).

*“Unlike a hospital emergency department, not all people enter the justice system through the same door.”*

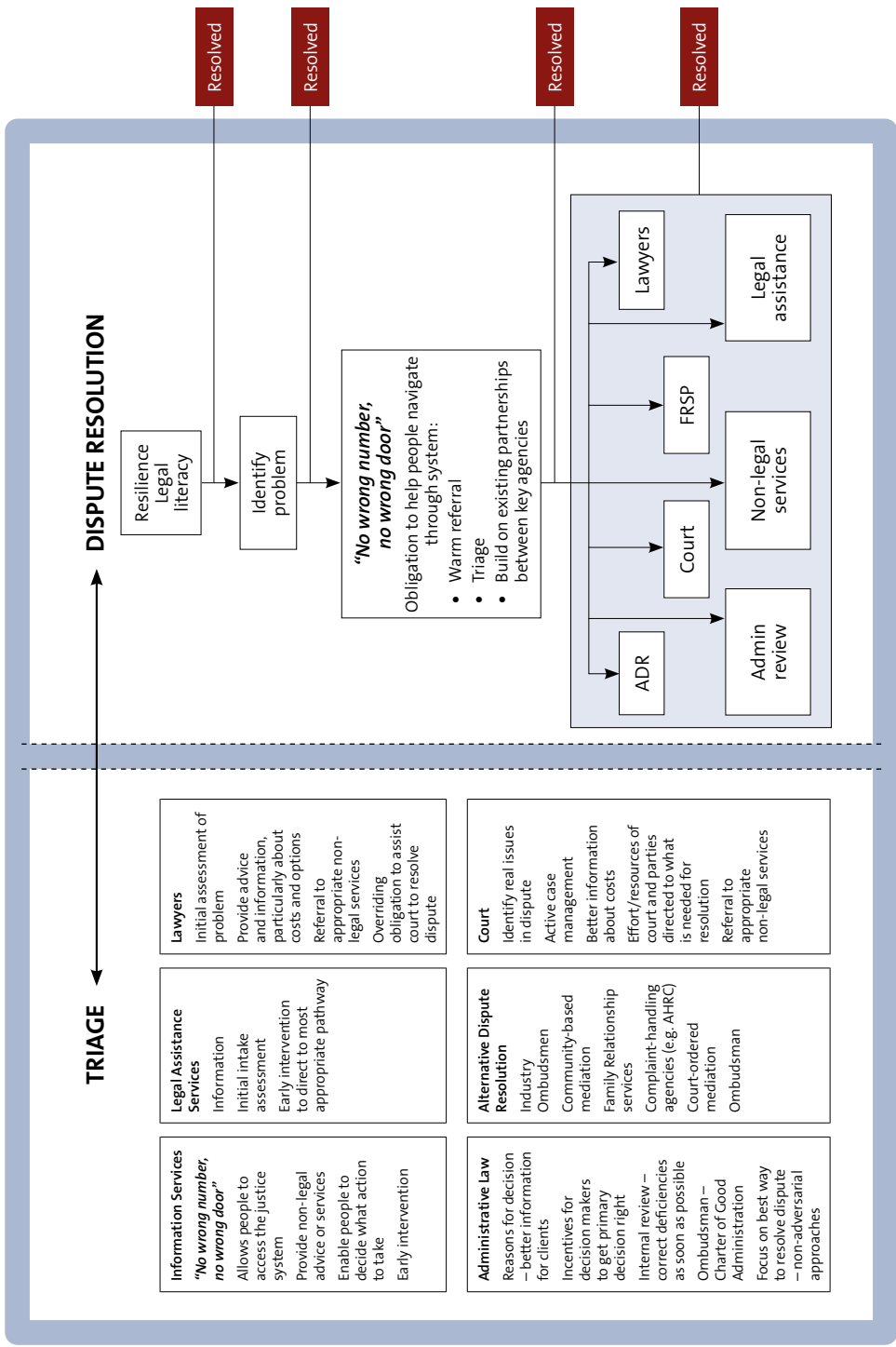
Under the broader Framework, the triage function works because *all* elements have a triage function. In short:

- a responsibility to assess the needs of the individual case, what the best pathway is (be it information, assistance, dispute resolution or court adjudication of legal rights), and
- a commitment to help the person get to that destination.

This obligation applies to legal assistance services, government agencies, decision makers, courts and tribunals, lawyers and ADR practitioners and services.

The Access to Justice Framework, including the identification of the triage function is outlined in **Figure 5.3**.

Figure 5.3: The operation of the triage function within aspects of the justice system as part of a pathway to resolution

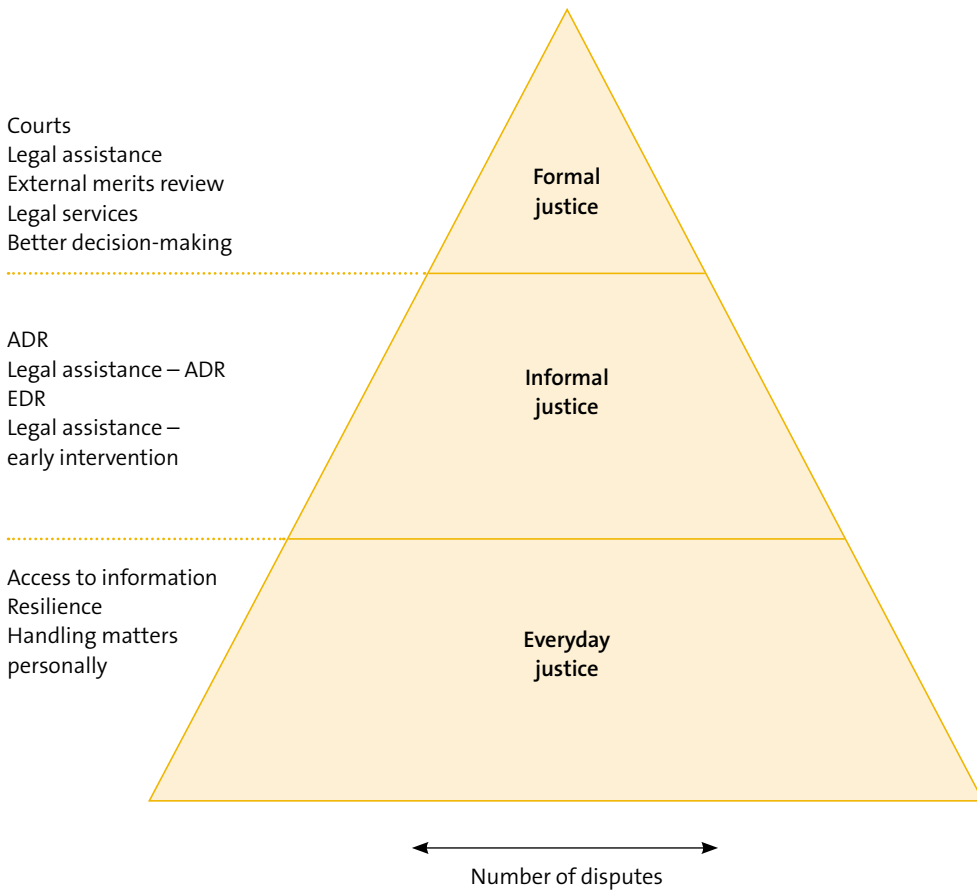


## How they work – the Access to Justice Recommendations

Under the current system, an individual's pathway through the justice system will vary depending on entry point, the level of assistance available, and the resources the individual has at their disposal. A person might take a more ideal pathway through the system if he or she has good legal advice, whether hired privately or through a legal assistance provider. However, it is possible that this person might take a less than ideal pathway if assistance is not provided. The Strategic Framework for Access to Justice seeks to ensure that each individual takes the most appropriate pathway through the justice system.

The Access to Justice Recommendations focus on a range of options that recognise the dynamics of disputes and maximise the delivery and quality of access to justice.

**Figure 5.4: The relationship between justice types and the number of disputes resolved**

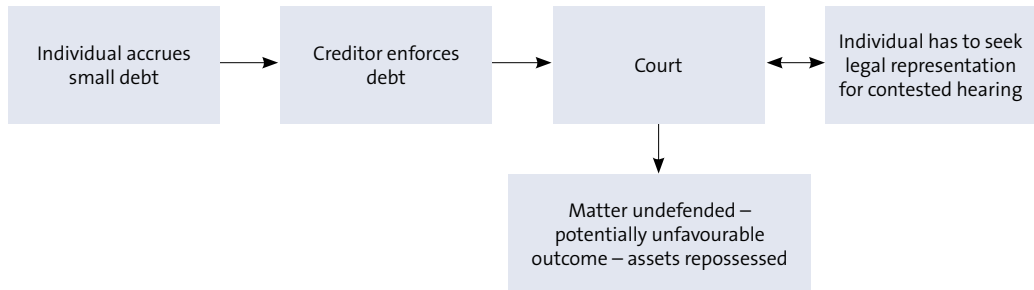


While there are a range of justice options available, different types of disputes are suited to different methods of resolution. The following case studies seek to illustrate different pathways through the justice system.

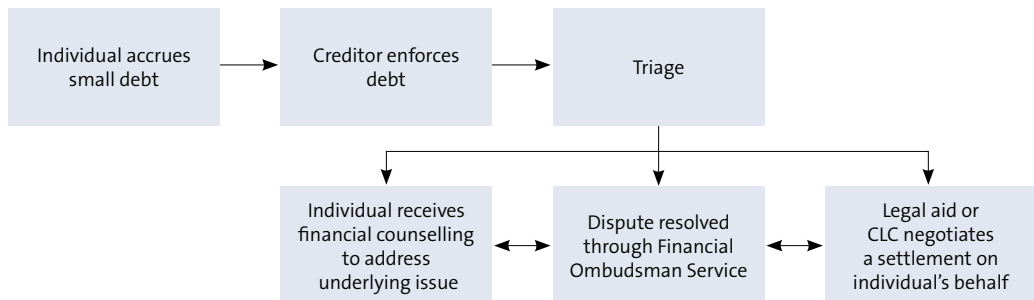
## Case studies

### Debt recovery

A possible pathway to the current system for an individual faced with creditors enforcing a debt—in the absence of early legal assistance—is as follows:

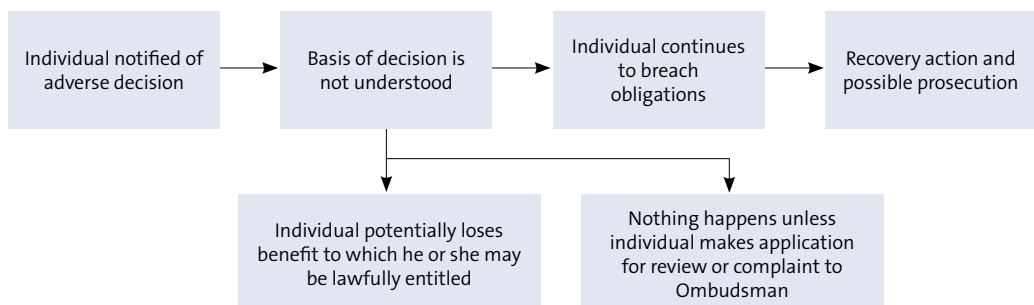


Access to early intervention produces this more ideal pathway:

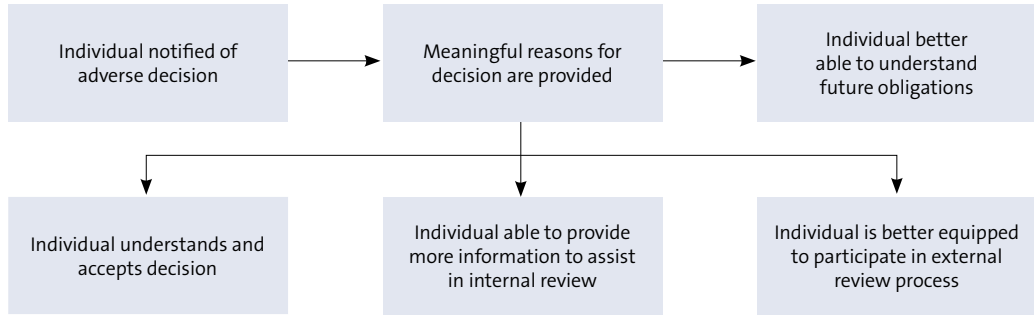


### Improving Government decision making

A possible pathway for an individual currently faced with an adverse Government decision:

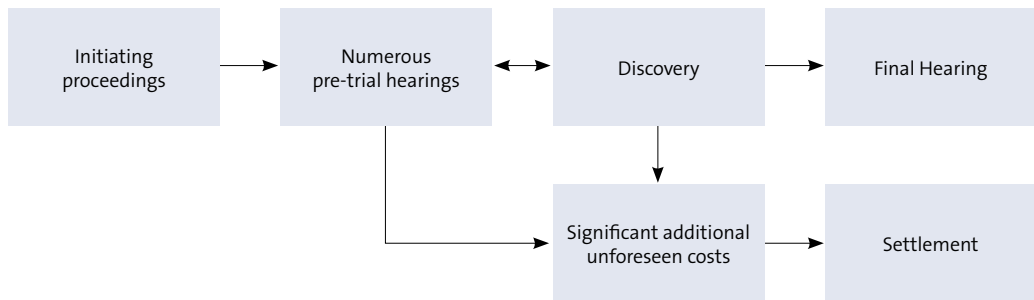


Improved decision-making may lead to this pathway:

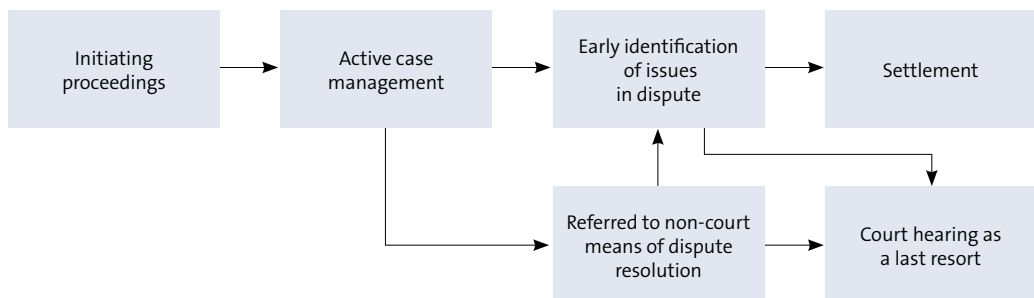


### Improved case management

Current court procedures may produce this litigation pathway:



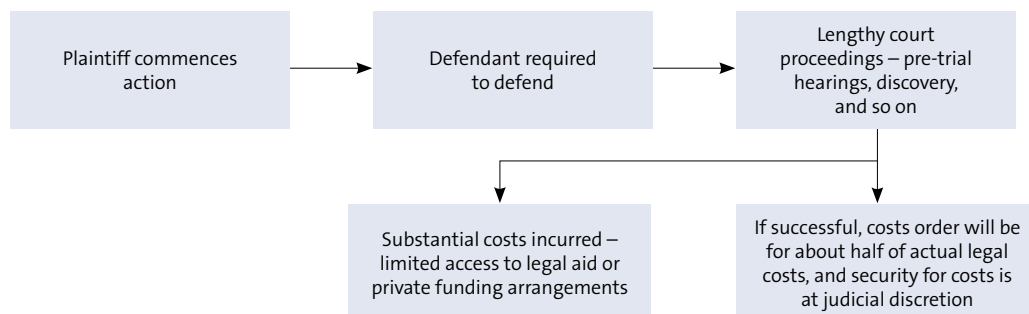
Improved case management will help achieve a more ideal pathway:



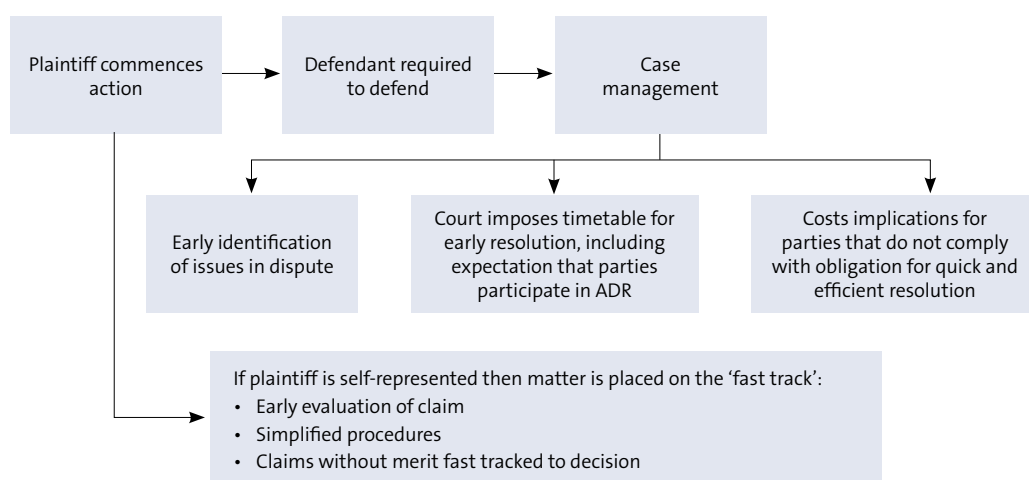


## The meritorious defendant

The current system allows a defendant to be exposed to significant costs by a vexatious litigant:



The burden placed on the defendant by litigation could be eased by improved case management and a streamlined pathway for all SRLs:



## The way forward

The development of this access to justice framework will provide a basis for the implementation of structural changes to improve Australians access to justice on an ongoing basis. It will provide the foundation for better targeting of resources and priorities for reform of the federal civil justice system.

A number of Recommendations, consistent with the framework, have been developed to propose changes to the way the justice system responds to the needs of its users.

## Justice system statistics

Access to justice related inquiries over several years have consistently indicated that insufficient statistical data is available to make comprehensive decisions about access to justice. As has been made clear in Part I of this Report, data collection in relation to the justice system, while having improved since *Managing Justice*, remains an issue. Statistics are inconsistently collected and reported, and significant gaps remain (for instance, in relation to timing and SRLs). Data is necessary not only to the institution to identify and act on problem issues, but also to inform analysis and understanding (undertaken by agencies, academics, the public) regarding the performance of the justice system generally.

The success of the framework, and options to reform the justice system, will require more and better data as a matter of priority to inform decision-making. Measures that would assist include:

- who uses the justice system, and who does not
- what types of disputes they use it for
- what kind of assistance they seek and what they find
- the quality of outcomes
  - what kind of results they get (how do they resolve their disputes, how long does it take, how effective is it)
- how much it costs
  - including better information on the actual costs (public and private)
  - the costs of particular pathways and mechanisms for resolving disputes, and
  - how satisfied they are with the outcome.

An external body with standing responsibility or a one-off reference might assist with this issue. The various justice institutions have a variety of administration arrangements and many are responsible for their own data collection. However, the courts and other justice institutions, the Government and the community need consistent and strong evidence bases to make future decisions.

## Data requirements<sup>156</sup>

### RECOMMENDATION 5.1

The Commonwealth should request the Productivity Commission to undertake a review of the efficiency of the courts and tribunals in the context of the civil justice system in Australia. The scope of the review would be identification of relevant measures and data requirements necessary for ongoing monitoring of the justice system.

Based on the outcome of this review, the Attorney General's Department should work with the federal courts, tribunals, and other justice services to develop an overarching data collection template to inform the necessary collection of data on a comprehensive, consistent basis.

### RECOMMENDATION 5.2

As a standard practice, implementation of changes to the justice system should include consideration of data collection necessary to enable evaluation of the impact of these changes.

As an immediate measure—to the extent they are not already doing so—federal courts and tribunals should identify key practice or procedural requirements or rules and begin to collect data with a view to assessing the implementation, impact (quality of outcome and cost), and effectiveness of the measure.<sup>156</sup>

*Information; Action; Triage; Outcomes; Proportionate cost; Resilience; Inclusion.*

## The Federal dimension

This report concentrates on measures to improve access to justice in the federal civil justice system. However, it is clear that the issues people experience in accessing justice, and the applicability of the Strategic Framework for Access to Justice and other Recommendations, is not confined to the limits of Commonwealth jurisdiction. The distinction between federal and State powers can seem artificial to a person's day to day life and business, but have a significant effect on the quality of justice a person receives and the navigability of the justice system. In addition, the division of responsibility between the levels of government can lead to duplication and inefficiency.

<sup>156</sup> For example, the Federal Court might consider ways of measuring the impact of Practice Direction 17, *The use of technology in the management of discovery and the conduct of litigation*, (issued 29 January 2009), including capturing and reporting information relating to the best preliminary estimate of the cost associated with Discovery parties are expected to provide in accordance with that Direction.

**RECOMMENDATION 5.3**

The Attorney-General should commission a review of the interrelationship between Commonwealth and State/Territory justice systems, including looking at:

- opportunities for the systems to work more seamlessly
- areas of duplication
- inefficiency, and
- obstacles to a more unified system and ways to overcome them, particularly constitutional issues.

The review would ideally be conducted by a small panel, led by an eminent person and comprising representatives from the Federal and State levels, from both court and non-court backgrounds.

*Information; Action; Triage; Outcomes; Proportionate cost; Resilience; Inclusion.*

## Part III

# Supporting the Strategic Framework





# Chapter 6: Information about the law

## Key points

Easy to find, easy to use information about legal issues is of fundamental importance to providing access to justice. This includes:

- improved access to information and advice for people with legal issues, with particular reference to ensuring that entry points to access information and services are as simple as possible, and do not in themselves create a barrier to justice
- improved legal information and advice for people with legal issues, and the means of providing it, are developed having regard to evidence of how people access and use information
- improved coordination between service providers to enhance the provision of legal and non-legal services and information to members of the public
- measures directed to ensure that appropriate information and advice services are available to people and communities that experience legal issues but are less likely to access such services, particularly Indigenous communities
- the use of technology, as effectively and innovatively as possible, to improve capacity for services to reach more people, and
- clearer laws.

Early access to information about how to respond to legal issues is vital to reducing barriers to justice and overcoming social exclusion.<sup>157</sup> Early access to information can also lead to early resolution of disputes which might otherwise require resolution by a court or other formal dispute resolution provider. The Commonwealth currently funds a range of legal assistance providers to provide 'legal information' services. As we have seen in Part I, these services are a much lower cost to Government than the provision of formal dispute resolution services.

However, information about the law and relevant services can be hard to access and confusing, often because there are many potential sources of information. Difficulties in navigating through the maze of services and institutions to identify the correct source of information, advice or assistance is itself a significant barrier to justice

People who are not able to access information to resolve legal issues are denied the most basic access to justice. Yet, as highlighted in Chapter 2, evidence shows many people do not contact private lawyers, or 'user friendly' services such as CLCs, LACs or family relationship services, even when they recognise that they are dealing with a non-trivial legal issue.<sup>158</sup> Non-legal advisers are the primary providers of assistance. People are more likely to seek assistance from prominent members

<sup>157</sup> P Pleasence, *The Future of Civil Justice: Culture, Communication and Change*, in Canadian Forum on Civil Justice Conference Papers, Edmonton, 2006, viewed 18 August 2009, <<http://cfcj.fcjc.org/publications/itf-en.php#19>>; see also Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, and Legal Services Commission (UK), P Pleasence, *Causes of Action: Civil Law and Social Justice*, 2006, p 157.

<sup>158</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 94; see also Legal Services Commission (UK), P Pleasence, *Causes of Action: Civil Law and Social Justice*, 2006, p 156.

of their community, such as doctors, teachers or union officials.<sup>159</sup> It is difficult to assess the quality of assistance in addressing legal issues that such lay persons provide.<sup>160</sup>

Evidence also suggests that many people do nothing in response to legal events, increasing the likelihood of the issue escalating and hindering the chances of the issue being resolved and the person satisfied.<sup>161</sup> People may need assistance to understand the implications of their choices or find the right option for action. Knowing where to seek assistance will help people find third party assistance and move more quickly towards a just and satisfying outcome.<sup>162</sup>

The Law and Justice Foundation reported that 16 per cent of people who experienced a legal issue handled it alone.<sup>163</sup>

Awareness of services that have a specific information or advice function—such as LACs, CLCs, or family relationship services—is low. The most common way that people reported finding out about the NSW LawAccess service is the White Pages.<sup>164</sup> Many service providers are themselves unaware of complementary services, even in the same field.<sup>165</sup> Increased awareness of options in responding to legal issues—by service providers and the people involved—help put people on the right path to resolution. Findings that higher-income groups and university-qualified people are more aware of the negative cost implications of some options (such as court) suggest that there is a need to better inform broader cross-sections of society, helping them to understand the range of justice options that are available.<sup>166</sup>

*“Awareness of services that have a specific information or advice function—such as LACs, CLCs, or family relationship services—is low.”*

Once a person reaches a service provider, they often need to be referred to a more appropriate provider for their particular question or issue. However, many people experience ‘referral fatigue’, dropping out from the information cycle and doing nothing further after an incorrect (or even a correct) referral.<sup>167</sup> Reasons given for members of the public not following through on seeking information or assistance include being put on hold, delays in getting a response and delays in getting an appointment.<sup>168</sup>

<sup>159</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 104.

<sup>160</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006 indicated that satisfaction levels with other advisors was lower, but not substantially lower than for legal advice (at p 125). However, the level of satisfaction with the advice does not necessarily correlate with quality advice.

<sup>161</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Small Business Survey 2007 Report*, 2007.

<sup>162</sup> Ibid.

<sup>163</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 92.

<sup>164</sup> LawAccess NSW, *Customer survey: monitoring satisfaction*, 2008, p 15.

<sup>165</sup> These views were expressed by service providers at the Inaugural Family Law System Conference proceedings, held at Old Parliament House on 19–20 February 2009.

<sup>166</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Small Business Survey 2007 Report*, 2007.

<sup>167</sup> Pascoe Pleasence, Legal Services Commission (UK), *Causes of Action, Civil Law and Social Justice*, 2006, p 119 Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 225.

<sup>168</sup> Ibid p 116.



The total expenditure on information services is not a significant proportion of Commonwealth expenditure on the justice system. However, as we have seen in Chapter 2, people who seek legal information do not necessarily access a funded information provider. People will seek help from friends, non-legal professionals, school teachers and so on. Accordingly, merely increasing the capacity of funded legal assistance providers to provide legal information is unlikely to significantly improve the availability of legal information. What is needed is a more strategic approach to the provision of legal information.

### **No wrong number, no wrong door – improving access to information for people with legal issues**

A sophisticated single integrated service, accessible by telephone and internet, which provides information, warm referrals and (where appropriate) legal advice would provide accessible legal information and effective triaging to resolve disputes. This would require significant resources and lead times, to ensure all jurisdictions participate, and to develop and transition to common information technology systems and training.

A better option is to ensure that, no matter which information provider, legal assistance or related service a person approaches, a referral system is in place to help connect them to the most appropriate service. The *no wrong number, no wrong door* approach recommended below seeks to ensure this. Evidence indicates that many people contact government to find ways to respond to legal issues, making the policy a viable step towards quicker and better resolution of legal issues.<sup>169</sup> A large proportion of legal issues that people experience in the Commonwealth jurisdiction involve Government. Coupled with the millions of approaches fielded by government agencies and Commonwealth-funded service providers, the *no wrong number, no wrong door* policy has the potential to significantly assist people's progress through dispute resolution.

Significant additional resources would not be required, as all government agencies, courts and legal assistance services already have information functions within their core business. There is already evidence that warm referral practices within government work to improve justice outcomes. As part of the Australian Taxation Office's (ATO) 'complaint assisted transfer project', the Commonwealth Ombudsman currently facilitates the transfer of ATO complaints from its office to the ATO, for internal review.<sup>170</sup> The Ombudsman commenced this initiative due to the low take-up of referrals by complainants.

One feature of the *no wrong number, no wrong door* approach would be a common referral database, which lists available services (both legal and non-legal) by service type and location. There is currently no such database—each legal assistance provider, including LACs and CLCs, maintains its own referral database. In response to a survey conducted by the Taskforce, CLCs indicated that significant time is spent updating their referral databases (responses ranged from 1–2 hours to 1–2 days per month). This is a significant drain on resources.

Many CLCs indicated that they do not have the resources to update their database as frequently as they would like. There is a high likelihood that some services are regularly referring clients to services which no longer exist or whose contact details have changed.

<sup>169</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Small Business Survey 2007 Report*, 2007, p 19.

<sup>170</sup> Commonwealth Ombudsman, *Annual Report 2007-08*, p 62.

The ‘*no wrong number, no wrong door*’ approach provides a triage function for people with legal issues, as:

- timely and appropriate referrals can prevent legal problems from escalating
- information providers provide more effective service, and
- the issue gets the most appropriate treatment in the shortest and most efficient manner possible—be it referral to accurate information (rather than Google, the White Pages, friends or simply ignoring the issue) or more specific legal or non-legal services such as counselling, personalised assistance or advice.<sup>171</sup>

#### RECOMMENDATION 6.1

That Commonwealth agencies that provide services and information to the public and Commonwealth-funded service providers adopt a *no wrong number, no wrong door* approach to the provision of information about government services, or queries seeking information about legal issues. This will reduce information barriers to accessing justice, by ensuring that whichever source of assistance people turn to is able to assist, either directly or by taking people to the correct source.

The *no wrong number, no wrong door* approach involves development of a best practice protocol, through consultations with all interested parties led by the Attorney-General’s Department, for the provision of legal information, assistance or referral. A referral policy may require that the first agency contacted would not refer on without endeavouring to make some assessment of an appropriate referee, and ensure that referee has the capacity to take the referral.<sup>172</sup>

#### RECOMMENDATION 6.2

The *no wrong number, no wrong door* approach can be implemented at a purely Commonwealth level, but would be most effective if it involved the States and Territories. Accordingly, the Attorney-General should consult with State and Territory Attorneys-General for the adoption of the policy by relevant state bodies.

#### RECOMMENDATION 6.3

The Attorney-General’s Department should develop a consultative process to enable relevant agencies, service providers, courts and tribunals to consolidate existing information about the type and location of services on a common referral database.

*Information; Action; Triage; Outcomes; Resilience; Proportionate cost; Inclusion.*

<sup>171</sup> The ‘*no wrong number, no wrong door*’ policy does not need to be limited to referral to legal services; in some instances it may be more appropriate to refer someone to a financial counselling service or a welfare rights service for example. The default referral point when it is not clear where to refer a person would be a legal aid commission, where staff are best equipped to assist in a wide range of instances, including through referring on further where appropriate.

<sup>172</sup> This practice is commonly described as ‘warm referral’. It involves assisting a person to approach a more appropriate service, usually by contacting that service and arranging an appointment, or arranging for the service to contact the person. Importantly, a move towards warm referrals will counteract the effect of ‘referral fatigue’, where users of the justice system become less likely to follow their issue through to resolution the longer it takes or the harder it is to obtain the information needed. Warm referral is especially effective for clients who may not have the means or are hesitant to contact other.

## Direct engagement

Disadvantaged or remote communities access information services less than others, and have less access to telephone and internet services.<sup>173</sup> The experience of ATSILSs shows that the most effective way to educate Indigenous communities about legal issues and legal services is through direct contact. Direct contact can be made with communities and also be targeted to build the capacity of community leaders.

ATSILS report that civil issues, such as debt, driver's licence and social security issues are increasing bases for Indigenous peoples' contact with law enforcement, including arrest, detention and ultimately sentencing. Even minimal early intervention might resolve these issues without escalating to the criminal jurisdiction.

There is scope to build on existing service networks in the development of outreach programs, including those established by ATSILS, legal assistance services and relevant non-legal services such as family relationships services, which have a strong geographical presence across Australia.

Information to assist people with legal issues needs to be accessible and meaningful to people in their particular circumstances. Some people do not have the language or internet skills to access online services or the confidence to call for advice or information over the telephone. In any case, in the more remote parts of Australia the necessary infrastructure that would make this possible is not currently available. Outreach enables information to be provided in community members' language and by people who are sensitive to and respectful of cultural difference. It can also be more responsive to the needs of people from different cultural backgrounds. For example, some cultures have an oral/story-telling approach to learning, meaning that printed material will have a more limited impact on increasing knowledge and awareness.

The Commonwealth Ombudsman has recommended enhancing access to interpreters to improve the availability of government information and services for culturally and linguistically diverse (CALD) groups. The Ombudsman proposes that Government provide a direct link to interpreter services on website homepages; supply an interpreter when requested (and record reasons for inability to do so); specify who can be used as an interpreter (for example, interpreters must be over 18); train staff in working with interpreters; promote qualified interpreters; and offer accessible complaint handling mechanisms to allow feedback about access to, use, or quality of interpreters.

---

<sup>173</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, pp 183, 214.

**RECOMMENDATION 6.4**

The Attorney-General's Department should develop strategies to increase the accessibility of legal information and services among groups that may not be reached by more general programs. This may include targeted advertising, technological solutions, and outreach programs.

**RECOMMENDATION 6.5**

The Attorney-General's Department should work with Indigenous legal assistance providers, relevant non-legal services and communities to improve the provision of information to Indigenous Australians, including through direct contact, and building outreach services to connect existing services.

**RECOMMENDATION 6.6**

In line with the Commonwealth Ombudsman's recommendations to enhance access to interpreters as a 'lifeline' for access to government information and services for culturally and linguistically diverse communities, Commonwealth agencies should explore ways to improve access to interpreters, including through direct links to interpreter services on website homepages.<sup>174</sup>

*Information; Action; Triage; Outcomes; Resilience; Proportionate cost; Inclusion.*

## Collaboration between service providers

The legal issues that a person experiences will often have their foundation in broader, non-legal issues. For example, family separation is a question of relationships as much as the legal aspects of a divorce. Debt problems may stem from issues with unemployment or financial management. These non-legal issues need to be addressed to resolve them and prevent them from recurring or escalating. Collaboration between legal and non-legal services is necessary to ensure that people's legal issues are resolved and their broader needs met.

**RECOMMENDATION 6.7**

Legal assistance providers and relevant Commonwealth-funded service providers (such as family relationship services) should increase collaboration to develop joined-up solutions to service delivery. Strategies could include the collaborative delivery of services, increasing the use of warm referral between providers and more uniform data collection. The new national coordination group for legal assistance (Recommendation 11.1) could be one mechanism to facilitate this Recommendation.

*Triage; Outcomes.*

<sup>174</sup> Commonwealth Ombudsman, 'Use of Interpreters', Report No 03/2009, March 2009.

Existing and emerging technology can greatly expand the availability of services. Four in five Australians now use the internet, a figure which varies depending on the age of the user, but is not dependent on socioeconomic status.<sup>175</sup> Convenience is a primary factor in the increased use of the internet, highlighting its potential for providing legal information.<sup>176</sup>

In relation to Commonwealth government services, the internet is now the most common way Australians last made contact with the government.<sup>177</sup> The internet is also the channel people would prefer to use to contact government.<sup>178</sup> This is not a sudden development; rather, it reflects milestones in trends in the last decade.

Greater emphasis on online information services would help respond to Australians' changing information needs. The use of internet-based technology for live video call and conferencing—such as software that uses Voice over Internet Protocol (VoIP)—is an emerging and accepted medium in Australia. It can overcome issues such as distance, cost and lack of knowledge about what to do, or where to find information, in case of a dispute. The capacity to better direct people to the most relevant information has a triage benefit, as it provides a means of overcoming some of the limitations of written information—for example, a person picking up a brochure that does not reflect the best information or pathway for them to follow.

Potential initiatives that could be explored include the expanded use of web conferencing and online 'chat' services to provide legal information and advice. For example, Youthlaw community legal centre currently manages Youthlaw Online, using real-time video and document sharing capabilities to provide virtual face-to-face information and legal advice to young people in Victoria. Youthlaw collaborates with youth workers in regional Victoria, in particular Uniting Care, to organise advice sessions and provide the support and tools for young people to attend and benefit from its services.

An example of an innovative online initiative is the Commonwealth Government Workplace Ombudsman 'Live Help' service, which provides information about the Commonwealth workplace relations system. As part of Live Help, members of the public can use instant messaging to chat with a Workplace Ombudsman representative and obtain instant help. To access the service, a client is required to enter their first name, email address, jurisdiction and indicate whether they are an employer, worker or other party. Once the live chat is complete, the client is emailed a transcript of the chat session. This is important as it will reduce the likelihood that information will be misunderstood or forgotten, and provides a permanent record of the information for later reference or use.

The Federal Court has also introduced a number of measures to incorporate technology to improve access to justice. The Court has introduced 'eCourtroom' which allows pre-trial orders to be made online, saving cost and time. The Court has also introduced the 'Commonwealth Courts Portal', which provides web-based services to judicial officers, lawyers, litigants and court staff providing real-time information about cases before the courts.

<sup>175</sup> See, for example, Australian Government Information Management Office, *Interacting with Government: Australians' use and satisfaction with e-government services*, 2008.

<sup>176</sup> Law and Justice Foundation of New South Wales research demonstrated 87.7 per cent satisfaction with the internet as the sole or most useful source of legal assistance. Australian Government Information Management Office, *Interacting with Government: Australians' use and satisfaction with e-government services*, 2008 – this report shows that the internet is now 'the main service delivery channel for Australians to interact with government (at pages 4–6).

<sup>177</sup> Australian Government Information Management Office, *Interacting with Government: Australians' use and satisfaction with e-government services*, 2008, p 24.

<sup>178</sup> *Ibid* p 94.

Noting that the likelihood of internet usage among Australians varies with age and is highest among younger people, the Commonwealth should ensure that its focus on the internet as a key channel for delivering information and services does not exclude people of any age or cultural background.<sup>179</sup> Consideration also needs to be given to difficulties for remote Indigenous communities in accessing internet based services. To help ensure accessibility, information should be provided through a variety of sources, giving people choice in the way they access information and assistance.

Video conferencing gives people in regional and remote areas access to legal services not available locally. It can be used for legal advice, collaboration between services, training and connecting people with courts and government agencies. It is not appropriate in all situations—for some clients outreach and other initiatives will always be necessary due to problems caused, for example, by disadvantage, distance, lack of infrastructure, and the capital and recurrent costs of maintaining facilities. Current experience in rural Queensland (for example, use of videoconferencing by community centres and Legal Aid, as part of a South Queensland Justice Network) demonstrates that while videoconferencing can make a real difference it needs time, resources and collaboration.<sup>180</sup>

*“Video conferencing gives people in regional and remote areas access to legal services not available locally.”*

#### RECOMMENDATION 6.8

Greater emphasis should be placed on the opportunities that using new technologies can afford to improve the efficiency and scope of service delivery on a cost-effective basis. Measures to achieve this include:

- The Attorney-General’s Department should initiate discussions with courts, tribunals, Government agencies, service providers and the legal assistance sector to undertake a stocktake of the use of technology to identify opportunities to increase collaboration and expand availability of services, particularly for regional, rural and remote Australia.
- The Attorney-General’s Department should work with legal assistance service providers, desirably through the proposed national coordination group (see Recommendation 11.1), to explore options for improving service delivery through new technology.

*Information; Action; Outcomes; Resilience; Inclusion.*

<sup>179</sup> Note the potential role of initiatives to educate people about navigating the internet to obtain online information and assistance. For example, the LawAccess NSW, *Guide to the Law on the Internet*, 2003.

<sup>180</sup> Care Goondiwindi, for example, uses video conferencing within its own organisation to regularly connect with its clients due to the vast coverage area that Care operates in (40,000 sq kilometres) as this is an efficient personal contact system with clients.

## Access to legislation

In order for people to be able to solve their own disputes and access legal information, primary legislation should be drafted with a sufficient clarity so that the target audience can understand the law without need for a lawyer. What this means will depend to some extent upon the subject of the legislation. For example, laws governing complex superannuation or taxation arrangements may not be readily understandable by an ordinary person in the same way one would expect that laws dealing with less complex subjects might be. Having said that, all laws should strive for clarity. For example, inconsistent and extended numbering adds to complexity, uncertainty and cost.

The retention of outdated or unclear legislative provisions makes the law complex, inconsistent and difficult to access. The 'red tape' imposed by an outdated or unclear law is a burden on users of the civil justice system and will increase the need for private legal advice.<sup>181</sup> This imposes unnecessary costs on the community and makes the law inaccessible for those who cannot afford legal advice. Consequently, they are denied the right to understand the law.

Recommendation 6.9 would allow for a 'stocktake' of primary legislation that is appropriately managed by ministers. In many cases, no or minimal action will be necessary, but the scheme retains the important benefit of regular consideration of the relevance and clarity of laws. In addition:

- ministers could refer legislation to the Attorney-General in order to receive advice on instances of lack of clarity or problems with drafting. The Attorney-General could then make recommendations to the minister about whether and how to review legislation
- under no circumstances would primary legislation be sunsetted
- ministers would continue to assess and identify portfolio legislation that would benefit from significant review and simplification outside of the 10 year review process, and
- decisions for resourcing major reviews would be made on a case by case basis.

The Office of Parliamentary Counsel (OPC) uses the principle of plain language when drafting legislation. However, the quality of legislation is also dependent on the complexity of the original policy and on the instructions being prepared with clarity as a goal. Feedback from drafters suggests that good instructors are less risk averse, leading to stronger, clearer and simpler laws.

To assess whether legislation is sufficiently clear, a review process such as the one described in Recommendation 6.10 would allow external feedback to be provided to the drafters and instructors prior to introduction. The feedback received would assist future drafting as well as improving the legislation under consideration.

---

<sup>181</sup> There is no current estimate of the current administrative burdens imposed by the Commonwealth. A UK baseline measurement exercise in December 2006 found that administrative burdens are about one per cent of gross domestic product. It is possible to estimate Australia's burden on this basis, noting the need to divide it according to relative Commonwealth and State share of administrative burdens.

**RECOMMENDATION 6.9**

To ensure that legislation is relevant, clear, effective and not redundant, the Government should introduce a flexible scheme for the regular review of primary legislation. This would involve:

- For new legislation, ministers should consider the inclusion of appropriate review periods and mechanisms when the legislation is introduced.
- At regular intervals, a schedule of primary legislation<sup>182</sup> which was passed 10 years previously, or had not been reviewed in the last 10 years<sup>183</sup> be published. Relevant ministers would consider whether it was necessary to review the legislation to ensure that it is relevant, clear, effective and not redundant.

While ministers would be accountable for their decisions, the conduct and form of a review would be for ministers to determine, and review would not be mandatory.

**RECOMMENDATION 6.10**

The Attorney-General's Department, the Office of Parliamentary Counsel and the Department of the Prime Minister and Cabinet work to improve the clarity of legislative drafting by:

- developing a scheme so that when primary legislation is released for public consultation as an exposure draft, specific consideration is given to assessing its clarity and readability, and opportunities for that to be tested are included in the consultation process, and
- amending the Legislation Handbook to reinforce the need for instructing officers to provide clear drafting instructions so that legislation can be as simple as possible.

*Information; Action, Proportionate cost.*

<sup>182</sup> Relevant primary legislation would be a substantive new Act or a major amendment to existing legislation – minor amending Bills would not be relevant, as they would be considered in the context of the parent Act.

<sup>183</sup> There would be an initial transition period to ensure that reviews of existing legislation commenced in an orderly manner after an initial period such as two years after the commencement of the scheme.



# Chapter 7: Non-court models of dispute resolution

## Key points

An increase in the early consideration and use of non-court models of dispute resolution has significant capacity to improve access to justice, in particular by ensuring that:

- the dispute is resolved as early as possible
- an appropriate pathway for resolution is used that places an emphasis on the parties' interests and, where appropriate, their future relationship, and
- the cost of resolving the dispute is minimised, and is proportionate to the complexity and importance of the dispute.

As discussed in Part I of the report, there are a wide variety of dispute resolution methods available, all involving varied costs to the Government and to individuals. In particular, there are a variety of low-cost methods of dispute resolution, which involve resolution of disputes outside of the courts. Knowledge and awareness of these methods remains lower than it could be. Raising awareness of these methods has significant potential advantages, including reducing the cost of dispute resolution, and providing stronger outcomes for people with disputes. This Chapter discusses some of these methods, and strategies for increasing their uptake.

A variety of avenues of dispute resolution exist independent of the courts and judiciary, including:

- personal pathways to dispute resolution, including negotiating directly with the other party or deciding not to proceed
- administrative law remedies such as the Commonwealth Ombudsman and tribunals
- EDR
- internal complaint mechanisms
- ADR, and
- FDR services.

The nature of disputes in society is constantly changing. To be effective, non-court models of dispute resolution must be responsive to that change. As the public reaction to the global financial crisis demonstrates, people expect government to take the lead in responding to large-scale challenges that affect society.<sup>184</sup> This includes responsibility for dispute resolution.<sup>185</sup>

This Chapter addresses current initiatives on non-court models of dispute resolution and potential directions for reform. These include EDR, internal complaint mechanisms, ADR and FDR services. Administrative law remedies are discussed in Chapter 10.

<sup>184</sup> The Hon. Kevin Rudd MP, Prime Minister, 'The Global Financial Crisis', *The Monthly*, February 2009, No. 42.

<sup>185</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007, p 21. For example, the majority of Victorians (79 per cent) believe Government has a responsibility to provide ADR services to help resolve disputes.

## Consumer Disputes

Evidence suggests that Australians experience a higher incidence of consumer disputes than other types of dispute.<sup>186</sup> Evidence also shows that people are less likely to take action to try to resolve a consumer-related matter than other types of legal events.<sup>187</sup> If they do take action, people appear most likely to seek help from a friend, and have lower rates of resolution of consumer disputes than other types of disputes.<sup>188</sup>

Consumer disputes generally involve a disparity of resources between the consumer and the business. The subject matter of the dispute is generally of low monetary value, but is potentially significant to the consumer. Accordingly, less complex, more accessible means of dispute resolution, such as small claims tribunals, are necessary.

Businesses also appear to have a high incidence of disputes, and prefer to resolve matters themselves, or get advice from colleagues.<sup>189</sup> The most important factors in choosing a pathway for resolving disputes are cost and time.<sup>190</sup> Following resolution, evidence suggests that third party involvement is viewed as beneficial.<sup>191</sup> Despite an increased interest in ADR on the part of the business sector, the level of use of ADR and recognition of external mediation and dispute resolution services remains relatively low.<sup>192</sup>

## External Dispute Resolution

EDR schemes can offer cheap and flexible approaches to dispute resolution for business and consumers. EDR gives consumers a responsive complaint and dispute resolution scheme, and there are no costs to the customer if he/she is unsuccessful. Additionally, businesses benefit from continuous improvement to best business practice. EDR schemes also give industries responsibility for maintaining their own system and standards of access to justice, encouraging compliance and change in corporate culture.

There is a high level of acceptance of current EDR schemes by industry and consumer groups, with high levels of perceived fairness and satisfaction with the outcomes.<sup>193</sup> Dispute resolution standards are usually maintained as a condition imposed by an industry regulator.<sup>194</sup>

Given the benefits of EDR schemes, the capacity to encompass a broader range of disputes should be explored. This would assist consumers and businesses to resolve relatively small disputes quickly and cheaply. This could be achieved by identifying industries that have a need and capacity for

<sup>186</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 74.

<sup>187</sup> Ibid p 99.

<sup>188</sup> Ibid p 140.

<sup>189</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Small Business Survey 2007 Report*, 2007, pp 15–21.

<sup>190</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007, p iii.

<sup>191</sup> Ibid p x.

<sup>192</sup> T Soudin, *Alternative Dispute Resolution*, 2008 (3<sup>rd</sup> Edition), p 320; Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007, p i.

<sup>193</sup> Financial Industry Complaints Service Limited, *1 January 2008 – 30 June 2008 Review*, p 9; Allen Consulting Group, *Review of the Telecommunications Industry Ombudsman Scheme*, November 2006, pp 60, 74; A Stumer, *Resolving Consumer Disputes: Out of the courts and into private industry* (2003) 31 Australian Business Law Review 48, p 50.

<sup>194</sup> For example, in the area of financial services, all licensees that provide services to retail clients must join an ASIC-approved EDR scheme as a condition of that licence. See also Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, Report No. 49, 2008, p 19.

an EDR scheme, with a view to potentially extending the use of the EDR model in the future. In particular, it would include industries where there is a significant imbalance in power and resources between the service provider and customer, where traditional dispute resolution mechanisms and litigation may not be feasible.

*“There is a high level of acceptance of current EDR schemes by industry and consumer groups, with high levels of perceived fairness and satisfaction with the outcomes.”*

The TIO Service and Financial Ombudsman Service note that many of their members are small (and some micro) businesses. Given the broad support for industry ombudsmen and forms of EDR, there may be benefit in extending the scope of EDR schemes to business-to-business disputes, at least where one of the parties is a small business.<sup>195</sup>

There is general support within industry for ombudsmen. Industry ombudsmen are appropriate for consumer disputes because there is an audience for their recommendations (that is, the business who has agreed to be bound by determinations and the consumer who has brought the complaint). Agreements are reached which remove the necessity that there is a ‘winner’ and a ‘loser’, and there is consistency in the quality of decisions. Additionally, industry ombudsmen can undertake systemic investigations, to address issues that may affect a large number or class of customers without the need for each to lodge a complaint.<sup>196</sup>

The decisions of industry ombudsmen are binding under a certain monetary limit if the consumer accepts the decision.<sup>197</sup> If the consumer does not accept the determination, he or she can pursue other avenues of redress, such as courts. Failure by a scheme member to comply with a decision may result in sanctions imposed by the association or regulator (such as the withdrawal of a licence). Many industry ombudsmen can also make non-binding recommendations, which generally have a high rate of acceptance by parties.<sup>198</sup>

The Administrative Review Council (ARC) developed a ‘framework of guideline principles’ for business regulation. This framework is contained in its report titled: *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*. Importantly, it proposes that ‘where individual rights or entitlements are affected, the principles suggest that administrative law review mechanisms or other redress mechanisms consistent with administrative law values, should be available’.<sup>199</sup> This is consistent with the regulatory requirements for EDR schemes. The ARC report notes that:<sup>200</sup>

<sup>195</sup> Consultations with the TIO and FOS indicated that such an approach might warrant some consideration, Melbourne, 23 March 2009.

<sup>196</sup> Telecommunications Industry Ombudsman, *Annual Report 2007–08*, p 47; Financial Industry Complaints Service Limited, *1 January 2008 – 30 June 2008 Review*, p 11.

<sup>197</sup> The Telecommunications Industry Ombudsman can make binding determinations and directions up to the value of \$10,000; Telecommunications Industry Ombudsman, *Annual Report 2007–08*, p 26. As of January 2010, most areas of the Financial Ombudsman Service will be able to deal with claims valued up to \$500,000; Australian Securities and Investments Commission, *Media Release 09-88AD – ASIC improves dispute resolution schemes*, Monday 18 May 2009.

<sup>198</sup> While the TIO makes non-binding recommendations ‘rarely’, none have been rejected since it was established in 1993; Telecommunications Industry Ombudsman, *Annual Report 2007–08*, p 26.

<sup>199</sup> Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, Report No. 49, 2008, p 39. At page xiii the Report states the principle as ‘all business rules should be applied in a manner consistent with the administrative law values of lawfulness, fairness, rationality, openness (or transparency) and efficiency’.

<sup>200</sup> Ibid p 23.

In order to gain approval a scheme must produce decisions that are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it, and by having specific criteria on which its decisions are based.

The [Australian Securities and Investment Commission (ASIC)] Regulatory Guide incorporates the key principles set out in the *Benchmarks for Industry-based Customer Dispute Resolution Schemes*<sup>201</sup>—consistency with the requirements outlined in the regulations, accessibility, independence, fairness, accountability, efficiency and effectiveness.

The guide supplements the principles in certain respects: in relation to decision-making, it specifies that as a general rule written reasons should be given for a decision and that, in reaching a decision about a complaint, a scheme should not be entitled to rely on information that is not available to all parties.<sup>202</sup>

### The Trade Practices Act as a foundation for resolving consumer disputes

The Productivity Commission has recommended using the *Trade Practices Act 1974* (TPA) as a ‘stepping off point’ for all reforms to consumer policy as it is the foundation of generic laws in this area.<sup>203</sup> Another option might be for the TPA to be amended to require industry codes of conduct to include binding complaint handling provisions. The Australian Competition and Consumer Commission (ACCC) has already provided some guidance in the establishment of such schemes. It suggests that relevant considerations include whether a particular practice is causing significant consumer detriment, whether the proposed scheme has the enforcement tools it needs, whether it is clear what activities should fall within the scope of the proposed scheme, and whether it is likely to complement (not duplicate) existing consumer protection laws and so on.<sup>204</sup>

#### RECOMMENDATION 7.1

The Attorney-General should work with responsible ministers to examine options to increase the range of consumer disputes which have access to an industry ombudsman or external dispute resolution service. This could be done by identifying industries with the need and capacity for an external dispute resolution scheme, with a view to potentially extending the use of the external dispute resolution model in the future. In particular, this would include industries where there is a significant imbalance in power and resources between the service provider and customer, and as such where traditional dispute resolution mechanisms and litigation are not feasible for the vast majority of customers.

#### RECOMMENDATION 7.2

External dispute resolution schemes should be available to deal with disputes involving small businesses, and not just complaints between customers and businesses.

*Information; Action; Triage; Outcomes; Proportionate cost; Resilience.*

<sup>201</sup> Department of Industry, Science and Tourism, *Benchmarks for Industry-based Customer Dispute Resolution Schemes*, Canberra, 1997.

<sup>202</sup> See Australian Securities and Investment Commission Regulatory Guide 139, *Approval of External Complaints Resolution Schemes*, RG 139.47.

<sup>203</sup> Productivity Commission, *Productivity Commission Inquiry Report: Review of Australia's Consumer Policy Framework*, Report No 45, 2008, p 19.

<sup>204</sup> Australia Competition and Consumer Commission, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, Canberra, 2007, viewed 18 August 2009, <<http://www.accc.gov.au/content/index.phtml/itemId/788437>>.

Such approaches align with current Commonwealth initiatives to strengthen consumer protection by enhancing EDR. In October 2008, the Council of Australian Governments (COAG) agreed to transfer responsibility for consumer credit issues to the Commonwealth Government. This decision followed the Productivity Commission's *Reviews of Australia's Consumer Policy Framework*, which identified inconsistencies and gaps in Australian consumer regulation. The National Consumer Credit Protection Bill 2009, which implements the first tranche of reforms in the new national consumer credit framework, was introduced into Parliament on 25 June 2009.

An objective of the Consumer Credit Code is to introduce a national consumer jurisdiction that provides consistent and equal access to remedies for Australian consumers. It introduces a three-tiered approach to resolving disputes concerning consumer credit.<sup>205</sup> The first is internal review by the organisation in question, followed by access to an EDR mechanism and redress from courts. State and Territory courts will have concurrent jurisdiction with the federal courts with respect to consumer credit disputes. As it is not constitutionally possible to confer the judicial power of the Commonwealth upon State and Territory tribunals, the advantages of the tribunals are to be replicated in the new 'opt-in' small claims-type procedures in the federal judicial system. These procedures will be more streamlined and a person will be able to choose whether or not to use them in certain actions they commence in a State magistrates court, local court or the FMC (or the 'second tier' of the Federal Court following the court restructure). The new procedures will also enable courts to act without regard to legal forms and technicalities and will ensure more expedient processes for small claims matters. The implementation of these procedures, along with the changes to the EDR schemes, are intended to ensure that there will be no 'gap' when the State and Territory tribunals cease to have jurisdiction over consumer credit matters.

The Federal Court's and the FMC's ability to provide fee waivers in some circumstances and the introduction of a presumption against issuing adverse cost orders for certain applications, will also help to ensure that redress remains accessible to consumers.

Despite the EDR procedures and small claims jurisdictions, some consumer organisations have suggested that consumer access to legal remedies may be compromised under the new regime. In particular, they have expressed concern that consumers may need to go to court if resolution through EDR mechanisms is not achieved, rather than accessing the low cost mediation services that some State or Territory tribunals provide.<sup>206</sup> This concern could be addressed by the FMC (or lower tier of the Federal Court) introducing pre-hearing procedures aimed at resolving the matter as quickly as possible, including presumption that ADR would be appropriate.

### Internal Complaint Mechanisms

Another, more incremental approach would be to encourage all businesses (whether members of an EDR scheme or not) to implement effective dispute resolution systems and procedures. This would involve processes for customer dispute/complaint handling—adhering to administrative law standards such as fairness, rationality, openness and efficiency—and consumer access to some external mediation processes, if necessary. Such an approach should not impose costs

<sup>205</sup> Australian Securities and Investment Commission, *Helping home borrowers in financial hardship*, Report No 152, 2009.

<sup>206</sup> See, for example, statements made by the Consumer Action Law Centre (Victoria) and Consumer Credit Legal Centre (NSW) in James Evers, *Credit Code May Disadvantage Consumers*, *The Australian Financial Review*, 12 June 2009, p 20. See also Consumers' Federation of Australia, *National Consumer Credit Law – Briefing Paper – Ensuring Access to Justice*, Melbourne, 2009, viewed 27 July 2009, <<http://www.consumersfederation.org.au/submissions.htm>>.

on business—dispute resolution already consumes significant business time.<sup>207</sup> It would not be new—dispute resolution clauses are standard features of commercial contracts because they are cost effective. Similar advantages (of certainty, reducing cost and maintaining positive relationships with customers) are likely to accrue from the implementation of such practices in relation to retail relationships with consumers. Given the benefits, this seems to be an area where imposition of obligations would be unnecessary, but is one where positive results are likely to be achieved through encouragement, education and leadership for businesses. Several Australian industries have codes of conduct and industry associations already.<sup>208</sup> Adding dispute resolution processes to existing structures would improve existing organisations and create an example for other organisations to follow.

### RECOMMENDATION 7.3

To further improve the quality of dispute resolution, the Government should encourage business associations and businesses to consider ways to:

- help businesses understand their obligations in resolving disputes
- encourage businesses to address systemic issues to avoid disputes arising
- where a dispute occurs, ensure that the first step is internal dispute resolution
- support the use of external dispute resolution mechanisms, where appropriate
- ensure that businesses are aware of national standards for dispute resolution—and that their mechanisms adhere to the standards of administrative review such as accessibility, independence, fairness, accountability, efficiency and effectiveness,<sup>209</sup> and
- provide a choice between court (for those matters of a higher monetary value or complex legal issues) and alternative, enforceable means of seeking redress.

*Information; Action; Triage; Outcomes; Proportionate cost; Resilience.*

## Alternative Dispute Resolution

ADR refers to those processes, outside of a court hearing, where an impartial person helps the parties to resolve their dispute.<sup>210</sup> ADR options include arbitration, conciliation, mediation, negotiation, conferencing and neutral evaluation.

The potential benefits of ADR include:

- early resolution of disputes and identification of the real issues in dispute
- less adversarial processes for matters that involve ongoing relationships
- ownership of outcomes by parties who have participated in ADR, and
- proportionate cost in cases of early resolution.

<sup>207</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Small Business Survey 2007 Report*, 2007.

<sup>208</sup> See, for example, Australian Bankers' Association website at <<http://www.bankers.asn.au/About-ABA/default.aspx>>.

<sup>209</sup> ARC, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, Report No. 49, November 2008, p 39.

<sup>210</sup> National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution*, 2006, p 24.

Mainstream ADR services are not always available or adaptable for the needs of a diverse range of disputants. Available material demonstrates that mainstream ADR services may need to be more accessible and appropriate for Indigenous Australians and SRLs. In particular, the National Alternative Dispute Resolution Advisory Council (NADRAC) has previously reported that 'disputes involving Indigenous people will tend to be more complex, involve a larger number of people, comprise a series of overlapping issues and evolve over a longer period of time when compared to non-Indigenous groups'.<sup>211</sup> Complexities in delivering ADR services in Indigenous communities include the intersection of mainstream services with traditional conflict resolution, involvement of Indigenous practitioners, delivery of services in remote locations, and particular difficulties in establishing trust and confidence in services.

Mediation with SRLs can also present specific challenges. While there is a high success rate for simpler non-court ADR,<sup>212</sup> ADR in more complex litigation involving SRLs tends to have a lower success rate.<sup>213</sup> However, surveys of SRLs suggest they were not offered the options of mediation or conciliation at any stage.<sup>214</sup> Similarly, of a sample of cases involving SRLs examined by Sourdin, only 19 per cent had attempted mediation.<sup>215</sup> Accordingly, there is potential to expand the use of ADR processes in cases involving SRLs, but it may also be necessary to better adapt ADR services to their needs.

*"On 13 June 2008, the Commonwealth Attorney-General asked NADRAC to enquire into and report on strategies to remove barriers from, and provide incentives to, the greater use of ADR options — both as an alternative to civil proceedings and during the court or tribunal process."*

The Access to Justice Framework provides a number of Recommendations to support the use of ADR in dispute resolution, as part of pathways such as EDR and courts, and in its own right. More detailed Recommendations will be considered by the Commonwealth Government following the NADRAC inquiry into ADR. On 13 June 2008, the Commonwealth Attorney-General asked NADRAC to enquire into and report on strategies to remove barriers from, and provide incentives to, the greater use of ADR options — both as an alternative to civil proceedings and during the court or tribunal process. The NADRAC terms of reference include:

- whether mandatory requirements to use ADR should be introduced
- other changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process
- the potential for greater use of ADR processes and techniques by courts and tribunals to enhance court and tribunal process, including by judicial officers, and
- whether there should be greater use of private and community based ADR services, and how to ensure that such services meet appropriate standards.

<sup>211</sup> NADRAC, *Indigenous Dispute Resolution and Conflict Management*, 2006, p 16.

<sup>212</sup> For example, agreement was reached in 80 per cent of matters where mediations were held in Community Justice Centres in New South Wales during 2006–07. See Community Justice Centres, *Annual Report 2006–07*, p 6.

<sup>213</sup> T Sourdin, *Mediation in the Supreme and County Courts of Victoria*, Report to the Victorian Department of Justice, pp 84–85.

<sup>214</sup> Queensland Public Interest Law Clearing House, *Self-representation Civil Law Service – Evaluation 2007–08*, p 13.

<sup>215</sup> T Sourdin, *Mediation in the Supreme and County Courts of Victoria*, Report to the Victorian Department of Justice, p 84.

NADRAC released an issues paper on 26 March 2009 and will provide a final report by 30 September 2009.

#### RECOMMENDATION 7.4

The Attorney-General's Department should work with relevant departments and agencies to ensure that opportunities to expand ADR services are considered for a diverse range of disputants, including for Indigenous disputes and for self-represented litigants.

*Action; Outcomes; Triage; Proportionate cost; Resilience.*

### Family Dispute Resolution Services

FDR is the term used in the *Family Law Act 1975* to describe ADR services such as mediation and conciliation that help separating people resolve disputes without going to court.

The current FDR regime has been phased in progressively along with other significant changes to the Family Law Act beginning in July 2006. Significantly, the FDR process is now compulsory. This means that, where an individual wants to apply to the Family Court for a parenting order (including those seeking changes to an existing parenting order), they will first need to attend FDR and obtain a certificate from a registered FDR provider confirming an attempt at FDR was made. However, there are some exceptions to this requirement—including cases involving family violence, child abuse or urgency.

In 2006 the Australian Institute of Family Studies was commissioned to evaluate the extent to which the family law reform package as a whole has been effective in achieving the objectives of the reforms. The evaluation report is expected to be provided to the Australian Government in late 2009. Given this comprehensive evaluation is to be provided soon, the Taskforce does not propose to make recommendations regarding the FDR process.

While the comprehensive evaluation should provide a better understanding of the effectiveness of the requirement for FDR, available data suggests that it has been successful in keeping disputes out of court. There was an 18 per cent decrease in filings for final orders in the family law courts between July 2007 and June 2008 (the first year of compulsory FDR) compared with the previous year.

However it is important to note that ADR had a strong role in the family law system prior to the introduction of compulsory FDR, through what was then described in the Family Law Act as Primary Dispute Resolution (PDR). The Family Court provided a range of mediation services and services were also provided by community organisations. These services reported high success rates—a 1996 evaluation reported a 75 per cent agreement rate,<sup>216</sup> and an evaluation of court-based mediation found an 82 per cent agreement rate.<sup>217</sup>

<sup>216</sup> Moloney et al, *Managing Differences: Federally Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction* National Centre for Socio-Legal Studies La Trobe University July 1996, p xiv.

<sup>217</sup> S Bordow and J Gibson, *Evaluation of the Family Court Mediation Service*, Family Court of Australia Research and Evaluation Unit, Report No 12, Sydney, 1994.



The introduction of compulsory FDR was also supported by a range of Government services designed to assist parties in resolving their dispute. The most significant of these was the establishment of 65 FRCs throughout Australia. These centres offer a range of information and advice for families. They also function as a high profile entry point into the legal system.

The system is also supported by a range of other services which can assist people in resolving disputes without any form of intervention at all. For example, the Family Relationships Advice Line is a national telephone service which can provide advice and information on family issues and refer people to other appropriate services. The Family Relationships Online (FRO) website also provides a range of information and helps people find local, appropriate services.

From 1 July 2009, accredited FDR practitioners will be required to meet new accreditation standards that include knowledge about how to respond to family and domestic violence, how to create a supportive environment for the safety of vulnerable parties in dispute resolution and how to operate in a family law environment. This will ensure that practitioners providing FDR services have an adequate skill base.

The Government is continuing to refine FDR. In June 2009, the Attorney-General announced the introduction of a pilot scheme under which CLCs could receive funding to develop partnerships and collaborative arrangements with FRCs. This will provide opportunities for FRC clients to receive targeted legal advice, while still working towards a non-litigious outcome.

*“In June 2009, the Attorney-General announced the introduction of a pilot scheme under which CLCs could receive funding to develop partnerships and collaborative arrangements with FRCs.”*

The introduction of compulsory FDR into the family law system may serve as a ‘best practice’ model to guide increased use of ADR in other areas of the justice system. The introduction was accompanied by a significant investment in related, complementary services, and followed an already strong culture of non-court-based dispute resolution.

As noted earlier, it is not proposed to make recommendations regarding the current family law system, given the comprehensive evaluation now underway. However, the strategic framework for access to justice is still applicable to the family law system and will be relevant to future decisions in this area. The current FDR model appears to be consistent with many elements of the proposed access to justice framework—there is a strong focus on the provision of early information and referral, a robust non-court dispute resolution mechanism, and a focus on multi-disciplinary service provision so that all the issues arising from family breakdown can be addressed.

### **Use of ADR by the Commonwealth**

The Commonwealth is a significant litigator and purchaser of legal services. Given the benefits of ADR, it would be useful for the Commonwealth to use ADR where possible—for its own intrinsic benefits, and to set an example for other litigants. While ADR is no doubt used widely by Commonwealth agencies, there is currently no way to measure this. Agencies report their expenditure on legal services, however they are currently not required to report on the type of service—whether it was for ADR or for litigation.

The increase in the uptake of ADR could be implemented in a way similar to that which has occurred in the UK. In 2001, the UK Government committed to requiring its departments and agencies to resolve disputes through ADR where appropriate and the other party agrees.<sup>218</sup> Additionally, a commitment was made to the promotion of ADR to increase awareness among claim managers, assisting some to become qualified mediators.<sup>219</sup> Importantly, the text of the pledge notes that some cases will not be suitable for ADR, such as matters involving the abuse of power or vexatious litigants.

The UK Government also undertook to monitor the developments and use of ADR in suitable disputes, and every year agencies provide statistical information to the Ministry of Justice to collate.<sup>220</sup> In 2007–08, ADR was used in 374 cases with 271 leading to settlement (72 per cent), resulting in savings estimated at £26.3m. In comparison to the data available from 2006–07, this represents an increase in the number of cases in which ADR was utilised (311 cases in 2006–07), and a slightly higher settlement rate (68 per cent in 2006–07).<sup>221</sup>

Amendments to the way data is collected on legal services expenditure are recommended in Chapter 9 to provide a better picture of how the Commonwealth purchases legal services. These amendments might include a requirement to distinguish between expenditure on litigation services and ADR services. Data collected here would allow a more rigorous cost-benefit analysis of ADR, and would identify agencies where ADR services are possibly underutilised. It would also assist to identify successful programs which could guide ADR practice in other agencies.

#### RECOMMENDATION 7.5

All Commonwealth agencies should put in place strategies to maximise the use of ADR in resolving disputes. Drawing on event-based costs information collected as a consequence on Recommendation 9.5, the report of Commonwealth Legal Services Expenditure should include details of expenditure on dispute resolution by agencies by reference to the particular dispute resolution mechanisms employed.

*Information; Outcomes; Proportionate cost.*

### ADR and litigation

The commencement of litigation does not preclude the parties coming to a resolution by ADR. However, there are benefits to commencing any ADR process early on in the litigation process. Research on ADR shows that the prospects of successful, non-court resolution are higher for new disputes than for matters that have been in dispute for some time.

The Sourdin report on mediation in the Victorian Supreme and County courts showed that mediation in those courts was taking place significantly after filing—about 76 per cent of the way through an expected full case duration.<sup>222</sup> In the Victorian Supreme Court the mean number of days from filing to first mediation was 324 days. While mediation late in the process may benefit

<sup>218</sup> Ministry of Justice (UK), *Alternative Dispute Resolution: annual pledge report 2007–08*, p 2. A copy of the full pledge is extracted at page 2 of the annual pledge report.

<sup>219</sup> *Ibid* p 11.

<sup>220</sup> *Ibid* p 6.

<sup>221</sup> *Ibid*.

<sup>222</sup> T Sourdin, *Mediation in the Supreme and County Courts of Victoria*, Report to the Victorian Department of Justice, p vi.

from availability of information to allow an informed choice, Sourdin found that earlier action meant that disputes are more likely to be finalised at mediation than for older disputes.<sup>223</sup> Early mediation also has the advantage of occurring before significant litigation costs have been incurred.

It also avoids the problem of parties becoming too invested in a dispute by the time an opportunity to settle it arises to make a considered decision about settlement.

The Sourdin report demonstrates that the quality of an ADR process and its capacity to involve the parties is crucial.<sup>224</sup> Some processes described by lawyers as mediation are more akin to competitive negotiations between lawyers, with little or no involvement from the parties. The format of mediation often seemed to be chosen for its appeal to the representatives rather than the litigants. Most parties to disputes indicated that they would have liked to have participated more. Equivalent material on mediation in federal court proceedings does not appear to be available.

ADR should be considered a standard practice in civil litigation, both before and after filing a dispute.<sup>225</sup> In approaching ADR policy, the Taskforce considers that:

- appropriate referral to ADR is a core component of court process
- central to the process of active case management should be consideration by the judge and the parties of the best method of resolving the dispute
- early ADR is often most effective in resolving disputes, and in minimising costs, and
- the benefits of ADR extend beyond the resolution of disputes to the narrowing of issues for ultimate determination.

The Federal Court, Family Court and FMC have all adopted a docket system for individual cases with a view to narrowing the issues in dispute, requiring fewer events in the litigation process and ensuring that cases more suitable for ADR are easily identified. The docket system also enables the judicial officer assigned to take an active role in the management of the case, with a view to promoting settlement as a preferred outcome.

The proposal to include consideration of attempts to resolve disputes when deciding liability for costs aims to have parties think early about options for resolution by including the potential for adverse cost consequences if they do not.

#### RECOMMENDATION 7.6

Before preparing to litigate, disputants and their legal advisers should attempt to resolve the matter through an ADR process or direct negotiation where appropriate. The Attorney-General should work with federal courts and professional bodies to ensure that procedural and professional requirements reflect the expectation that parties have considered resolving the matter outside the court process prior to commencing litigation.

The expectation that parties will have attempted to resolve matters through ADR and negotiation should apply to self-represented litigants.

*Action; Triage; Outcomes.*

<sup>223</sup> Ibid p 65.

<sup>224</sup> Ibid pp iii–iv.

<sup>225</sup> The issue of whether ADR should be mandatory are complex as they may impose costs and may be not be effective. NADRAC is looking closely at such issues.

## Chapter 8: Court based dispute resolution

### The federal courts and access to justice

#### Key points

In the quality of judicial decisions, and in the conduct and management of actions brought before them, courts have a central role in ensuring fair, simple, affordable and accessible justice.

The essential judicial function is to declare (and enforce, where required) the state of the law in disputes between parties who have standing to bring the issue before the court, in so doing creating or altering legal rights. However, the impact of the courts on access to justice goes beyond the processes that take place in the courtroom after filing. The court process can also frame parties' decisions about dispute resolution pathways through:

- court expectations of parties' behaviour (both before and after filing)
- the cost and time risks inherent in proceeding with litigation if other dispute resolution options fail
- court procedures prior to final hearing (for example discovery, pleadings), and
- the courts' power to issue binding final decisions in the absence of agreement between parties to a dispute (as a barrier to obstructive or bad faith behaviour).

Improving access to justice in the federal courts requires changing the culture of the courts, parties and lawyers from an adversarial system to one where effort and resources are directed to resolving disputes at the earliest opportunity and at a proportionate cost. Better dispute resolution will require:

early and substantive attempts to resolve disputes being built into the court process, including an increased emphasis on the right pathway to resolution

- early and proportionate exchange of information and evidence, and early evaluation of the real issues in dispute by parties and the court
- changing court processes to ensure that all steps in the process are aimed at resolving the dispute, including:
  - amending the legislation and legislative instruments relating to court procedure to reflect the fact that most civil disputes, including the majority of those filed with the courts, do not require final adjudication, and
  - an explicit expectation that judges will actively manage matters to resolution, supported by specific powers for judges to control matters before them.

The access to justice potential and risks of specific types of litigants and types of litigation should also be considered, in particular:

- the scope for self-represented litigants to participate effectively in the court process
- the capacity for public interest litigation and class actions to improve access to justice, and
- the negative impact of excessively litigious parties and unmeritorious claims in imposing disproportionate costs and undue complexity in the resolution of disputes.

Most disputes are resolved without assistance from a court or a lawyer. However, there are a number of complex disputes for which court resolution is necessary. As indicated in Part I of the report, the court system is the most significant cost component of the justice system, in terms of the costs of the courts, and the cost of providing legal assistance to disadvantaged Australians who appear in court.

This report emphasises strategies to resolve disputes without resort to courts. This Chapter is concerned with disputes for which court resolution is necessary, and strategies for reducing the cost and complexity of court resolution in those cases.

### The role of the courts in the federal civil justice system

The importance of courts in the justice system reflects their essential role in the maintenance of the rule of law and their status as one of the three constitutional arms of Government.

The courts properly decide the most complex, vexed and entrenched disputes not capable of resolution by other means or where the parties need or desire an adjudicated statement of the law. The role of courts in the federal civil justice system is heavily informed by their constitutional role (under Chapter III of the Commonwealth Constitution) as the institutions empowered to exercise the judicial power of the Commonwealth. This informs, particularly, the role of the courts in deciding disputes where the issue in dispute is the content of the relevant law.<sup>226</sup>

The exclusive role of the courts is:

- deciding disputes about the content of the law (including the constitution). A caveat to this is that, even where there is a genuine issue of law to be resolved, the circumstances of the dispute may mean that a negotiated or mediated settlement leads to a better outcome for both parties
- creating or altering legal rights where that power is exclusively granted to the court by statute (where a court order is the only means by which it can be achieved—for example, divorce), and
- use of coercive powers.

<sup>226</sup> The nature of courts:

a) only courts can declare and enforce, without consent, people's (including legal person's) existing rights and liabilities or existing legal status: *The Queen v Davison* (1954) 90 CLR 353, 368–369; *Re Cram*; *Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140, 148–9; *Harris v Caladine* (1991) 172 CLR 84, 147; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 15; *Nicholas v The Queen* (1998) 193 CLR 173, 70; *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542, 153.

b) a court of law is essentially a body independent of the executive which has the power to conclusively determine disputes between parties in accordance with the law: *Harris v Caladine* (1991) 172 CLR 84, 94–5; 99 ALR 193, 197–8; 65 ALJR 280, 283; 14 Fam LR 593 per Mason CJ and Deane J; *Re Tracey*; *Ex parte Ryan* (1989) 166 CLR 518, 580; 84 ALR 1, 39; 63 ALJR 250, 273–4 per Deane J; *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54, 93; 21 ALR 128, 145; [1915] HCA 17; BC1500048 per Isaacs J.

Additionally, the courts:

- decide the most complex, vexed and entrenched disputes that are not capable of resolution by other means, and
- decide matters where one or both parties prefers judicial determination to other available methods for resolving the dispute. (This raises questions about the balance between public good and private interest in the allocation of taxpayer funds).

The Commonwealth spends over \$300m annually on the federal court system.<sup>227</sup> Despite the small proportion of matters that reach court, let alone those that are resolved through final adjudication, the court process affects all dispute resolution. The activities of the courts not only resolve the most contentious disputes; they also provide a ‘background of norms and procedures against which negotiations and regulation in both private and governmental settings take place’.<sup>228</sup>

*“The Commonwealth spends over \$300m annually on the federal court system.”*

### The current picture

Commentary on access to justice in the federal courts often focuses on criticisms that the courts are slow and expensive, that they are only accessible to the well-off or legally aided, and that very few matters filed actually require or reach final judgment. For example, in the *Ipsos Community Survey*, the disadvantages of courts and tribunals that were most frequently cited were cost (52 per cent) and time (37 per cent).<sup>229</sup> The accuracy of these impressions is considered below, although the issue of cost is mostly dealt with in Chapter 9.

On 5 May 2009, the Commonwealth Attorney-General announced a restructure of the federal courts by merging the FMC into the Family Court and Federal Court:

- consolidating all family law matters under the Family Court; and
- consolidating all general federal law matters under the Federal Court.

The Attorney-General explained that the reform will increase access to justice by creating ‘a one-stop-shop in family and other federal law matters, ensuring an integrated and accessible system that focuses on dispute resolution’.<sup>230</sup> This is consistent with the elements of the Access to Justice Strategic Framework, particularly as it will contribute to assisting people to reach the most appropriate dispute resolution service, and to ensuring that matters are dealt with at the lowest appropriate level, and at a proportionate cost. The Recommendations in this Chapter are designed to be applicable both to a lower tier of the Federal and Family Courts or to a separate FMC.

<sup>227</sup> The estimated annual cost of the federal courts (the High Court, the Federal Court, the Family Court and the FMC) in 2008–09 is \$307m.

<sup>228</sup> M Galanter, ‘Justice in Many Rooms: Courts, Private Ordering and Indigenous Law’ (1981) *Journal of Legal Pluralism*, 19, pp 6–7.

<sup>229</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007, p 24.

<sup>230</sup> The Hon Robert McClelland MP, Attorney-General, ‘Rudd Government to Reform Federal Courts’ *Media Release*, 5 May 2009.

### *General federal law (Federal Court of Australia and Federal Magistrates Court)*

The vast majority of disputes never reach court. Of those that do, the majority are settled without recourse to final hearing. The survey of legal needs in NSW conducted by the Law and Justice Foundation of NSW reported that, of the civil legal events that people experience, only a very small proportion (4.8 per cent) were resolved through legal proceedings in a court or tribunal.<sup>231</sup>

The majority of matters that do reach court are resolved prior to final judgment. In 2007–08, 27 per cent of general federal law matters in the FMC were finalised by judgment.<sup>232</sup> A comparable figure is not available for the Federal Court. However, anecdotally the proportion of matters finalised through judgment is significantly higher than in family law matters.<sup>233</sup> Nonetheless, general federal law matters filed in the courts are somewhat more likely to be resolved by means other than final adjudication. In considering this data, it is important to bear in mind that matters resolved through adjudication are more likely than average to be complex, entrenched and/or requiring resolution of a specific question of law.

There is an often-expressed view that delay is a major problem in the court system. However, the available data, on the whole, does not bear out that assertion. In 2007–08, the FMC finalised 73 per cent of general federal law applications within 6 months and 91 per cent within 12 months.<sup>234</sup>

*“There is an often-expressed view that delay is a major problem in the court system. However, the available data, on the whole, does not bear out that assertion.”*

The Federal Court finalised 71 per cent of matters within 6 months, and 84 per cent of matters within 12 months. On the other end of the spectrum, about 10 per cent of matters were over 18 months old when finalised. It is important to note that there was significant variation between types of matters:

- 83 per cent of appeals and 89 per cent of corporations matters were finalised within six months—these make up a large portion of the court’s work and contribute substantially to the overall speed of finalisations
- 73 per cent of native title matters finalised were over 18 months old—this is unsurprising, given the complexity of native title proceedings, and the many steps that need to be taken in order to finalise most native title matters, and
- 54 per cent of taxation matters, 43 per cent of competition law matters, 40 per cent of consumer protection matters, 30 per cent of human rights matters and 22 per cent of intellectual property matters were over 18 months old at the time of finalisation.

<sup>231</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 140.

<sup>232</sup> Federal Magistrates Court, *Annual Report 2007–08*, p 13.

<sup>233</sup> Higher rates of finalisation by judgment in general federal law matters is likely to reflect a number of factors. The high rate of public law matters in the federal jurisdiction is likely to increase the proportion of matters requiring judgment. In addition, final judgment is required in migration matters in much higher proportions than for other types of matters—this reflects the fact that prospects for settlement in migration matters is particularly low. These factors are also visible in comparing Federal Court matters with State Supreme Courts—only three per cent of first instance civil matters in the Western Australian Supreme Court were finalised by trial in 2007–08 (*Annual Review* p 15) and only 7 per cent of first instance civil matters in the Supreme Court of Victoria were tried to judgment in 2006–07 (*Annual Report* p 14).

<sup>234</sup> Federal Magistrates Court, *Annual Report 2007–08*, p 23.

Broadly speaking, then, the time between a dispute arising and finalisation in the Federal Court is relatively quick, but there is significant variation between dispute types.

There is almost no information available about the demographic make-up of the parties before the federal courts in general federal law matters. The most that can be deduced is that a significant proportion of litigants are likely to be under some degree of financial hardship—this can be deduced from the fact that approximately 32 per cent of total fees are exempted or waived, with the majority of the waiver amount arising in migration actions.<sup>235</sup> There are also high rates of waiver and exemption in administrative law (41 per cent) and human rights (43 per cent) matters. Obtaining more information about the parties who appear before the courts should be a priority.

Chapter 3 outlines the information available about the public and private cost of litigation, and costs issues are further considered in Chapter 8. For the purposes of this Chapter, it is worth noting that the legal costs incurred by parties to litigation are significant and may represent a barrier to justice, and that the cost to the Commonwealth of court services in connection with litigation is high in the Federal Court, but relatively modest in the FMC.

*“Broadly speaking, then, the time between a dispute arising and finalisation in the Federal Court is relatively quick, but there is significant variation between dispute types.”*

#### *Family Law (Family Court of Australia and Federal Magistrates Court)*

The Law and Justice Foundation of NSW has found that a significantly higher proportion of family law disputes (28 per cent) are resolved through legal proceedings than is the case for other civil matters.<sup>236</sup> However, once in court, the proportion of matters being resolved through final adjudication is much lower, with nine per cent of first instance Family Court filings being finalised by judgment<sup>237</sup> and in the FMC,<sup>238</sup> about four per cent of family law matters (excluding divorce) being finalised by judgment.

The timeframe for resolution of family law matters through the courts in 2007–08 is, on the whole, somewhat longer than for general federal law matters. In 2007–08, the FMC finalised 51 per cent of final orders applications within 6 months.<sup>239</sup> In the Family Court, 50 per cent of matters finalised were less than 8.5 months old, and 90 per cent were less than 28.7 months old.<sup>240</sup>

The family law sector has a long history of integrating less adversarial procedures, including counselling and mediation. This is demonstrated both in the high success rates of the courts in finalising matters through means other than adjudication<sup>241</sup> and in recent reforms to the family law system. Outside the courts, since July 2006, FRCs have been established around Australia to deliver

<sup>235</sup> 83.4 per cent of first instance migration fees are exempted or waived, and 76.8 per cent of appeal fees are waived – the vast majority of which might be expected to be migration fees.

<sup>236</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 140.

<sup>237</sup> Family Court, *Annual Report 2007–08*, p 45.

<sup>238</sup> Federal Magistrates Court, *Annual Report 2007–08*, p 13.

<sup>239</sup> *Ibid* p 23.

<sup>240</sup> Family Court, *Annual Report 2007–08*, p 55. While matters finalised in 2007–08 were slower than in previous reporting years, this reflects the fact that the court cleared a significant number of outstanding matters from its pending cases list, and that the Court’s clearance rate for final orders applications in the financial year was over 150 per cent (see p 54).

<sup>241</sup> 58 per cent of Family Court matters were finalised by mediated agreement in 2007–08 (*Ibid* p 47).



FDR services. Since 1 July 2007, the law has required parties to undertake compulsory FDR before filing in court. Within the courts, a requirement for a less adversarial trial for matters involving children has been placed into Division 12A of Part VII of the *Family Law Act 1975* since 1 July 2006. An individual docket system to allow better case management, as used by the FMC and the Federal Court, has recently been rolled out in the Family Court.

*“The family law sector has a long history of integrating less adversarial procedures, including counselling and mediation.”*

The various recent changes to the family law system have been complex and are currently under extensive evaluation. In 2006, the Australian Institute of Family Studies was commissioned to evaluate the extent to which the family law reform package as a whole has been effective in achieving the objectives of the reforms. The evaluation will consider the legal aspects of the family law reforms, the role of new and expanded services in achieving the objectives of the reforms, and the impact of the reforms on Australian families. The evaluation report is expected to be provided to the Australian Government in late 2009.

Given the scale of the family law system changes and the ongoing evaluation process, this Access to Justice Report will make limited Recommendations relevant to the family law system. However, application of the Strategic Framework, as set out in Chapter 4, may guide future evaluation and reforms.

## Resolving disputes better

### Early and proportionate exchange of information and evidence

#### *Pre-action protocols and pre-trial examinations*

The opportunity to resolve disputes will be improved by identification of the real issues in dispute as early and as cost effectively as possible.

In the UK, Lord Woolf’s 1996 report on Access to Justice led to the introduction of pre-action protocols in the courts of England and Wales setting out procedures that parties must undertake prior to commencing an action in court. Pre-action protocols can contribute to changing the culture of courts and lawyers by entrenching an expectation of early cooperation in resolving disputes. They do so by encouraging early action to:

- identify what the dispute is actually about, so that parties may address what the concerns are directly
- obtain information that may assist to limit the scope of a dispute, or
- obtain information that is necessary before parties are able to make informed attempts to settle the dispute.

Pre-action protocols and similar processes have since been implemented in several jurisdictions, particularly in personal injury, transport accident and workers’ compensation claims.<sup>242</sup> Recent changes in the area of family law also mandate certain pre-action procedures, including compulsory FDR.

<sup>242</sup> For a detailed discussion, see Victorian Law Reform Commission, *Civil Justice Review Report*, 2008, pp 120–133.

The term ‘pre-action protocol’ has been used to describe a wide range of processes, from mandatory pre-action mediation through to targeted or expansive information and evidentiary exchange. Consequently, introduction of pre-action protocols will need to be specific as to what is and is not envisaged.

Not all matters that appear before the courts will be suitable for pre-action protocols—for example, in the migration jurisdiction, claims have already been through an extensive merits review process, and there is a high volume of relatively simple proceedings with a very low success rate and a basis of administrative review. Introducing additional pre-action steps in this process is likely to extend the process and increase costs.

As a first step, pre-action procedures might best be targeted at types of proceedings that tend to be complex and take a long time to resolve. As has already been identified, 54 per cent of taxation matters, 43 per cent of competition law matters, 40 per cent of consumer protection matters, 30 per cent of human rights matters and 22 per cent of intellectual property matters in the Federal Court were over 18 months old at the time of finalisation. Implementation of pre-action protocols might usefully begin with matters of those types (depending on a more detailed analysis of suitability).

The design of pre-action protocols needs to take into account some of the challenges identified through the UK experience, including:

- to ensure proper participation in the pre-action procedures by parties, effective enforcement mechanisms and/or sanctions are crucial
- to avoid excessive front-loading of costs, as has been reported in England and Wales, pre-action requirements should not be excessively detailed and should only require action that is reasonable and proportionate in the circumstances, and
- safeguards to avoid the misuse of pre-action protocols as a litigation strategy, to inconvenience or intimidate the other party.

In addition, it will be important to consider the design and applicability of pre-action protocols in cases where one or more parties is self-represented.

### **RECOMMENDATION 8.1**

#### *Pre-action protocols*

The Attorney-General’s Department should work with the federal courts to determine the types of matters suitable for pre-action protocols. Pre-action protocols should set out requirements for action prior to commencing proceedings, particularly exchange of information between the parties, and should be supplemented by effective sanction or enforcement mechanisms.

To ensure costs of compliance with a protocol do not exceed the benefits, the obligations of a protocol should be reasonable and proportionate, and directed to identifying the real issues in dispute and appropriate pathways for resolution.

*Information; Action; Triage; Outcomes; Proportionate cost.*

### Discovery

Opinions on the efficacy of different forms of discovery are mixed. For example, while the Federal Court rules do not permit general discovery as of right, the practice and experience of judges and practitioners varies. Nonetheless, it is generally acknowledged that the cost of full discovery is too high—examples include:

- Spigelman CJ (NSW Supreme Court) noted that ‘when senior partners of a law firm tell me, as they have, that for any significant commercial dispute the flag-fall for discovery is often \$2m, the position is not sustainable’.<sup>243</sup>
- Middleton J (Federal Court) has referred to cases such as *Multiplex* where estimates of \$25m for discovery where the total claim was \$100–150m; in another case (not named) the amount in dispute was \$80,000, yet 800,000 emails were discovered.<sup>244</sup>

The vast majority of documents obtained through discovery are not of sufficient relevance to be used in the case. For example, the 85,000 documents (comprising over half a million pages) put before the court in *Seven Network Ltd v News Ltd* [2007] (C7) amounted to only 15 per cent of the discovered documents.<sup>245</sup>

*“Spigelman CJ (NSW Supreme Court) noted that ‘when senior partners of a law firm tell me, as they have, that for any significant commercial dispute the flag-fall for discovery is often \$2m, the position is not sustainable.’”*

In the Federal Court discovery is not automatic and parties are already required to make a case for discovery of documents. Judges are already involved in making assessments of the relevance, usefulness and reasonableness of proposals for discovery of documents, including the costs of the proposed discovery.<sup>246</sup> Parties are also expected to provide estimates of the costs associated with proposed discovery.<sup>247</sup> These measures are directed to ensuring that discovery requests are realistic, necessary and proportionate.

These objectives could be assisted if the reasonable costs of discovery were required to be paid up front by the requesting party. This approach would assist to ‘reality test’ discovery requests, to encourage proportionate behaviour, and to reduce the burden of carrying the costs of discovery until the end of the hearing. Concerns that this approach will lead to over-inflated estimations by one party in an attempt to intimidate the other party so they do not persist with an action might be addressed by reference to the role of judges in making assessments about discovery proposals. This role would encompass an assessment of the reasonableness of a particular estimation.

<sup>243</sup> Spigelman CJ, ‘Access to Justice and Access to Lawyers’ (2007) 29 Australian Bar Review 136.

<sup>244</sup> Middleton J, ‘The attainment of justice – with particular emphasis on the Federal Court’, speech to the Annual North Queensland Law Association Conference, 30–31 May 2008.

<sup>245</sup> Ibid.

<sup>246</sup> Federal Court Rules Order 15, Rule 1; see also Federal Court *Practice Note 14* which provides that ‘in determining whether to order discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit’.

<sup>247</sup> Federal Court *Practice Note No 17*: the Pre-Discovery Conference Checklist provides that ‘each party should exchange with the other parties their best preliminary estimate of the cost associated with discovery’.

Such an approach would not apply in all cases, but could be a presumption. The court would need to exercise discretion before making such an order to ensure that parties with a meritorious case were not denied justice through a lack of capacity to pay for reasonable discovery, without which the case would not be able to proceed. Equally, willingness to pay for discovery should not be sufficient to justify that discovery taking place if it is not otherwise reasonably necessary for the conduct of the litigation.

### RECOMMENDATION 8.2

The cost of discovery continues to be very high, and often disproportionate to the role played by discovered documents in resolving disputes. The Attorney-General should ask the ALRC to conduct an assessment of the effectiveness (including the impact on the length and cost of proceedings) of different discovery orders (general, by category or more limited). This would include an appraisal of the extent to which discovered documents are actually used and are influential in proceedings.

### RECOMMENDATION 8.3

The Attorney-General's Department should develop options by which courts may order that the estimated cost of discovery requests would be paid for in advance by the requesting party.

*Triage; Outcomes; Proportionate cost.*

## Redesigning court procedures to ensure all steps in the process are aimed at resolution

### *Active case management*

Successful case management is crucial to achieving the resolution of matters quickly and at a proportionate cost. The management of a matter by a judicial officer is one of the most powerful tools available to direct parties towards the most appropriate path for resolution. However, it has been argued that the decision in *State of Queensland v JL Holdings* (1997) 189 CLR 146, where the High Court held that case management (and its focus on efficiency) should not prevail over the need for justice between the parties, has had a chilling effect on case management.<sup>248</sup> The High Court handed down its decision on 5 August 2009 in *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27, holding that, to the extent that statements about the exercise of the discretion to amend pleadings in *JL Holdings* suggested that case management considerations are to be given little weight, it should not be regarded as authoritative. The Court noted that:

in the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone....It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.<sup>249</sup>

However, Justice Finkelstein has also noted the concerns that parties themselves have when litigation timetables are not followed.

<sup>248</sup> *Black and Decker Australasia v GMCA* [2007] FCA 623, per Finkelstein J.

<sup>249</sup> *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27, [113] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

**BLACK & DECKER (AUSTRALASIA) PTY LTD and BLACK & DECKER INC v GMCA PTY LTD**  
[2007] FCA 623

Finkelstein J: (emphases added)

1. *It is common for parties to do little more than pay lip service to timetables fixed to regulate when steps should be taken to get a case on for trial.* Seemingly it makes no difference whether the timetable is fixed with the consent of the parties or following argument. The view that has taken hold in many quarters is that a party is only required to keep an eye on the timetable and, if it cannot be met, it will be extended. The assumption is that the wronged party will be fully compensated by an award of costs.

...

4. *It is time that this approach is revisited, especially when the case involves significant commercial litigation. One of the primary objects of a commercial court is to bring the litigants' dispute on for trial as soon as can reasonably and fairly be done. If, in some instances, the preparation of the case is not perfect so be it. A case that is reasonably well prepared is just as likely to be decided correctly as a perfectly prepared case.*

5. I am of the firm view that parties should not be treated as leniently as they have been in the past. Commercial parties expect this approach from the courts and their expectation should be met. A useful rule to adopt is to allow an extension only if the failure to meet the existing timetable is the result of excusable non-compliance. In deciding whether there is excusable non-compliance the court should take into account, among other factors: (a) the direct and indirect prejudice to the opposing party; (b) the impact of the delay on the proceedings; (c) the reasons for the delay; (d) good faith or lack of good faith on the part of the party seeking to be excused; and (e) the effect of putting off a trial both on other litigants and generally on the court's ability to efficiently manage its cases.

Court procedures should reflect the fact that most matters do not proceed to final hearing. Obligations imposed on parties should be directed to:

- identifying the real issues in dispute
- planning a pathway to resolution of the dispute, including consideration of the most appropriate course of disposition—be it mediation or other ADR options or judicial determination
- emphasising resolution as early as possible, before positions are entrenched, and
- ensuring that costs incurred are necessary to progress toward resolution, and are proportionate to the issues in dispute.

The measures contained in the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* introduced in the Federal Parliament on 22 June 2009 are directed towards this result. The Bill amends the *Federal Court of Australia Act 1976* to:

- insert an overarching purpose for powers regarding the Court's practice and procedure to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible
- impose obligations on parties and practitioners to act consistently with the overarching purpose, and allow the Court to take into account the failure of legal practitioners or parties to observe

these requirements when awarding costs, including personal costs against a legal practitioner or to provide that a legal practitioner should have no right of reimbursement from their client, and

- provide that, for the purposes of giving effect to the overarching purpose, the Court may take into account the objects of case management, including:
  - the just determination of all proceedings before the Court
  - the efficient use of the judicial and administrative resources available for the purposes of the court
  - the efficient disposal of the Court’s overall caseload
  - the disposal of all proceedings in a timely manner, and
  - the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

The effectiveness of the amendments contained in the Bill is expected to be enhanced by the High Court’s decision in *AON Risk Services*, with legislation and case law both emphasising the importance of active case management.

Assuming the Bill is implemented, it will be important to ensure that the new case management rules do not themselves become a source of interlocutory appeals. The effectiveness of the reforms should be assessed early, and consideration given to whether additional amendments to limit the availability of interlocutory appeals are required to maintain the effectiveness of active case management.

#### *Encouraging active case appraisal*

Judges should be able to provide guidance and feedback to parties about the key legal issues in dispute as early in the process as possible. This will assist parties to focus early on the key issues in dispute and to provide targeted assistance to the court on those issues. This will not only assist parties to direct their efforts and finances to the crucial issues but will also assist parties to make a realistic evaluation of the case, leading to informed and timely settlement decisions.

*“Judges should be able to provide guidance and feedback to parties about the key legal issues in dispute as early in the process as possible.”*

There are concerns that if a judge were to offer any views prior to final judgment that could lead to a claim of apprehended bias. The rule against apprehended bias has arisen from the requirement that courts and tribunals be independent and impartial, and is considered so important that even the *appearance* of departure from impartiality is prohibited.<sup>250</sup> Decision makers must conduct themselves in such a way that a fair-minded observer could not reasonably conclude that the decision maker may not bring an impartial and unprejudiced mind to the resolution of the issues.<sup>251</sup> All submissions from the parties must be heard with an open mind to avoid an appearance of pre-judgement, regardless of the apparent strength of a party’s case.<sup>252</sup>

<sup>250</sup> *Antoun v The Queen; Antoun v The Queen* [2006] HCA 2; (2006) 224 ALR 51, [82] per Callinan J.

<sup>251</sup> *Ibid* [51] per Hayne J.

<sup>252</sup> *Antoun v The Queen; Antoun v The Queen* [2006] HCA 2; (2006) 224 ALR 51, [86] per Callinan J.

The interaction between efficiency and apprehended bias was discussed in *Antoun v the Queen* but unfortunately, the line between permissible and impermissible judicial comment is ill-defined.

Kirby J stated that it is not just acceptable but ‘preferable (at least in a trial by judge alone without a jury) that the judge should express tentative or preliminary views to the parties’,<sup>253</sup> but these views must not suggest that the decision maker has made a final and unchangeable determination in the matter. Decision makers may suggest that certain applications, submissions or arguments may be easy or hard to sustain in the circumstances,<sup>254</sup> and are not required to devote unlimited time to hear unmeritorious arguments.<sup>255</sup> However, the arguments must be heard before a final decision is made. In *Antoun*, the trial judge’s ‘peremptory announcement, as soon as [an] application was mentioned, that he would dismiss it, was a departure from the standards of fairness and detachment required of a trial judge’.<sup>256</sup> The mere fact that an argument, once heard, is proven to be without merit does not alter this requirement.<sup>257</sup>

#### RECOMMENDATION 8.4

The Attorney-General’s Department should explore the feasibility of amending relevant federal court legislation and rules to provide legislative guidance to the effect that the expression by a judge of a preliminary view on an issue does not amount to apprehended bias unless couched in such emphatic terms that it is clear that the judge is irresistibly drawn to that view.

*Information; Action; Triage; Outcomes; Proportionate cost.*

*A case management approach – what we should expect from judges*

#### RECOMMENDATION 8.5

Case management and dispute resolution should be considered central judicial functions and crucial to ensuring fair, cheap and effective access to justice. The Attorney-General should work with the courts and the National Judicial College of Australia to ensure that judicial education includes measures aimed at enhancing the understanding and use of ADR, dispute resolution and case management techniques.

#### RECOMMENDATION 8.6

In considering possible candidates for judicial appointments, the Attorney-General should have regard to the importance of case management and the use of ADR in achieving just, fair and equitable outcomes.

*Action; Outcomes; Triage; Proportionate cost; Resilience.*

<sup>253</sup> Ibid [31] per Kirby J.

<sup>254</sup> Ibid [21] per Gleeson CJ.

<sup>255</sup> Ibid [22] per Gleeson CJ.

<sup>256</sup> Ibid [21] per Gleeson CJ.

<sup>257</sup> Ibid [87] per Callinan J.

### *Case management – fast track*

The Federal Court has recently trialled a ‘fast track’ process (also known as a rocket docket) which has shown very promising results in the Melbourne registry, with high settlement rates and efficient resolution. The process allows parties and the court to focus on the key matters in dispute, and provides parties with the certainty of knowing that a dispute will be finalised in a relatively short time period. The ‘Fast Track Directions’ allow judges to direct that a matter be conducted as a fast track matter but the court does not expect this power to be used very much in practice.

Of the 64 matters finalised under the fast track, only 16 have required final judgment. The majority of matters have been in the areas of trade practices or intellectual property—both types of disputes characterised by lengthy matters before the courts. The average time to finalisation for fast track matters was 118 days, with judgments delivered in an average of 35 days.<sup>258</sup>

From April 2009 the fast track process has been rolled out across all Federal Court registries.

#### **RECOMMENDATION 8.7**

The Attorney-General, acknowledging the positive contribution to efficiency and proportionality made by the Federal Court’s Fast Track, should encourage the Federal Court to identify further scope for parties to use the Fast Track, or specific Fast Track processes.

*Action; Triage; Outcomes; Proportionate cost.*

### *Resolving disputes at the lowest appropriate level*

Lower level courts, and lower divisions within courts, generally have more streamlined and simpler procedures, and are set up to deal with a high volume of less complex matters. Extension of jurisdiction to the lower level courts wherever appropriate will ensure that matters are dealt with at the most suitable level, and that less complex matters are dealt with by courts using the simplest and most cost effective procedures. This recommendation would apply both to the FMC and to any lower divisions of other federal courts which might be created as a result of the Government’s decision to restructure the federal court system.

#### **RECOMMENDATION 8.8**

Disputes should be resolved at the lowest appropriate level. The Government should confer jurisdiction for specific types of disputes on the lowest level of court available and appropriate to hear the matter. This jurisdiction will usually be in addition to jurisdiction conferred on higher courts.

*Action; Triage; Outcomes; Proportionate cost.*

<sup>258</sup> M Pelly, ‘Fast track hits road’ 24 April 2009, *The Australian*; A Boxsell, ‘Fast track wins judges’ vote’ 24 April 2009, *Australian Financial Review*.



## Specific types of litigants and litigation

### Self-represented litigants

#### *Case management pathways*

The merits of claims made by SRLs vary quite widely from case to case. SRLs may be more likely to benefit from referral to external services (including legal assistance services) and from early assessment and guidance as to the form and merits of their claim. This process is also expected to be of assistance in dealing with unmeritorious claims, which is considered further below.

Additionally, courts should be flexible and allow for the filing of revised claims for SRLs. As these litigants may not always know or understand the court rules and processes and are not generally in a position to correctly identify the legal issues to be resolved, allowing them the opportunity to revise or amend a claim is likely to save costs and time, and additionally assist the court and the other party in resolving the dispute.

Less formal processes for the hearing of SRLs are also appropriate, as those litigants with a good claim may struggle to comply with the usual formal requirements of the court and would benefit from a simplified process.<sup>259</sup> It should be noted that the proposal for simplified procedures is not to give self represented litigants preferential treatment over other litigants. Rather, it is to ensure that those litigants are not disadvantaged by their lack of familiarity with court procedure. The current situation is that such litigants learn (however imperfectly) on the job—this imposes burdens of time, cost and stress on those litigants, on the other parties and on the courts themselves, all of whom are drawn into the process (either actively or passively) of tutoring an inexperienced litigant.

Simplified procedures could be introduced on a staged, pilot basis. The potential benefits of this approach are:

- simplified procedures for self represented litigants should help to reduce those costs for all parties and the courts, and
- simplified procedures might be found to be appropriate as a general rule—not just for inexperienced litigants. This could make litigation cheaper and quicker for all concerned.

There is limited data to ascertain the extent to which self represented litigants are problematic for courts. Better data—as part of the data strategy outlined in Chapter 5—will assist to develop processes to support meritorious claims and minimise the adverse impacts of unmeritorious claims.

#### **RECOMMENDATION 8.9**

The courts should develop means by which self-represented litigants' claims could be listed for early evaluation of the merits, and considering whether parties should be referred for external assistance. Courts should be flexible in allowing the filing of revised claims where an applicant is self-represented.

*Information; Action; Triage; Outcomes; Proportionate cost.*

<sup>259</sup> Federal Court Research Memorandum, 'Recommendations for the expeditious management of unmeritorious claims made by self-represented litigants', 30 October 2008, pp 5–6.

## Public interest litigation and class actions

### *Cost barriers in public interest and discrimination matters*

Public interest proceedings are an important mechanism for clarifying issues of relevance to the whole community. Public interest litigation assists in the development of the law and provides greater certainty about the law, greater equity and access to the legal system, and increased public confidence in the administration of the law.

In *Oshlack v Richmond River Council*, Justice McHugh noted that the possibility of adverse costs orders may well inhibit some individuals and groups from bringing meritorious cases to court.<sup>260</sup> It is therefore appropriate to consider whether public interest matters are not reaching the courts because of the risk of an adverse costs order.

Under section 43 of the *Federal Court of Australia Act 1976* (Cth), the Court has a general discretion to award costs in all proceedings before it.<sup>261</sup> The ALRC noted that:

- the current discretion of courts to vary the usual order that costs follow the event where the matter is in the public interest is not often utilised,<sup>262</sup> and
- courts tend to take the view that a party should not be deprived of their right to seek costs if successful merely because the matter is in the public interest.<sup>263</sup>

The ALRC considered that a costs order will most effectively assist to facilitate public interest litigation if the order were made at the beginning of the proceedings, notwithstanding that doing so may lead to a 'substantial dispute between the parties that might be more easily resolved' if the order was made at the conclusion of the proceedings.<sup>264</sup> Although hearing an application for a costs order will add another interlocutory proceeding to the matter, the main benefit in removing the barrier to litigation is only achieved in practice if litigants are aware of where they will stand as regards costs before those costs are incurred.

An example of a legislative scheme enabling a court to consider whether a proceeding affects the public interest in considering an application for parties to bear their own costs is section 49 of the *Judicial Review Act 1991* (Qld).

In cases where a public interest costs order were made, there would by definition be additional costs on defendants that are ultimately successful but are unable to recover a proportion of their costs. Concerns are raised on the basis of a potential flood of frivolous litigation, which businesses would have to pay for. It is also suggested that if a matter were truly in the public interest, then the public, not the business, should fund it.<sup>265</sup>

<sup>260</sup> *Oshlack v Richmond River Council* (1998) 193 CLR 72, [90].

<sup>261</sup> Existing measures also include cost capping under Order 62A of the *Federal Court Rules*. This Order allows the court to specify the maximum costs that may be recovered on a party and party basis, arguably increasing the ability of the 'everyday Australian' to attain justice. However, the order only regulates party/party costs, and no reference is made in the Order to the ability of the court to determine in advance that costs will not follow the event.

<sup>262</sup> Australian Law Reform Commission Report 75 *Costs shifting – who pays for litigation* (1995) pp 143–4.

<sup>263</sup> *Ruddock v Vadarlis* (No. 2) (2001) 115 FCR 229, [18–19].

<sup>264</sup> Australian Law Reform Commission Report 75 *Costs shifting – who pays for litigation* (1995) p 151.

<sup>265</sup> The Australian, 19 June 2009 *Changes to court rules risks flood of litigation*. The article discusses a reported proposal for public interest costs orders submitted to the Victorian Government by the Victorian Public Interest Law Clearing House. The article quotes Greg Evans acting Chief Executive Australian Chamber of Commerce and Industry – 'It would encourage endless media-driven and frivolous litigation against companies with potentially serious cost implications for shareholders and business owners, and ultimately those costs would be passed on to customers'.

The cost to a defendant would be an important factor for a court to consider, and it is not expected that such orders would be made as a matter of course.

The ALRC notes that ‘existing legislative provisions aimed at encouraging public interest litigation have not led to a significant increase in the number of litigants’.<sup>266</sup> Consistent with this experience, a ‘flood’ of litigation is not expected as a result of an explicit discretion to award public interest costs orders as:

- the appropriateness and limits of a costs order would be a matter for the judge to determine in any particular case
- case management rules would apply to keep costs proportionate
- the Court could still refer a dispute to ADR to limit the scope of litigation to the core issues requiring resolution, and
- the significant financial burden on litigants posed by meeting their own costs acts to limit the incidence and scope of litigation.

*“Consistent with this experience, a ‘flood’ of litigation is not expected as a result of an explicit discretion to award public interest costs orders.”*

In the human rights jurisdiction, complaints can be made to the Australian Human Rights Commission by representative groups.<sup>267</sup> The Commission President is empowered to hear complaints, but may terminate a complaint if satisfied that there is no reasonable prospect of the matter being settled by conciliation.<sup>268</sup> Representative groups do not generally have standing to take action in the federal courts if conciliation fails.<sup>269</sup> This has the potential to provide an incentive for respondents not to conciliate in the Commission, on the basis that the representative group cannot pursue the matter should conciliation fail, and that individual complainants are unlikely to be able to afford the risk and cost of litigating.

The Law and Justice Foundation of NSW found that of all the different types of legal issue that people face, they are most likely to do nothing when they experience a human rights issue.

The Productivity Commission recommended overcoming this disconnect in relation to disability discrimination claims in its 2004 report on the operation of the *Disability Discrimination Act 1992*.<sup>270</sup> The Government response, delivered in January 2005, did not accept the recommendation on the basis that courts may be asked to adjudicate matters where no actual evidence was presented, effectively seeking an advisory opinion.<sup>271</sup> However, the party bringing the action would still have to identify a specific act or acts of alleged discrimination. In addition, taken in conjunction with recommendations relating to the overarching obligations of parties and active case management, the case managing judge would be able to determine at a very early stage whether there was in fact a justiciable controversy.

<sup>266</sup> Australian Law Reform Commission Report 75 *Costs shifting – who pays for litigation* (1995), p 147.

<sup>267</sup> *Human Rights and Equal Opportunity Commission Act 1986*, s 46P.

<sup>268</sup> *Human Rights and Equal Opportunity Commission Act 1986*, s 46PH(i).

<sup>269</sup> *Human Rights and Equal Opportunity Commission Act 1986*, s 46PO. Representative groups rarely meet the standard of ‘person aggrieved’ required by the *Human Rights and Equal Opportunity Commission Act*. See, for example, *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 (2 May 2007).

<sup>270</sup> Productivity Commission, *Productivity Commission Inquiry Report: Review of the Disability Discrimination Act 1992*, Report No. 30, 30 April 2004, Recommendation 13.5.

<sup>271</sup> Commonwealth Attorney-General’s Department, *Government’s Response to Productivity Commission’s Review of the Disability Discrimination Act 1992*, January 2005, accessed 18 August 2009, <<http://www.ag.gov.au/PCDDA>>.

**RECOMMENDATION 8.10**

The Government should consider amending federal court legislation to provide a discretion for the court to make a public interest costs order, at any stage of the proceeding, where the court is satisfied that the proceedings concerned will be of benefit to the public because the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant section of the community, or affect the development of the law generally and reduce the need for further litigation.

The Government should consider amendments to allow representative and advocacy groups to bring actions based on claims of discriminatory conduct under the *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth), *Age Discrimination Act 2004* (Cth) and *Racial Discrimination Act 1975* (Cth) before the federal courts (where conciliation in the Australian Human Rights Commission has failed). Action would be constrained by the requirement that there be a justiciable issue, and that actions may only be taken by established groups with a demonstrated connection to the subject matter of the dispute.<sup>272</sup> Consideration should also be given to whether any remedies that are available to individuals would be inappropriate where action is taken by representative bodies.

*Outcomes; Proportionate cost; Resilience.*

*Class actions*<sup>272</sup>

Part IVA of the *Federal Court Act 1976* (Cth), enacted in 1992, enables representative proceedings, or ‘class actions’, to be brought before the Federal Court. Class actions require seven or more people to have a claim which arises out of the same or similar circumstances, and gives rise to a substantial common issue of law or fact.<sup>273</sup>

The objectives<sup>274</sup> of introducing representative proceedings were to promote the efficient use of public and private resources in resolving disputes and enhance access to justice by providing a means by which similar claims which, by themselves, might be too small to be worth pursuing, could be considered together. In addition, class actions can have a strong regulatory impact with the potential scale of the pecuniary damages providing a strong incentive to abide by existing laws.<sup>275</sup> However, class actions also impact significantly on business due to the scope of disputes involved. The availability of class actions may result in litigation in situations where it would not otherwise have arisen.

*“...class actions can have a strong regulatory impact with the potential scale of the pecuniary damages providing a strong incentive to abide by existing laws.”*

<sup>272</sup> The requirements for a demonstrated connection to the subject matter might be similar to those required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

<sup>273</sup> See *Federal Court of Australia Act 1976* (Cth), section 33C(1).

<sup>274</sup> Commonwealth, *Parliamentary Debates*, HoR, 14 November 1991.

<sup>275</sup> It is important to also recognise the role of regulatory agencies in this function. For example, in addition to commencing class action proceedings on behalf of class members, the Australian Competition and Consumer Commission may also institute proceedings in its own right (for example seeking declarations, injunctions and/or imposition of financial penalties outside of the class action context).

Concerns that the introduction of class actions would result in an explosion of ‘US-style’ litigation have not been borne out. In 2005, it was estimated that 166 class actions had been considered by the Federal Court since the introduction of Part IVA.<sup>276</sup> The cost rules in Australia, where the losing party is generally required to bear the costs of the winner, provides a strong disincentive against unmeritorious actions, unlike in the US where costs are generally borne by the individual parties. This is borne out by research conducted in the UK, and reported in the UK *Review of Civil Litigation Costs: Preliminary Report*. That report notes:

...more cases of low merit tend to be commenced under the US rule than under the English rule. Cases proceeding under the English rule are more likely to be settled or abandoned before trial than cases proceeding under the US rule. Those cases which progress to trial under the English rule are likely to be stronger than those which proceed to trial under the US rule... The overall conclusion from this research is that the UK costs rule deters more claimants from beginning or continuing claims. The claimants so deterred probably comprise (a) claimants with relatively weak claims and (b) some claimants who have relatively strong cases but are fearful of costs liability.<sup>277</sup>

Since the introduction of Part IVA, there have been a number of judicial developments that impact on the extent to which the class action objectives are being achieved. The decision of the Full Federal Court in *Philip Morris (Australia) Ltd v Nixon*<sup>278</sup> has interpreted the legislation to require that all members of the class must have claims against each of the defendants. This approach can significantly limit the availability and flexibility of class actions to deal with a full group of related claims, and has affected a number of claims.<sup>279</sup> Given the significant impact of *Philip Morris* and the conflicting authority in *Bray v Hoffman-La Roche Ltd*<sup>280</sup> further consideration of the policy merits of the approach is desirable.

Recent judicial developments in the area of class action funding might also benefit from broader policy consideration. While litigation funding can significantly increase access to justice through funding claims where a plaintiff might not otherwise be able to afford to litigate, it also raises complex questions. Issues that arise include the interaction of litigation funding agreements with the opt-out procedure contained in the legislation,<sup>281</sup> and settlement of claims by some members of a (funded) class while the class action continues.<sup>282</sup>

The prevalence of interlocutory disputes in class actions has impacted the efficiency of pursuing matters through a class action. Finklestein J has noted in two Federal Court cases that class actions can be ‘bogged down’ by numerous expensive interlocutory applications, and even more expensive appeals from interlocutory orders.<sup>283</sup> This development is at odds with the aim of class actions in

<sup>276</sup> Chief Justice Michael Black, Federal Court of Australia, ‘Untitled’ (Speech delivered at the International Class Actions Conference, Melbourne, 2 December 2005), cited in B Murphy, C Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia*, MULR Vol 30 No2, [2006] p 411.

<sup>277</sup> Lord Justice Jackson – *Review of Civil Litigation Costs: Preliminary Report*, May 2009, page 93. At page 91 the English is described as the rule where costs tend to follow the event – as in Australia. The US rule is described as where each side bears its own costs, as generally applies in the USA.

<sup>278</sup> *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487.

<sup>279</sup> See examples listed in V Morabito, *Submission with respect to the Victorian Law Reform Commission’s Consultation Paper, ‘Civil Justice Review’*, p 5.

<sup>280</sup> *Bray v Hoffman-La Roche Ltd* (2003) 200 ALR 607. While both *Philip Morris* and *Bray* are decisions of the full Federal Court, the former has been followed more often.

<sup>281</sup> The Federal Court considered this issue in *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2005) 147 FCR 394.

<sup>282</sup> For discussion of this issue see, for example, V Morabito, *Submission with respect to the Victorian Law Reform Commission’s Consultation Paper, ‘Civil Justice Review’*, pp 22–25.

<sup>283</sup> *Bright v Femcare Ltd* (2002) 195 ALR 574, 607 and *Bray v Hoffmann-La Roche Ltd* (2003) 200 ALR 607, 660.

assisting individuals who would not readily have access to a remedy to attain justice by pursuing a claim as a group.<sup>284</sup> These interlocutory claims rely particularly on disputes about whether the class meets the criteria for commencing a claim and the various methods by which a properly commenced class action may be terminated.<sup>285</sup>

*“Finklestein J has noted in two Federal Court cases that class actions can be ‘bogged down’ by numerous expensive interlocutory applications, and even more expensive appeals from interlocutory orders.”*

Finally, payment of an award of damages in a class action may not always be possible, for example:

- not all the members of a particular class may be able to be identified
- the proportionate share which should go to each member cannot be ascertained, or
- it is impractical (due to administration costs) to return each affected person’s share and thus redress the wrong.

If the damages cannot be paid they are retained by the respondent. If it is accepted that behaviour modification is one of the aims of allowing class actions, such an approach may not be appropriate. Alternatives that might be considered to overcome this are an increase in actions by regulatory agencies, or the introduction of cy-pres like remedies similar to the approach recently recommended by the Victorian Law Reform Commission.<sup>286</sup>

The cy-pres doctrine allows the whole or a portion of a fund that cannot be directly or fairly distributed to individual members to be put to its ‘next best’ use, and administered to the affected class by another means,<sup>287</sup> through the distribution of the damages, either in whole or in part, to an associated charity or public interest beneficiary. This ensures that practical issues do not inadvertently shield the wrong-doer even when the fact of a violation is evident.<sup>288</sup>

<sup>284</sup> Ibid.

<sup>285</sup> V Morabito, *Submission with respect to the Victorian Law Reform Commission’s Consultation Paper, ‘Civil Justice Review’*, pp 6–11. In particular, section 33N is very broad. It allows the court to order that the proceeding not continue as a class action where it is in the interests of justice to do so.

<sup>286</sup> Victorian Law Reform Commission, *Civil Justice Review Report*, 2008, p 531.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

**RECOMMENDATION 8.11**

The Attorney-General should commission a review of the *Federal Court of Australia Act 1976* (Cth) Part IVA class action provisions to ensure they are operating in a manner consistent with the objectives of improving access to justice, improving judicial economy; and contributing to behaviour modification. Among issues the review should consider are:

- means to limit interlocutory proceedings in class actions
- whether the ability for the Federal Court to terminate a class action under s33N should be limited or removed, and whether it should be replaced with any specific criteria
- whether the legislation appropriately takes account of the behaviour modification aspects of class actions, including whether there is scope for the greater involvement of regulatory agencies in class actions and whether the Court should be allowed to award cy-pres remedies, and
- whether the current opt-in arrangements for class actions funded by litigation funders are appropriate or should be amended.

*Outcomes; Proportionate cost; Resilience.*

## Litigants imposing disproportionate costs

### *Vexatious litigants*

Vexatious litigants are parties who persistently bring legal action that has no basis in law, often bringing multiple actions against the same defendants. Proceedings brought by vexatious litigants hinder access to justice because their actions inconvenience and harass other parties, and divert finite court resources towards unmeritorious actions. In August 2003, SCAG agreed that reasonably consistent legislation across Australia may:

- discourage vexatious litigants from ‘forum shopping’ by choosing jurisdictions in which it was easier to achieve their goals
- curtail vexatious litigants acting in concert with litigants from other jurisdictions, and
- enable similar outcomes to flow from one jurisdiction to another.

A SCAG *Vexatious Proceedings Bill 2004* was developed by a working party of officers from each jurisdiction. Under the Model Bill:

- the definition of vexatious proceedings includes proceedings that are an abuse of process, proceedings instituted or pursued without reasonable ground and proceedings instituted or conducted to harass or annoy, cause delay or detriment, or for another wrongful purpose
- specified office holders, including the Attorney-General and the registrar of the court, may apply for a vexatious proceedings order. With leave, a person against whom another person has instituted or conducted vexatious proceedings, or a person with a sufficient interest, may also apply. The Court may also make a vexatious proceedings order on its own motion
- the court may make a vexatious proceedings order if it is satisfied that the person has frequently instituted or conducted vexatious proceedings in Australia
- the effect of the order can be to stay all or part of any proceedings instituted by the person, to prohibit the person from instituting any proceedings or any other order the court considers appropriate, and

- the Bill also provides for the registration and publication of vexatious proceedings orders. Consultation on the Bill indicated support for a nationally consistent scheme, subject to local variations to take into account different policy positions and legislative drafting styles.

The SCAG Model Vexatious Litigants Bill is based on Western Australian law,<sup>289</sup> and legislation consistent with the model has been implemented in Queensland<sup>290</sup> and NSW.<sup>291</sup> The VLRC Civil Justice Review Report recommended that laws consistent with the model be implemented in Victoria.<sup>292</sup> It is noted, however, that courts are generally reluctant to make a declaration that a litigant is vexatious because of the effect such a declaration would have on that individual's right to justice. This concern is addressed by the strict demarcation of criterion a litigant needs to fulfil before being deemed 'vexatious'.

#### RECOMMENDATION 8.12

The Government should consider implementing vexatious litigants legislation based on the Standing Committee of the Attorneys-General model Vexatious Proceedings Bill.

*Action; Triage; Outcomes; Resilience.*

#### *Unmeritorious self-represented litigants*

It is important that claims by SRLs are subject to early evaluation to identify the issues in dispute, the merits of the claim, and options for assistance. A further purpose of evaluation is to identify whether claims are meritorious. Anecdotally, there is a high rate of unmeritorious claims made by SRLs. Early disposal of those claims will reduce costs for courts and, importantly, for defendants who need to minimise costs as they may struggle to enforce a costs order against a SRL. In addition, an unmeritorious litigant's behaviour may not be sufficient to have them declared a vexatious litigant, but can still be a serious burden to the court and other parties. Early evaluation of claims will also ensure that unmeritorious claims are dealt with as quickly and simply as possible.

#### *Mega-litigation*

Mega-litigation is an increasing problem and has the potential to consume disproportionate amounts of court time and resources. Active case management techniques, as recommended above should be applied rigorously to limit the excesses of mega-litigation, including:

- excessive documentary and expert evidence
- unnecessarily lengthy pleadings
- the absence of attempts to narrow the issues in dispute, and
- costs highly disproportionate to the amount in issue.

In addition to recommendations relating to active case management, options for greater cost recovery of the public costs involved in lengthy litigation are also being considered. See Recommendations 8.1 and 8.2.

<sup>289</sup> *Vexatious Proceedings Restriction Act 2002 (WA)*.

<sup>290</sup> *Vexatious Proceedings Act 2005 (Qld)*.

<sup>291</sup> *Vexatious Proceedings Act 2008 (NSW)*.

<sup>292</sup> Victorian Law Reform Commission, *Civil Justice Review Report*, 2008, pp 599–600.



# Chapter 9: Costs

## Key Points

As we have seen, the Government makes a significant contribution to the costs of the justice system. Using the justice system can involve significant costs for an individual. In some cases it is appropriate that an individual who is seeking to resolve a dispute in the justice system meets these costs rather than the Government. On the other hand, costs can act as a significant barrier for justice for disadvantaged Australians.

A comprehensive strategy on legal costs is required so that costs incurred in legal proceedings are proportionate to the issue in dispute. This strategy should aim to:

- improve information and transparency about legal costs and empower people to make appropriate decisions about how they address legal issues and disputes
- ensure that costs are directed towards resolving a dispute at the earliest opportunity, and
- ensure that there is sufficient information available about the costs of legal services to enable people to make an informed decision about the path that they wish to pursue.

Part I of the report, particularly Chapter 3, contains a detailed analysis of the costs of the justice system. The costs of the justice system can be divided into two categories: the cost to the individual and the cost to Government. The cost to Government includes costs such as the cost of funding the federal courts and granting funds to legal aid, while the cost to the individual generally includes legal fees and court fees. This Chapter contains some specific strategies on how costs can be managed.

Cost is a factor in assessing both the demand and supply aspects of access to justice. Where possible, matters should be directed to the least costly option that produces a fair outcome. Comprehensive data on the costs of the civil justice system is needed to allow Government and individual users of the justice system to make informed choices.

## The current picture

### The need for more comprehensive data on costs in the civil justice system

As a first step, the demand for legal services needs to be clearly understood. This requires comprehensive data. Currently, there is not enough information available to a participant in the justice system to decide which pathway to take to obtain the least costly option that produces a fair outcome in the particular circumstances. As noted in Chapters 2 and 3, the production and collection of data needs to be built into reforms to the justice system as a core function.

In addition, while studies have shown that cost does not generally influence a person's decision about whether to act on legal issues, it may influence the choice of service to resolve a legal dispute.<sup>293</sup> The 2007 Victorian Dispute Resolution Survey explored the factors that influenced

<sup>293</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006. In a survey of people's response to legal issues, of those who did nothing, only 3.9 per cent cited not being able to afford it as a reason for inaction.

the choice of service. That study showed that people were more likely to choose one pathway over another if it is cheaper (37 per cent), easier (24 per cent) and quicker (16 per cent).<sup>294</sup> People were less likely to use a dispute resolution service based on the perceived cost (20 per cent) or the time involved in dealing with an outside agency (13 per cent).<sup>295</sup> The disadvantages of courts and tribunals that were most frequently cited were cost (52 per cent) and time (37 per cent).

From the information available, while it is clear that there is significant demand for federal civil justice services, users need more information to make informed decisions on which pathway to take when faced with a legal problem. Taking into account the cost and usefulness of the service, Government can make informed decisions on how best to use the scarce resources available to maximise access to justice. Better information on legal costs will also assist in ensuring that the cost of using the justice system is proportionate to the issues in dispute.

### *The apportionment of costs—costs to the Commonwealth Government*

It is important to have a clear picture of how legal services are supplied in the civil justice system in order to ensure that funds for legal services are apportioned in a targeted and effective manner.

In 2007–08, over \$1 billion in Commonwealth funding was committed to the various institutions of the Commonwealth civil justice system, including courts, tribunals and legal assistance providers. In addition, Government agencies expended \$510 million on legal services in 2007–08. The Commonwealth Government is currently undertaking a review of legal services expenditure.<sup>296</sup> The review is looking at the current arrangements for the procurement of legal services with a view to providing advice on how the Commonwealth can most efficiently purchase legal services to deliver value for money for taxpayers.<sup>297</sup>

*“In 2007–08, over \$1 billion in Commonwealth funding was committed to the various institutions of the Commonwealth civil justice system, including courts, tribunals and legal assistance providers.”*

One area where the Government meets costs that would normally be borne by individuals is by providing legal assistance. However, the legal aid system is under increasing pressure. In 2007–08, legal aid service levels were cut by six per cent (from 2006–07 levels) across the board,<sup>298</sup> primarily due to an increase in the costs of service provision. For example, the average cost of a grant of aid for a family law matter increased by 25 per cent from the 2006–07 level.<sup>299</sup> The service cuts are happening differently in different states, but generally LACs are no longer providing the full range of services contemplated in the legal aid agreements. There is now very limited availability of legal aid for civil law matters as LACs focus on family and criminal law matters—a reduction of 78 per cent since 1995–96.<sup>300</sup>

<sup>294</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report*, 2007, pp 19–20.

<sup>295</sup> Ibid p 22.

<sup>296</sup> The Attorney-General announced a review of legal services procurement arrangements on 20 March 2009, which is expected to report in October 2009.

<sup>297</sup> Attorney-General media release, *Review of Commonwealth Legal Service Procurement* 20 March 2009, accessed 10 August 2009, <[http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2009\\_FirstQuarter\\_20March2009-ReviewofCommonwealthLegalServiceProcurement](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_FirstQuarter_20March2009-ReviewofCommonwealthLegalServiceProcurement)>.

<sup>298</sup> Calculated from data from the LARI, a database maintained by the Attorney-General's Department.

<sup>299</sup> Calculated from data from the LARI, a database maintained by the Attorney-General's Department.

<sup>300</sup> Calculated from data provided by LACs.

The cost of supplying legal services differs depending on the type of service. The cost of dispute resolution services generally increases according to the formality of the services provided and the institutional arrangements used. For example, dispute resolution in court will generally be more expensive than dispute resolution in a FRC. As noted in Chapter 3, the provision of information, advice and counselling services by CLCs, FRCs and legal aid is relatively inexpensive and can be an efficient means of avoiding or quickly resolving disputes. Formal adversarial proceedings on the other hand, such as hearings before the AAT and the Federal Court, tend to involve the greatest costs to Government due to the significant resources involved. For example, the average grant of legal aid in 2008–09 for federal law court work was \$4191.55.<sup>301</sup> Given that LACs are generally paying less than commercial rates, this figure is likely to be much higher for someone not entitled to legal aid who is engaging a solicitor privately.

As noted in Chapter 3, governments need to identify ways to maximise the use of their scarce resources when possible. A major part of this is directing resources to early and less formal dispute resolution services before issues escalate and impose greater costs on the system. This reflects the principle of efficiency outlined in this report; that the justice system should deliver outcomes in the most efficient way possible. This is often achieved without resorting to a formal dispute resolution process, and includes preventing disputes.

#### *Cost to the individual*

In addition to the cost to Government, accessing the justice system generally has a cost to the individual. The cost varies according to the service used. As noted above, the more formal the mechanisms used, the higher the cost. For example, many of the less formal, early forms of assistance are provided free of charge, through information services, advice lines and community legal education. Once matters are elevated to courts and tribunals, the costs increase markedly. Fees are generally imposed for courts and tribunals and legal fees are also usually necessary. Legal fees are by far the largest cost in litigation and are often seen as a barrier to accessing justice.

*“Legal fees are by far the largest cost in litigation and are often seen as a barrier to accessing justice.”*

A Law Reform Commission survey conducted in 1999 found that the costs of legal professional services, while varying consistent with the complexity of the issues involved, were significant. For example, the average cost for professional fees for an applicant in the Federal Court was \$62,134. These costs have obviously increased over the last ten years. Court and tribunal fees on the other hand are only a small proportion of the actual cost of using the court or tribunal. Currently, the Government bears the majority of this cost.<sup>302</sup>

Given the above analysis, it is clear that in general, the longer a dispute takes to resolve and the further it progresses towards court determination, the higher the cost to the individual and public resources. The focus should be on encouraging the early resolution of disputes wherever possible, thereby decreasing costs both for the Government and the individual.

<sup>301</sup> Calculated from data from the LARI, a database maintained by the Attorney-General's Department.

<sup>302</sup> In 2007–08, fees paid in the Federal Court of Australia amounted to only 9.3 per cent of the Government's expenditure on the Court.

## Cost recovery

All Commonwealth courts charge a fee for some or all applicants. While the fees vary between courts and jurisdictions, the collection of fees falls well short of full cost recovery. In 2007–08, fees paid in the Federal Court of Australia amounted to only 9.3 per cent of the Government's expenditure on the Court. The figure for the FMC is 22.4 per cent, while the Family Court, where fewer fees are charged, recovers only 0.9 per cent.<sup>303</sup> Fees are subject to exemption and waiver provisions, which apply to those in receipt of legal aid or income support payments and others who would suffer financial hardship if they had to pay fees.

As outlined in Chapter 3, resolution of a dispute by the courts can have significant benefits to the individual parties involved. Given the importance of state sponsored machinery for dispute resolution and enforcing rights, courts also have public benefits—not least of which is its fundamental importance to maintaining the rule of law, which benefits the whole community. The specific civil litigation related functions of a court are performed at the request of the parties who have the immediate and almost exclusive interest in the conduct and outcome of the litigation. In these circumstances, it may be appropriate to require that parties pay for the cost of these services. There are a range of factors relevant to deciding when cost recovery is appropriate in the federal justice system. These are examined in detail in Chapter 3.

*“The specific civil litigation related functions of a court are performed at the request of the parties who have the immediate and almost exclusive interest in the conduct and outcome of the litigation. In these circumstances, it may be appropriate to require that parties pay for the cost of these services.”*

Full cost recovery could also send proper price signals to litigants to properly value the public resources being made available through the court services and infrastructure. While extreme examples, such as the *C7*<sup>304</sup> and *Bell Group*<sup>305</sup> cases illustrate the costs of what is commonly known as ‘mega-litigation’. Mega-litigation has been described as ‘civil litigation, usually involving multiple and separately represented parties, that consumes many months of court time and generates vast quantities of documentation in paper or electronic form’.<sup>306</sup> *C7* involved 120 hearing days in the Federal Court, and the *Bell* case sat for 485 hearing days in the WA Supreme court. In the *Bell Group* matter, an internal WA Government report has estimated that the full cost of that matter to the Government was \$6.19m, while only \$0.9m was able to be collected in fees payable by the parties.<sup>307</sup> In these cases, litigants with the deep pockets to pay enormous legal fees are able to make significant demands of the taxpayer in the form of court usage. In addition to this direct cost on the taxpayer, large-scale litigation impacts significantly on a court's capacity to handle other matters.

<sup>303</sup> Productivity Commission, Report on Government Services 2009.

<sup>304</sup> *Seven Network Ltd v News Ltd* [2007] FCA 1062.

<sup>305</sup> *Bell Group Ltd (IN LIQ) v Westpac Banking Corporation* [No 9] [2008] WASC 239.

<sup>306</sup> *Seven Network Ltd v News Ltd* [2007] FCA 1062 (*‘C7 Case’*), at [1].

<sup>307</sup> WA Department of the Attorney General, Consultation Paper, *Court fees charge to well resourced litigants in lengthy civil cases*, internal paper undated.

Mega-litigation is not the only example where cost recovery may be appropriate. Cost recovery can potentially be used in a much wider category of cases to ensure that incentives are in place for parties to appropriately value the taxpayer funding of court resources.

Cost recovery would operate fairly, effectively and simply for all litigants if it were applied by reference to objective criteria (for example the number of sitting days), subject to appropriate judicial flexibility for waivers and exemptions. This would avoid the perception that the court was engaged in imposing a penalty on a party, with potential for satellite litigation arising from a decision to impose full cost pricing.

Consideration should be given to implementing the recommendation for full cost pricing on a consistent basis for all courts exercising federal jurisdiction (Federal Court, FMC and State and Territory Supreme Courts) to ensure that uniform cost recovery regimes apply nationally to courts exercising federal jurisdiction. SCAG might be the appropriate forum to negotiate this outcome. As noted in Chapter 3, competing courts (State and Territory Supreme Courts) which do not have the same cost recovery policies in place may make cost recovery in the Commonwealth sphere less effective.<sup>308</sup> If cost recovery schemes were introduced only in the federal courts, litigants would be able to avoid full cost recovery by running their cases in the State or Territory Supreme Courts. This would make the federal courts uncompetitive and would also limit the effectiveness of the policy intention behind cost recovery by allowing litigants to avoid cost recovery and run cases such as C7 in State or Territory courts.

#### **RECOMMENDATION 9.1**

The Attorney-General should initiate a thorough examination by the Standing Committee of Attorneys-General of issues and options for funding aspects of the justice system on a cost recovery basis. The purpose of the examination would be to ensure that resourcing of the justice system maximises access to justice.

#### **RECOMMENDATION 9.2**

Given the significant public costs of court hearings, and the opportunities parties have to resolve matters without hearing, or minimise the length of hearings by identifying the real issues in dispute, full cost pricing for long hearings is generally appropriate. The Government should propose a model of full cost pricing for long hearings which would:

- commence after a certain number of hearing days, or adopt a sliding scale, rather than be imposed as an exercise of judicial discretion, and
- be subject to a comprehensive system of exemptions and waivers (excluding, for example, human rights and native title matters) to protect access to justice.

*Outcomes; Proportionate cost.*

<sup>308</sup> The last significant increase in Federal Court fees occurred in 1996, where fees were raised to a level comparable to State and Territory courts. This was followed by a significant reduction in the number of filings in the Court for matters under the *Corporations Law*, where the Court had concurrent jurisdiction with State and Territory courts. The Court believes this reduction was caused by the increase in fees.

## Transparency – legal fees

As noted in Chapter 3, the last large scale survey undertaken in 1998–99 by the ALRC found that the costs of legal professional services, while varying depending on the complexity of the issues involved, were significant. There is little doubt that an average cost of \$62,134<sup>309</sup> for professional fees for an applicant in the Federal Court would be daunting to most people. Increasing transparency in legal fees is a positive step. It will allow people to make informed decisions about legal issues, taking into account whether a proposed course of action is proportionate in the circumstances.

## Advertising

The rules relating to advertising for legal services are different across Australia. Some States prohibit advertising for personal injury and ‘no win, no fee arrangements’, and some States allow advertising for any sort of legal service as long as the advertisement is not false or misleading.<sup>310</sup>

There is anecdotal evidence that people often do not see a lawyer because they are perceived to be too expensive. In many cases, seeking professional legal advice can be relatively inexpensive, and the cost of not seeing a lawyer can be much higher. For example, if a small business did not get advice about protection or use of intellectual property, the consequences could be significant and costly. If lawyers include in their advertisements more information about their costs, the perception that lawyers are always too expensive may be partly dispelled.

Advertising legal fees is difficult, as it is often challenging to predict the cost of legal services with any accuracy. Advertisements would need to be carefully worded to ensure they are not misleading. Importantly, not all legal services lend themselves to fee advertising; however services offered on a fixed fee basis are a good example of where advertising would be relatively simple. This includes, for example, conveyancing and providing legal advice on commercial contracts.

Lack of information about the cost of legal services means that many consumers are not in a position to make informed decisions about legal issues. Increased information on legal fees, through advertising, will provide a more accurate picture of the true cost of legal services. It may also increase competition between legal firms, thereby driving legal costs down.

## Consistent cost disclosure rules

The regulation of the legal profession in Australia is governed by State and Territory law. Legal profession regulation deals with those aspects of professional conduct and practice of lawyers, over and above general consumer protection mechanisms found in the *Trade Practices Act 1974* (Cth) and complimentary State and Territory legislation. This includes issues such as eligibility for admission, eligibility to hold a practising certificate, and the duties and responsibilities of a legal practitioner (including duties relating to cost assessments, disclosure and billing).

On 1 July 2009, the Attorney-General announced the formation of the National Legal Profession Reform Consultative Group. This Group was established to assist and advise the National Legal Profession Reform Taskforce, chaired by Roger Wilkins AO which has responsibility for preparing

<sup>309</sup> See Table 3.3, Chapter 3.

<sup>310</sup> For example s 63-66 *Personal Injuries Proceeding Act 2002* (QLD) states that lawyers cannot advertise for no win, no fee arrangements and also imposes restrictions about personal injury advertising, whereas in South Australia lawyers can advertise for legal service as long as it is not false or misleading Rule 36 *Rules of Professional Conduct and Practice*.

draft uniform legislation to regulate the legal profession across Australia. Consistent cost disclosure requirements are being considered by that Taskforce. More information on the work of the National Legal Profession Reform Taskforce is in Chapter 12 of this report.

### Exchange of litigation budgets

Improving information and transparency about legal costs improves access to justice by empowering people to make appropriate decisions about how they address legal issues and disputes. Currently, there is too little information available to consumers about the cost of legal services. People's ability to understand the cost implications of litigation restricts their ability to make decisions about which pathway is the most appropriate to resolve a dispute, and how and on what basis they might settle a matter. The level of information available would be improved by ensuring that:

- practitioners provide clients with meaningful estimates of the cost of the provision of legal services
- those estimates are updated at appropriate points in the process, and
- that parties exchange those estimates with the other party and the court.

Disclosure and exchange of cost estimates to all litigants can enable people to make better informed decisions about legal issues. Better information in the market should also (indirectly) have a competitive effect on legal fees.

There are already some obligations on litigants and lawyers to provide information on costs. Legislation regulating the legal profession in the States and Territories generally requires firms to provide estimates of costs of the case to clients, as well as estimates of the range of costs payable if successful or unsuccessful.<sup>311</sup> The Federal Court and the Family Court go a step further. The Federal Court requires parties to exchange their best preliminary estimate of the cost associated with discovery.<sup>312</sup> The Family Court requires that immediately before each court event, the lawyer for the party must give the party written notice of the party's actual costs, both paid and owing, up to and including the court event and the estimated future costs of court events.<sup>313</sup> There is also a requirement that a party's lawyer give to the court and the other party a copy of the notice given to the party at each court event.<sup>314</sup> Judicial intervention is usually necessary to ensure compliance with this rule.<sup>315</sup> This underlines the vital role that judges could play in ensuring that any proposal relating to exchange of litigation budgets is successful. The case management proposals in the Civil Litigation Reform Bill 2009 also include provisions which allow the court to direct lawyers to submit estimates of the total costs and disbursements and the costs that, if the party was unsuccessful, would be payable to the other party.

However, the current obligations are ad hoc and differ from court to court. The preparation of litigation budgets proposes consistent obligations for the provision of already required information. While the provision of costs estimates has potential to impose some new costs, these should be offset by the potential for savings in litigation costs overall.

<sup>311</sup> See for example Division 3 *Legal Profession Act 2007* (QLD) and s 309 *Legal Profession Act 2004* (NSW).

<sup>312</sup> Federal Court of Australia, Practice Note 17: Pre-Discovery Conference Checklist.

<sup>313</sup> Rule 19.04(1) Family Law Rules.

<sup>314</sup> Rule 19.04(3) Family Law Rules.

<sup>315</sup> Chief Justice Diana Bryant (letter to the Attorney-General's Department, 10 July 2009).

A requirement that, in the Federal Court, lawyers provide their clients with a litigation budget, and for that budget to be provided to the court and other parties, would:

- compel parties to turn their minds to identifying the best way to resolve their dispute at the outset of the matter, including by considering the likely stages the case would go through
- encourage parties to consider options to resolve disputes early, including through the use of ADR
- provide greater certainty about the costs the other party is likely to incur, giving parties notice of their likely costs liability if they are not successful (in accordance with the usual rule that the unsuccessful party pays the costs of the successful party), and
- allow the judge to consider whether the budgeted costs on each side are proportionate to the issues in dispute. For example, if the total costs represent a significant portion of or exceed the value in dispute, a 'rethink' is probably necessary. Similarly, significant disparity between the proposed budgets could be an indication of a need to examine the parameters of the case.

To determine whether this process achieves its objectives, a first step would be to provide judges with the discretion to order the preparation of a litigation budget. The use of that discretion, its effectiveness and costs could be assessed over a pilot scheme. Additionally, the role of the court in awarding costs to the successful party would include, as it does now, assessing the reasonableness or otherwise of a party's litigation budget. Parties would be informed that the costs drawn up will be subject to judicial discretion as regards costs orders at the time of submission.

There is a concern that the work involved in creating a litigation budget will be quite onerous, and involve significant cost. However, the requirement to prepare and exchange a budget would be discretionary, and such discretion would take into account the reasonable steps taken by the parties in order to settle the dispute and/or narrow the disputed issues before the matter escalates to litigation. In this regard, litigation budgets would serve as a 'reality check' for those litigants who insist on taking matters to court without attempting other methods of resolution. These budgets could serve to highlight cases where litigation is obviously not the most appropriate course, for example, where the costs are clearly disproportionate to the issues in dispute. Further, the costs associated with producing and exchanging a budget would serve as an incentive to use non-court methods of dispute resolution.

### RECOMMENDATION 9.3

The Attorney-General's Department should work with the Federal Court to develop options to require parties to litigation in the Federal Court to exchange with each other and the court a litigation budget which includes an estimate of the costs identified by reference to the stages and activities the party proposes are necessary to progress to resolution.

As an initial step this recommendation could be implemented as a pilot, with a judicial discretion to order the preparation of such a budget.

*Triage; Outcomes; Proportionate cost.*



## Event billing: Commonwealth legal services

Currently, the majority of lawyers charge on the basis of time billing. Time billing can encourage lawyers to work slowly or ‘over-service’, as it does not recognise efficiency and it also does not take into account the different levels of service. The same fee is charged for a lawyer drafting a simple follow up email as the drafting of complicated legal advice.

The Commonwealth has significant influence in the legal services market, both in terms of its behaviour and its buying power. In 2007–08 Commonwealth *Financial Management and Accountability Act 1997* (Cth) agencies<sup>316</sup> reported legal expenditure of over \$500 million. The Commonwealth should use its influence to improve the availability of information about the cost of legal services and to model positive conduct in the legal fee arrangements. Some large corporations are using their market power to demand different fee structures and more transparent and fair fees. As a large consumer of legal services, if the Commonwealth also demands a certain type of service, this may help to change the culture of the legal profession. Requiring firms to bill on an event basis will provide more certainty in Government legal purchasing and may encourage event billing in the wider community. In addition, this will allow Government to have more control over Government legal spending, which may allow resources to be used more effectively.

Further consideration will need to be given to the specific events to be billed as well as consideration of the types of cases where event billing may not be appropriate. For example, some Commonwealth departments currently bill legal work on a bulk, fixed fee basis. For example, DIAC does this for routine migration matters. Event billing is not intended to disrupt this cost saving practice.

An example of event-based costing in the purchase of legal services can be seen in the purchasing of legal services by LACs. The agreements between the Commonwealth and the States and Territories for the provision of legal aid services require that LACs use an event based costing model when granting legal aid in family law matters. The model sets out a number of events or stages in a matter and assigns a maximum number of hours payable work for each stage. The intention of this requirement is to manage the costs of litigation while providing certainty to both the legal aid commission and the practitioner delivering the legal services.

While many practitioners are dissatisfied by legal aid remuneration, a study commissioned by the Department in 2006 found that this is due to the low hourly rate paid more so than the requirement to use event based costing.<sup>317</sup> A further study in 2007 found that LACs support the requirement to use event based costing as it is an effective cost control mechanism.<sup>318</sup> The Legal Aid Commission of the ACT indicated that the payment model was supported by many legal practitioners, due to the clarity it provided, and that complaints about the model generally came from practitioners who were unfamiliar with the model.<sup>319</sup>

Currently, the *Legal Services Directions 2005* (Cth), administered by the Office of Legal Service Coordination (OLSC) in the Attorney-General’s Department, require Commonwealth agencies to report on legal services expenditure. However, the information provided by agencies is general and

<sup>316</sup> FMA agencies are those subject to the financial and reporting requirements of the *Financial Management and Accountability Act 1997*. This includes Departments of State and agencies that handle public money and are part of the Commonwealth, but not statutory corporations or companies that are separate entities.

<sup>317</sup> TNS Social Research (2006) *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*, p 30 – when practitioners were asked to nominate reasons for their decreased participation in family law legal aid work, only seven per cent of practitioners indicated it was due to the event based costing model.

<sup>318</sup> TNS Social Research (2007) *Review of remuneration and red tape in grants processes*.

<sup>319</sup> Ibid p 68.

does not identify how much is spent on legal advice as part of ongoing agency operations, and how much is spent as a cost of resolving disputes and by what process disputes were resolved (for example, by ADR, negotiation, litigation and so on). Increasing the reporting requirements to identify spending on the types of dispute resolution mechanisms, and the costs of the various stages of litigation will provide the Commonwealth with more specific information on legal costs. It will also provide important information on what aspects of the process are the more costly aspects, which may assist in making decisions on the best way to direct resources in the future. As noted earlier, the Government needs accurate data in order to make informed decisions about where to direct the finite resources available.

Given that most government departments do not currently require billing on an event basis, and do not report to OLSC on this basis, this Recommendation could initially be implemented as a pilot, with a view to sharing the experience within Government. Unfortunately, the differences between events—in terms of scope and complexity—even within similar types of matters mean that it may be difficult to identify an appropriate event-based scale for costs. Whether this is the case will be evidenced during the pilot.

*“The Government needs accurate data in order to make informed decisions about where to direct the finite resources available.”*

#### **RECOMMENDATION 9.4**

Commonwealth agencies should negotiate with legal service providers for the provision of legal services associated with litigation on an event basis—not time billing. For example, the Commonwealth could negotiate payment stages such as initial advice, pre-filing, filing, discovery, interlocutory, ADR, and final hearing stages. Agencies should provide a report to the Office of Legal Services Coordination on the outcome of such negotiations. This Recommendation could be implemented initially as a pilot.

Where the Commonwealth is already engaged in cost saving billing practices such as a fixed fee arrangement, this should continue.

#### **RECOMMENDATION 9.5**

Commonwealth agencies should include details of the cost of the litigation event stages in information provided to the Office of Legal Services Coordination in the Attorney-General’s Department for the report of Commonwealth Legal Services Expenditure. The Office of Legal Services Coordination should include in the report an aggregate figure on the costs of litigation events to the Commonwealth.

*Information; Triage; Outcomes; Proportionate cost.*

# Chapter 10: Administrative Law

## Key Points

The Federal Government is in a unique position as primary decision maker and participant in administrative law disputes to influence the quality of access to justice in the administrative law context. Optimising the quality of administrative law dispute resolution involves:

- earlier and better primary decisions
- improved communication with clients, leading to a better understanding by the client of the requirements and reasons for the decision
- providing incentives for agencies to place a high value on effective primary decision-making and dispute management
- feedback mechanisms to ensure the potential normative value of external review is captured by agencies and decision makers, and
- timely and appropriate merits review.

The area of administrative law is one where the application of the strategic framework for access to justice has strong potential for improving access to justice. As both a decision maker and participant in administrative law disputes, the Commonwealth Government has considerable influence on access to justice in this area. It is also an area where many of those involved are from disadvantaged groups, particularly where the subject matter of the dispute relates to government benefits. The strategies outlined in this Chapter are suggested ways in which Government might apply the Framework to reduce the cost and complexity of administrative disputes.

## The role of administrative law in Australia's civil justice system

### Administrative law generally

Administrative law regulates the decisions and actions of government agencies and officials, as well as non-government bodies which affect the public.

The Australian system of administrative law is made up of the following elements:

- primary decision-making: the original decision which is made by an agency or body
- internal review: the review of a decision by the agency or body which made the decision
- tribunals: independent bodies which provide 'merits review'; that is, examining government decisions and altering them if necessary
- courts: which provide judicial review of the decision
- the Commonwealth Ombudsman: whose role is to consider and investigate complaints about Australian Government departments and agencies, and
- freedom of information: specific laws which create a general right of access to official information upon application, subject to exclusions.

Administrative law focuses on the principles and procedures of decision-making by government. At state and local government levels, these principles and procedures are found mainly in the common law of judicial review.

At the federal level, a comprehensive system of review is provided by statute, which involves judicial review by the Federal Court of Australia. Administrative review is undertaken by the Commonwealth Ombudsman and several Commonwealth tribunals, including the AAT, the SSAT, the MRT and the Refugee Review Tribunal.

The review of administrative decisions can take place either internally, externally or both. A well established and independent review of administrative decisions is important for encouraging high quality decision-making, as well as building public confidence in the government and its agencies' ability to appropriately exercise power.

### **The role of administrative law in promoting access to justice**

In any dispute to which the government is a party, the actions of the relevant government agency are scrutinised. This is particularly true for administrative law because it considers primary decision-making by government.

A focus on correct and preferable primary decision-making is an important mechanism for improving access to justice. If original decisions are made appropriately and in accordance with the principles of fairness and equity, the cost of attaining justice will be significantly reduced, both in terms of the cost to the individual in seeking to have a particular decision reviewed, and in terms of the expenditure required by the agency to review the decision.

The number of appeals of administrative decisions is significant. For example, during the 2007–08 financial year 11,596 applications for review of Centrelink decisions were lodged with the SSAT,<sup>320</sup> 6,302 applications for review were lodged in the AAT,<sup>321</sup> the MRT received 6,325 new applications for review, and decided 5,519 matters,<sup>322</sup> and the RRT received 2,284 new applications for review, and decided 2,318 matters.<sup>323</sup>

### **Improved primary decision-making**

#### **Charter of Good Administration**

The Government has a role in ensuring that there are mechanisms available to resolve disputes lawfully, peacefully and fairly, and to reinforce the fundamental principles that are embodied in laws. The Government also has a duty to ensure that all administrative decision-making follows best-practice standards, correctly applies the law, and that a merits review of decisions, where appropriate, is readily available. In this regard, the development of a strong, statutory independent merits review infrastructure has been, and continues to be, a significant source of access to justice for Australians.

<sup>320</sup> Social Security Appeals Tribunal, *Annual Report 2007–08*, p 22.

<sup>321</sup> Administrative Appeals Tribunal, *Annual Report 2007–08*, p 20.

<sup>322</sup> Migration Review Tribunal, *Annual Report 2007–08*, p 27.

<sup>323</sup> Ibid p 27.

One of the stated purposes of the merits review tribunals is the normative effect—the process and effect of tribunal decision operating as a source of continual improvement for primary decision-making.<sup>324</sup> While this remains an objective, greater commitment to improving primary decision-making would improve access to justice, and could do so more directly than tribunal review. This is because few of those who experience injustice are likely to appeal to the tribunals, often because they are unaware of the injustice in the first place.<sup>325</sup>

When examining the demand for justice in administrative law, a 2006 Law and Justice Foundation of NSW survey found that nearly one third of individuals did nothing in response to a civil legal event involving government.<sup>326</sup> Significantly, of the civil legal events involving government, less than 50 per cent reported the matter resolved.<sup>327</sup> These figures point towards a breakdown in the relationship between the demand and supply of justice in this area. If many of those who experience a civil legal event involving government are likely to do nothing, it increases the importance of the primary decision maker ‘getting it right’ in the first place.

*“If many of those who experience a civil legal event involving government are likely to do nothing, it increases the importance of the primary decision maker ‘getting it right’ in the first place.”*

For justice to be achieved, targeted and effective communication with clients is essential. For example, merits review tribunals consistently report applicants’ statements that the tribunal presented the first opportunity for them to state their concerns, have the adverse decision explained to them or obtain information about how to address the deficiencies in their application.<sup>328</sup> These anecdotal reports indicate a failure in the supply of justice given that, before getting to the tribunals, applicants have had a primary decision and often several layers of internal review.

Matters should not be left until the tribunal stage before this communication occurs. Doing so imposes a significant barrier to justice, as many people do not have the financial or emotional capacity to contemplate challenging a decision, even in user friendly forums such as the SSAT.<sup>329</sup>

It is essential that administrative decisions are made in accordance with the principle of the rule of law, as it is fundamental to Australia’s democracy, economy and prosperity. Therefore, one critical element in improving access to justice is ensuring that decision makers have a strong understanding of the legal and administrative framework under which decisions are made.

A requirement that decision makers have such an understanding in turn requires adequate training. Training in administrative law is undertaken in many government agencies and externally,<sup>330</sup> though the content and depth of training differs between agencies. The ARC has published a series of best

<sup>324</sup> The Administrative Appeals Tribunal, The Hon. Justice Garry Downes AM, *Why Does Australia Have a General Review Tribunal*, Address to the New Zealand Chapter of the Council of Australasian Tribunals Wellington, New Zealand, 7 October 2005, p 6.

<sup>325</sup> M Adler, *A Socio-Legal Approach to Administrative Justice*, 2003 Volume 25, Law and Policy 323-352, p 232-4.

<sup>326</sup> Law and Justice Foundation, *Justice Made to Measure, NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 99.

<sup>327</sup> Ibid p 139.

<sup>328</sup> S Koller, *Back from the fringe – What Consumers Expect from Administrative Justice*, 1999, p 156. This is consistent with comments made during targeted consultation conducted by the Taskforce.

<sup>329</sup> S Koller, *Back from the fringe – What Consumers Expect from Administrative Justice*, 1999, pp 154-158.

<sup>330</sup> Note that Chartered Secretaries Australia has recently announced the introduction of a Graduate Diploma of Applied Corporate Governance for public sector employees, including subjects on transparency and accountability; [www.csaust.com](http://www.csaust.com). Universities such as the Australian National University also offer graduate programs in policy and governance, including the Master of Public Administration.

practice guides outlining the key elements, common to all administrative decision-making, which should be incorporated into agency training programs.<sup>331</sup>

The introduction of an overarching Charter of Good Administration would ensure this enhanced commitment to better decision-making continues to be met over time. It would also assist in identifying systemic issues that should be addressed within agencies in order that the demand for justice is able to be adequately addressed. The Charter would be informed by, but would not necessarily replicate, the ‘Ten Principles for Good Administration’ and should incorporate elements of the Access to Justice Strategic Framework.

The Charter would require agencies to have in place appropriate mechanisms for resolving disputes without recourse to statutory review rights, including internal review and/or ADR processes. Chapter 7 of this report contains a number of Recommendations seeking to increase the use of non-court methods of dispute resolution, including Recommendation 7.6, which recommends that Commonwealth agencies should put in place strategies to increase the use of ADR in resolving disputes. This would equally apply to administrative law disputes.

#### RECOMMENDATION 10.1

Improving the quality of primary decision-making, the level of communication between agencies and applicants, and the mechanisms agencies develop to monitor and improve the performance of their statutory functions will improve access to justice outcomes and reduce costs associated with unnecessary or prolonged disputes. These improvements should be systemic and not dependent on individuals exercising review rights. To this end, the Department of the Prime Minister and Cabinet and the Attorney-General’s Department, in consultation with the Commonwealth Ombudsman should develop a Charter of Good Administration. In particular, the charter would:

- promote best practice administration by agencies<sup>332</sup>
- reflect the ‘*no wrong number, no wrong door*’ policy (see Recommendation 6.1)
- clarify the general obligation on agencies to provide a clear statement of reasons (Recommendation 10.3)
- require decision makers to make an appropriate record of the reasons for adverse decision at the time the decision is made (Recommendation 10.4)
- require agencies to have in place appropriate mechanisms for resolving disputes without recourse to statutory review rights, including internal review and/or ADR processes
- require agencies to have processes in place to adapt to decisions by external scrutiny (Recommendation 10.6), and
- require agencies to have quality assurance methods in place (Recommendation 10.7).

*Information; Action; Triage; Outcomes.*

<sup>331</sup> Administrative Review Council, *Best Practice Guide 1 – Lawfulness, Best Practice Guide 2 – Natural Justice, Best Practice Guide 3 – Evidence Facts and Findings, Best Practice Guide 4 – Reasons, Best Practice Guide 5 – Accountability*, August 2007.

<sup>332</sup> The charter would be informed by the Commonwealth Ombudsman’s Ten Principles for Good Administration, April 2009.

## Better communication – statements of reasons

A statement of reasons is an important way for a person subject to an administrative decision to understand the reasons behind the decision. It is also an important tool for ensuring that the decision was made correctly in the first place, as it compels the decision maker to state the basis of their decision.

The right to a statement of reasons is provided under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)<sup>333</sup> and the *Administrative Appeals Tribunal Act 1975* (Cth).<sup>334</sup> However, many people are unfamiliar with administrative review and are not aware of this right and consequently do not know to request a statement of reasons. If a person does request a statement of reasons, the reasons provided are usually based on the assumption that they are a precursor for review action and there is a risk they may be written defensively and not aimed at providing assistance to understand the basis for a decision.

At a minimum, notification of adverse decisions should include a clear, concise explanation of the decision sufficient for the individual affected to understand the basis for the decision made. Any such statement should include information that would enable a person to discuss the decision and the reasons with an experienced officer. Helping people understand the specific basis for the decision in their case could reduce the number of requests for internal/external review, therefore reducing the cost of attaining justice, and also build confidence in decision-making.

Section 15 of the *Ombudsman Act 1976* (Cth) provides that the Ombudsman can report to an agency where reasons were not provided to a person who should have been given reasons for a decision. While in theory this means that agencies should act on the basis that reasons can be required for almost every statutory decision, even without an application for review, the obligation is not clearly stated and depends upon a person initiating some action or complaint. A clear statement of what is required would assist both agencies and the individuals who are the subject of decisions.

Providing reasons for a decision also promotes rational and consistent decision-making, ensuring justice is supplied in a manner which preserves equality before the law. Recording the reasons for a decision at the time it is made is critical to promoting good decision making. In high volume areas, decision makers may make many decisions every day. After 28 days, and possibly several hundred decisions, it would be difficult to recall the reasons for a particular decision unless recorded. The decision maker may need to reconstruct the outcome from the case file, which effectively amounts to ‘justifying’ the decision, not providing the reasons for it.

*“Providing reasons for a decision also promotes rational and consistent decision-making, ensuring justice is supplied in a manner which preserves equality before the law.”*

<sup>333</sup> Section 13 *Administrative Decisions (Judicial Review) Act 1977* (Cth)

<sup>334</sup> Section 28 *Administrative Decisions (Judicial Review) Act 1977* (Cth)

**RECOMMENDATION 10.2**

That the proposed Charter of Good Administration (Recommendation 10.1) clarify the general obligation on agencies to provide a comprehensive statement of reasons to individuals for decisions affecting them, independent of the merits review context.

**RECOMMENDATION 10.3**

Commonwealth agencies should review their methods of notifying clients of adverse decisions. At a minimum, notification of adverse decisions should include information and be sufficient to enable the affected person to discuss the decision and the reasons with an experienced officer.

**RECOMMENDATION 10.4**

Commonwealth agencies should ensure that internal processes require decision makers to make an appropriate record of the reasons for adverse decision at the time the decision is made. The record should provide a sufficient basis for the reasons for the specific decision to be communicated if sought.

*Information; Action; Triage; Outcomes; Proportionate cost.*

**Agency cost incentives**

Appropriate cost incentives could be introduced to reinforce to agencies the importance of placing a high value on effective primary decision-making. It could reduce the scope for the costs of ineffective decision-making to be externalised to budget funded review tribunals and, more importantly, to applicants who are the least well resourced to absorb those costs.

In order to encourage effective decision-making, as an initial step, a filing fee for agency appeals from other tribunals or responding to an application for review to the AAT could be imposed upon the relevant government agency. This fee would need to be set at an appropriate level; for example, equal to the Federal Court filing fee for an appeal from a decision of the AAT (\$3,150). This will help in promoting early resolution of issues where possible, and would provide a fiscal incentive to encourage better primary decision-making. It would also discourage any misuse of the AAT process by agencies.<sup>335</sup>

The scheme would need to provide an appropriate incentive structure to avoid any perception that it is a punitive measure. For example, the fee could be fully refundable if the agency is successful or if the matter settles without hearing (even if this constitutes an admission by the agency that the original decision was incorrect). This is appropriate given the large cost disparity between matters that are settled and those that proceed to hearing. It also reinforces the benefits of improved primary decision-making to limit circumstances that result in applications for review. The scheme would also need to take into account circumstances where agencies proceed to hearing for legitimate or compelling reasons. This could be achieved by including discretion for the President

<sup>335</sup> For example, the *SSAT Annual Report 2006–07*, p 54, in the Feedback to Departments and Agencies Section, it was noted that 'The Executive Director pointed out that the very large percentage of DEEWR appeals to the AAT which were ultimately withdrawn indicated that insufficient consideration may have been given to cases before a decision to appeal had been made. Many of those cases involved the payment of Disability Support Pension which are usually decided on the facts. The Executive Director made some suggestions as to what factors might be considered in relation to lodging an appeal to the AAT'.



of the AAT to authorise repayment of the fee to the agency if satisfied that there were compelling reasons. Reasons might include:

- where there are a large number of applicants in identical fact situations so that conceding on one application would be unfair to the other applicants, provided that the agency's original decision had good prospects of being successfully defended
- where new information was provided at the hearing and the agency had done all it could to explain to the applicant what information was required to resolve the dispute and provided sufficient opportunities to obtain that information
- there was pre-existing authority on the issue, or it was reasonable for an agency to pursue litigation where the trend of other AAT outcomes suggested that they were likely to be successful, or where the pre-existing authorities were divergent or where there was no authority on a particular issue, and
- the agency made genuine and reasonable efforts to reach settlement that were rejected by the applicant.<sup>336</sup>

#### RECOMMENDATION 10.5

The Government should consider imposing a filing fee, set at an appropriate level that takes into account the costs of a Tribunal hearing, for agencies that unsuccessfully appeal or defend decisions before the Administrative Appeals Tribunal. The purpose would be to provide a financial incentive to promote better primary decision-making and early resolution of issues where possible. The Administrative Appeals Tribunal would have a discretion to authorise repayment of the fee to the agency if satisfied that there were compelling reasons.

*Information; Action; Triage; Outcomes; Resilience; Inclusion.*

### Introducing robust feedback mechanisms – continuous improvement

While there appears to be strong acceptance of the value of external review, feedback mechanisms are needed to ensure the potential normative benefit of external review is captured. Most tribunals and agencies have established liaison procedures to share information, but arrangements vary.

Ensuring that relevant information reaches the actual decision makers is a fundamental feature of continuous improvement in primary decision-making. The information needs to be conveyed in a way that can be quickly and easily understood. In recent years, the Ombudsman has undertaken a strategic role as a standard setter for government agencies.<sup>337</sup> This can be an effective early intervention measure that helps avoid future disputes, and ensure that the cost of justice—both for the individual and the agency—are kept at a minimum. However, the extent to which those standards are being met is difficult to assess. Similarly, the systemic impact that the Ombudsman's complaints handling activities have on agency decision-making is generally unknown. The effect of decisions of the AAT and other external tribunals is also unclear.<sup>338</sup>

<sup>336</sup> For example, in the migration agents' context, an applicant may reject DIAC's offer to substitute a decision to cancel their registration with a decision to impose a caution. If the AAT ultimately sets aside the cancellation, but imposes another sanction (such as a caution) this would technically amount to a Departmental loss. However, this outcome would be consistent with DIAC's settlement offer.

<sup>337</sup> Commonwealth Ombudsman, *Annual Report 2007–08*, pp 4–5. See, for example, the Ombudsman e-bulletins and the Commonwealth Ombudsman, *Ten Principles for Good Administration*, April 2009, <[www.ombudsman.gov.au](http://www.ombudsman.gov.au)>.

<sup>338</sup> The ARC's 2000 report *Internal Review of Agency Decision-making* noted significant problems for agencies in providing effective feedback to decision makers. See in particular pages 53–54.

The introduction of a strengthened feedback mechanism has the potential to both improve agency decision-making and contribute to improved performance by review tribunals and the Ombudsman. Although the current take-up of recommendations appears to be high, a formal reporting mechanism would deliver more concrete information about Ombudsman outcomes and institute a feedback mechanism to ensure the Ombudsman's recommendations reach decision makers and promote systemic change, where relevant.<sup>339</sup> For example, reporting to agencies on key areas of complaint can help agencies identify those areas or aspects of administration where renewed attention may be needed.

*“The introduction of a strengthened feedback mechanism has the potential to both improve agency decision-making and contribute to improved performance by review tribunals and the Ombudsman.”*

A more effective feedback mechanism would be relatively simple to devise and implement for each agency—at a minimum it would require an avenue for agencies to report directly to the tribunals or Ombudsman (or indirectly report via annual reports):

- the fact of the decision/complaint
- the outcome in the particular case
- the action taken to address systemic issues—if any exist (noting that not every complaint or application for review discloses systemic issues), and
- how the complaint, outcome and action was communicated to staff of the agency—both those directly involved and more broadly to ensure the benefits of the action are able to be realised outside those directly involved.

Quality assurance mechanisms assist agencies to recognise and address systemic issues concerning the interaction between agencies and the public. These mechanisms help understand client's needs in administrative justice, identifying areas where there is a disjunction between the needs and expectations of clients, and decision makers' understanding of those needs and expectations. For example, an AAT client satisfaction survey ranked answering phone calls higher in importance in service delivery than, for example, independence from government or understanding the most important parts of a client's case.<sup>340</sup> This reflects the role of initial contact in influencing the way that people perceive services and the processes that affect them.

<sup>339</sup> Commonwealth Ombudsman, *Annual Report 2007–08*, p 16.

<sup>340</sup> Australian Law Reform Commission, *Issues Paper 24: Review of the adversarial system of litigation – Federal tribunal proceedings* (1998) p 11.41.

**RECOMMENDATION 10.6**

Agencies should ensure transparent mechanisms are in place to make appropriate changes in response to tribunal decisions and Ombudsman's recommendations, and to ensure that those changes are fully understood by primary decision makers.

**RECOMMENDATION 10.7**

As an element of good administration, agencies should ensure that they have quality assurance mechanisms, including regular client surveys, to continuously identify and address systemic issues relating to primary decision-making, internal review and related processes.

*Information; Action; Outcomes; Proportionate cost.*

## Specific agency and jurisdictional issues

The supply of, and access to, justice is not the same for administrative decisions across jurisdictions because internal and external review regimes vary. While some regimes have mechanisms to assist primary decision-making, others may have features that complicate attempts to promote a culture of better primary decision-making. For example:

- Social Security decisions have internal review, followed by two levels of external merits review. Of around 56,000 applications for internal review, around 2,000 make it to the AAT —of which few are varied by the Tribunal.<sup>341</sup> Taskforce analysis of SSAT decisions varied by the AAT found many decisions were based only on the different exercise of discretion.
- The vast majority of MRT appeals relate to visa refusals.<sup>342</sup> A significant number are varied or set aside by the MRT primarily as a result of new information.<sup>343</sup> The introduction of a limited internal review process (for instance in relation to partner/skilled worker visas), to run concurrently with MRT processes, could assist in reducing demand on limited MRT resources, improve the timeliness of decisions, and reduce MRT backlog.

These examples illustrate the importance of improving specific aspects of the administrative law system to suit the particular needs of the jurisdiction involved.

**RECOMMENDATION 10.8**

The Attorney-General should write to relevant Ministers to consider whether particular features of the decision-making structure in their jurisdictions impose barriers to justice or might be streamlined. The Administrative Review Council and the Attorney-General's Department would be available to provide advice and assistance to agencies in conducting any assessment.

*Information; Action; Outcomes; Resilience; Inclusion.*

<sup>341</sup> Centrelink, *Annual Report 2007–08*, p 35.

<sup>342</sup> Migration Review Tribunal, *Annual Report 2007–08*, p 28.

<sup>343</sup> Ibid p 33.

## Improving external merits review processes

The objective of the AAT is to provide review that is fair, just, economical, informal and quick.<sup>344</sup> The extent to which the AAT can discharge this charter is affected by the performance and behaviour of parties who appear before it, particularly government agencies. However, parties do not always comply with requirements. For example, section 37 of the *Administrative Appeals Tribunal Act 1975* (Cth) requires that a statement setting out the basis of a decision, along with all evidence relied on, be lodged with the Tribunal by the primary decision maker within 28 days of receiving a notice that the decision is under review.<sup>345</sup> In 20 per cent of cases, the statement is not lodged within the statutory time limit.<sup>346</sup>

In 2007–08, 61 per cent of applications were finalised within 12 months, and 89 per cent within 18 months.<sup>347</sup> Such delays are at odds with the objectives of a merits review tribunal, and also with promoting effective access to justice.

The largest delays in AAT proceedings is the time between application and first hearing, with only around half of all applications proceeding to hearing within 280 days from application.<sup>348</sup> The AAT has successful case management processes, particularly through the use of conferences early in proceedings, with around 80 per cent of applications for review settled without hearing.<sup>349</sup> However, there appears to be scope to further improve case management for cases which proceed to hearing. Such improvements would have a positive impact on the costs associated with access to justice.

### RECOMMENDATION 10.9

The Attorney-General's Department and the Administrative Appeals Tribunal should develop options for more proactive case management to reduce unnecessary delays in resolving matters.

*Outcomes; Proportionate cost.*

<sup>344</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.

<sup>345</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 37(1).

<sup>346</sup> Administrative Appeals Tribunal, *Annual Report 2007–08*, p 26.

<sup>347</sup> *Ibid* p 27.

<sup>348</sup> *Ibid* p 26.

<sup>349</sup> *Ibid* p 125.

# Chapter 11: Legal Assistance

## Key Points

Legal assistance has a key role in providing access to justice. Consistent with the framework the Attorney-General should establish an integrated national approach to the provision of legal assistance services through a national coordination group to drive legal assistance reforms and initiatives.

In developing a new legal aid National Partnership with the States and Territories, the Commonwealth should ensure that legal assistance programs:

- give greater priority to prevention and early intervention services
- expand ADR services and services for people representing themselves before courts and tribunals, and
- address issues affecting access to services for people living in regional, rural and remote Australia.

This Chapter examines the potential to improve access to legal assistance services through different models of service provision and strategic collaboration between service providers, consistent with the Framework. As the data in Part I shows, legal assistance services form a significant component of the Commonwealth's expenditure on the justice system. As there are many forms of dispute resolution, there are also many forms of legal assistance. And, just as the most significant cost of providing dispute resolution is the cost of funding the court system, the most significant cost of the legal assistance system is the cost of providing representation before the courts. The Australian legal assistance system consists of a range of service providers funded by the Commonwealth and/or State and Territory governments. Australian Government programs fund services through State and Territory LACs and non-government CLCs, ATSILS and Family Violence Prevention Legal Services (FVPLS). State programs fund services through LACs and CLCs.

Legal assistance programs help disadvantaged Australians and those at risk of becoming disadvantaged to address legal problems. They are an important element in addressing government agendas for social inclusion and closing the gap on Indigenous disadvantage, and in meeting Australia's human rights obligations under a number of international human rights conventions.

Legal assistance is a means by which persons can access legal advice and representation where they otherwise may not be able to afford it. However, legal assistance providers offer a range of services beyond legal advice and representation. They offer community legal education services, legal information hotlines, outreach services, workshops and ADR services. Higher cost services such as grants of aid for litigation are subject to eligibility criteria. Other legal aid services, such as legal information and advice, are available to the broader community.

The Commonwealth makes a significant contribution to legal assistance funding (\$283m in 2008–09). This complements the Commonwealth's other contributions to the justice system, by allowing people access to the Courts and other funded institutions.

## National coordination of legal assistance service provision

Together with LACs, community and Indigenous specific legal assistance services target particular groups and needs, and together enable the legal assistance system to address diversity. However, the services are provided separately through government and non-government agencies. Their historic development and independent funding mechanisms have driven different approaches to the delivery of legal assistance services across Australia resulting in a fragmented approach to service delivery.

Reform is needed to provide for a coherent and holistic approach to decision-making across the legal assistance system. Decisions about legal assistance priorities not only impact on achieving efficient and effective access to justice, but also on the Government's broader objectives for social inclusion and closing the gap on Indigenous disadvantage. A national approach to the legal assistance system is important in achieving these policy objectives and necessary to provide the system with the capacity to develop coherent national strategies.

To implement such an approach a mechanism is needed to bring the various service providers together formally to make decisions about matters that have a national impact.

Peak bodies exist for each of the legal assistance service providers and an Australian Legal Assistance Forum comprising representation from these bodies meets regularly to exchange information and discuss common service issues. Collaborative forums at the State level exist in NSW, Victoria, Queensland and WA. NSW has also introduced the Cooperative Legal Service Delivery Program in selected regional areas of NSW, where key legal services and community organisations cooperate to deliver legal services. Commenced as a pilot, the program is now being expanded across regional NSW following a positive independent evaluation.<sup>350</sup> However, such forums do not have any national decision-making capacity and are limited in the extent to which they can effect change across the legal assistance sector and across State and Territory borders.

In order to drive reform, it would be desirable for the Commonwealth to convene an effective national coordination group to provide a strategic coordinating capacity across the sector. A national coordination group would be chaired by the Attorney-General's Department with membership from National Legal Aid (NLA), the National Association of Community Legal Centres (NACLCs), Indigenous legal assistance services and the Law Council of Australia. The group would be supported by a secretariat located within the Department and could:

- i. set priorities and standards for the provision of legal assistance services across all programs
- ii. agree on common processes, particularly for triage type intake, assessment and referral, in accordance with this report, and based on promoting prevention and early intervention strategies consistent with social inclusion
- iii. review the appropriateness, availability and accessibility of legal assistance services nationally and identify options for improving the efficiency and effectiveness of service delivery for groups at risk of social exclusion
- iv. consider options for co-location with other service providers such as Centrelink and health clinics in broader service hub arrangements

<sup>350</sup> Evaluation of the Cooperative Legal Service Delivery Model (CLSDM) Pilot, Legal Aid Commission of New South Wales, August 2005.

- v. develop a common reporting framework and system for all programs, and
- vi. develop initiatives for the provision of national education and information services to build resilient individuals and communities capable of identifying legal problems early and resolving them before they escalate.

This proposed group would provide the mechanism to overcome the fragmentation of current service arrangements and tackle shared priorities through legal assistance sector and cross sector partnerships. It would have the capacity to drive reform across Commonwealth programs nationally, focusing attention on prevention and early intervention strategies, and would bring together all parts of the legal assistance system to work in new and flexible ways to get better outcomes for people at risk of social exclusion, including Indigenous Australians.

#### **RECOMMENDATION 11.1**

The Attorney-General establish a national coordination group to facilitate strategic decision-making across the legal assistance system, chaired by the Commonwealth and comprising representatives from legal assistance peak bodies. The group should identify priorities and opportunities for coordination and collaboration, particularly in driving reforms aimed at promoting prevention and early intervention strategies, and implementing relevant recommendations of this report. The group should develop a National Action Plan for the provision of legal assistance services and report regularly to the Attorney-General on progress in implementing the National Action Plan.

*Information; Action; Triage; Outcomes; Resilience; Inclusion.*

#### **RECOMMENDATION 11.2**

The national coordination group should play an overarching role in promoting joined up services for clients by strengthening linkages and cooperation between the legal assistance sector and other service sectors including the courts, family relationship services, and child protection services.

*Information; Action; Triage; Outcomes; Resilience; Inclusion.*

### **Promoting early intervention by legal assistance services**

Research in Australia and abroad has shown that access to effective legal assistance to resolve legal problems *before* they escalate or compound (and end up in court) is fundamental to social justice and tackling social inclusion. In addition to supporting the operation of the justice system, access to effective legal assistance facilitates the resolution of many of the problems of everyday life which affect social well being, such as family breakdown, violence, crime, unemployment, debt, health, housing and welfare. If legal problems can be addressed, particularly at an early stage, distress and costs are reduced benefiting the individuals, their families, the government and society.<sup>351</sup>

<sup>351</sup> Pleasence, P (2006) *Causes of Action: Civil law and Social Justice*, 2nd Edition, p.i.

Without access to legal advice the legal dimensions of many problems of day to day life, including financial difficulties, unemployment and family breakdown, can escalate and lead to entrenched disadvantage.

Research has shown that each time a person experiences a ‘justiciable’ problem—a problem for which there is a potential legal remedy—they become increasingly more likely to experience additional problems, including deterioration in physical and mental health.<sup>352</sup> A single legal issue can cause a cascade of ongoing problems for individuals and families. Failure to address even small civil law problems often places increased stress on families and individuals and can lead to loss of health, loss of income or employment, violence and crime, loss of home and relationship breakdown. All of these factors can be triggers for social exclusion.

Legal Aid Queensland provided the example (reported on ABC Radio Law Report) of a client who had accumulated some small credit card debts, totalling less than \$10,000, due to poor health.<sup>353</sup> The credit providers sold the debt to a collection company, who sued the client in NSW. As the client was located in Brisbane, she was unable to defend these proceedings. The judgment was registered in Queensland and the bailiff took action to sell the client’s home with two weeks notice. At this stage the client contacted Legal Aid Queensland, which was able to advocate on her behalf to the creditors and prevent the sale of her house. This example shows how what seems like a small legal problem can escalate without appropriate and timely legal assistance, in this case potentially leading to homelessness.

All Australian legal assistance providers deliver services that can be described as early intervention services, such as advice and minor assistance, legal information and community legal education. These services deliver substantial benefit to the community.

In 2006, the NALCLC commissioned the Institute for Sustainable Futures to conduct a research project into the economic value of the services provided by the CLCs. The report sought to demonstrate the extent to which CLCs’ work reduces the need, or extent to which individuals are (or could be), involved with the legal system. The report showed that community legal centre work provides enormous value for money in ‘avoided’ costs and benefits to individuals and society. The report analysed case studies typical of CLCs and showed that the benefits and avoided costs accrued as a result of community legal centre intervention can range from between \$10,000 and \$34,000. The analysis of the case studies showed that for each dollar invested in CLCs, around \$100 may be ‘saved’ by community legal centre clients, governments and/or other affected parties. While the report recognises the difficulties of accurately quantifying these indirect and avoided costs, it provides a good indicator of savings that can be made through upfront investment in preventative and early intervention services such as CLCs.

The Commonwealth separately funds prevention, diversion, rehabilitation and restorative justice programs to develop and undertake activities that divert Indigenous Australians away from adverse contact with the legal system, and rehabilitate and support Indigenous Australians who have been incarcerated or are in custody. These programs complement Indigenous legal assistance services and seek to fund activities that will lessen the need for legal aid. Early resolution of disputes, including through restorative justice practices, with greater involvement of agencies, the victims, offenders, and Indigenous communities is encouraged.

<sup>352</sup> Ibid.

<sup>353</sup> 27 January 2009 – transcript available at <<http://www.abc.net.au/rn/lawreport/stories/2009/2473286.htm>>

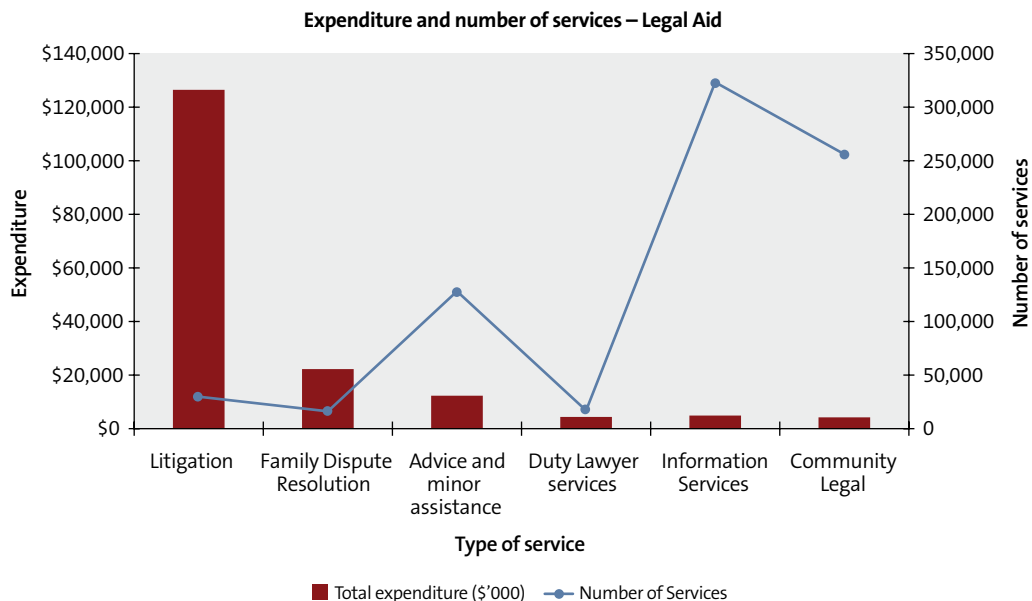


*“Early resolution of disputes, including through restorative justice practices, with greater involvement of agencies, the victims, offenders, and Indigenous communities is encouraged.”*

ATSILS respond to an overwhelming demand for legal assistance in criminal law, driven by State law and order policies, and FVPLS assist Indigenous adults and children who are victims of family violence, including sexual abuse, or who are at immediate risk of such violence. However, the availability of culturally appropriate legal assistance services for Indigenous people with family and civil law problems is limited and this compromises the ability of Indigenous Australians to realise their full legal entitlements. It also introduces a danger that civil or family law issues can escalate to criminal acts resulting in charges and a perpetuation of the cycle of over-representation in the criminal justice system.<sup>354</sup>

LACs provide early intervention services, including minor assistance, legal advice and community legal education. As state-wide organisations, LACs are often best placed to provide services for problems that affect a range of individuals. For example, in 2008, Legal Aid NSW organised a number of seminars addressing legal issues faced by those suffering ‘mortgage stress’ as a means to address the range of legal and other issues caused by this one problem. Nevertheless, these services make up only a small minority of commission’s expenditure. As **Figure 11.1** shows, in 2007–08, only 10.9 per cent of Commonwealth legal aid expenditure was on ‘early intervention’ services. The vast majority of legal aid expenditure is on grants of aid for representation in court proceedings.

**Figure 11.1: Legal Aid Expenditure and service levels, 2007–08**



<sup>354</sup> C Cunneen & M Schwartz, ‘Funding Aboriginal and Torres Strait Islander Legal Services: Issues of equity and access’, *Criminal Law Journal* 32, 2008, p 50.

The negotiation of a new National Partnership Agreement for Commonwealth funding of legal aid services provides an opportunity for the Commonwealth and the States and Territories to agree on national approaches to legal assistance service provision. These approaches will need to reflect broader national reforms in relation to federal financial relations, social inclusion, closing the gap on Indigenous disadvantage and protecting Australia's children. Consistent with the social inclusion agenda and the recommendations of this report, the Agreement should give greater priority to prevention and early intervention services such as education, information, advice and advocacy.

### **RECOMMENDATION 11.3**

The Commonwealth should seek to negotiate a National Partnership Agreement for legal aid that gives greater priority to intervening early to help prevent legal problems from escalating, building knowledge and respect for the law and resilience in dealing with legal issues.

### **RECOMMENDATION 11.4**

The Commonwealth should consider options for improving access to culturally appropriate legal assistance services for family and civil law matters for Indigenous Australians.

*Information; Action; Triage; Outcomes; Proportionate cost.*

## **ADR**

The access to justice framework envisages a move towards a justice system which favours the resolutions of disputes outside courts. There is a role for legal assistance programs in supporting such a move, by supporting persons who are accessing ADR services, and in some cases by providing the ADR service itself.

LACs currently run strong FDR programs using a dispute resolution model where the parties have legal representation. These programs are targeted towards complex disputes which are not able to be resolved through the services provided through FRCs. Data collected by the Attorney-General's Department demonstrates that legal aid FDR is particularly effective, with 54.2 per cent of FDR conferences resulting in full settlement of the dispute and a further 25.9 per cent resulting in partial settlement. The average cost of a grant of aid for FDR was \$1,374 in 2007–08, while the average cost of a grant of aid for litigation was \$3,837.<sup>355</sup> The involvement of legal representatives and the use of techniques such as shuttle conferencing (where the parties do not meet in the same room) can mean that even complex, difficult and entrenched disputes may be amenable to settlement of issues through an FDR process.

A recent evaluation of these programs also made positive findings about the cost-effectiveness of legal aid FDR. A quantitative cost benefit analysis concluded that legal aid FDR delivers a benefit costs ratio of 1:1.48—that is, for every \$1 of Commonwealth funding spent on these services, a return of \$1.48 is made to the Commonwealth. These returns take the form of legal aid costs and court time saved where a dispute is settled by FDR.

<sup>355</sup> LARI, a database maintained by the Attorney-General's Department. Figures are for the year 2007–08.

The development of FDR services will continue to be a high priority for resolving family law disputes. The recent evaluation of legal aid commission services has made recommendations which include screening procedures, promoting continuous improvement and developing protocols for working with people with special needs. The development and expansion of legal aid commission FDR services is integral to increasing the focus on resolving family law disputes before they reach the stage of litigation in court. This should be reflected appropriately in Commonwealth legal aid policy priorities under the National Partnership Agreement.

The development of ADR programs requires support and leadership from the Commonwealth, particularly if programs are to be rolled out nationally. Legal assistance providers should explore the use ADR services in other areas, as a low cost alternative to litigation.

#### **RECOMMENDATION 11.5**

##### *Alternative Dispute Resolution*

The Commonwealth should continue to support Legal Aid Centres as providers of family dispute resolution services and where possible expand the provision of these services.

The Attorney-General's Department should work with legal assistance providers to explore options for the development of ADR services in other areas, such as civil law.

*Action; Triage; Outcomes; Proportionate cost.*

## **Duty Lawyers and advice services at courts**

LACs have long provided duty lawyer services in criminal jurisdictions, but a national family law duty lawyer service was only introduced in 2004–05 following the provision of specific Commonwealth funding. Feedback from the courts in which duty lawyers were made available indicated that the duty lawyer service has been effective in directing parties to ADR, facilitating early settlement of matters, and reducing the level of frustration experienced by SRLs. In 2007–08, 11,450 people received family law duty lawyer services from LACs.<sup>356</sup>

Introducing this type of service to other civil law jurisdictions could have similar benefits. While many matters may not warrant the provision of funded legal representation, duty lawyer or advice service located at a court or tribunal on the day of a hearing can be beneficial, including identifying people who would benefit from more comprehensive advice and who may be eligible for representation. Court and tribunal processes benefit when the parties are better informed about proceedings.

#### **RECOMMENDATION 11.6**

The Attorney-General's Department should work with legal aid commissions to consider the benefits of locating duty lawyer/advice type services at courts and tribunals where appropriate.

*Action; Triage; Outcomes; Proportionate cost.*

<sup>356</sup> LARI, a database maintained by the Attorney-General's Department.

## Legal Assistance services in regional, rural and remote Australia

Research suggests that accessing legal services of any kind (publicly funded or otherwise) is becoming increasingly difficult in regional, rural and remote Australia.<sup>357</sup>

Under the Commonwealth's Regional Innovations Program for Legal Services, LACs in NSW, Queensland, Tasmania and WA have each developed initiatives aimed at increasing the availability of legal assistance services in regional, rural and remote Australia, and the NACLC is assisting students to undertake legal practice experience in a regional, rural or remote centre.

There is scope for enhancement of these initiatives through a national approach to this issue. For example, as part of its functions the proposed national coordination group could be tasked with the development of strategies for addressing the legal assistance needs of disadvantaged Australians living in regional, rural and remote Australia.

### RECOMMENDATION 11.7

The Attorney-General's Department should work with legal assistance service providers, desirably through the proposed national coordination group, to explore options for improving access to legal assistance in regional, rural and remote Australia.

*Action; Triage; Outcomes; Proportionate cost.*

## Funding

Legal assistance service providers have indicated that they are under pressure as funding by the previous government failed to keep pace with the increasing costs of service provision. The global economic downturn is likely to add to this pressure. Unemployment is a key indicator of legal need and as more people become unemployed they are more likely to need and be eligible for legal assistance. For example, recent research in the UK shows that the risk of relationship breakdown doubles for people who are newly unemployed.<sup>358</sup>

Recommendations in this report to improve efficiencies in the justice system will help address these issues by ensuring that resources are directed to the most efficient and effective means of resolving legal problems and disputes. Ensuring that more legal assistance funding is directed to prevention and early intervention will enable more people to get the assistance they need at an early stage, so that their legal problems and disputes do not become entrenched and require costly court intervention. Failing to intervene early to prevent legal problems and disputes from escalating is not only costly in terms of resource usage, but affects individual and community well being by embedding disadvantage and limiting capacity to participate fully in the economy and society.

<sup>357</sup> TNS Social Research (2006), *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*.

<sup>358</sup> Pleasence, P, March 2009, *Legal Aid in Tomorrow's World: Developments and Solutions from Research*, presentation at the Lionel Murphy Centre, Melbourne, <[http://www.legalaid.vic.gov.au/dir.Pascoe\\_Pleasence\\_Powerpoints.pdf](http://www.legalaid.vic.gov.au/dir.Pascoe_Pleasence_Powerpoints.pdf)>.

# Chapter 12: Building Resilience

## Key Points

The justice system will never replace the need for people to act responsibly and moderately in their dealings with others. There are many conflicts in everyday life which do not need the courts or the justice system for resolution. Teaching people skills for conflict resolution and equipping them with the information to understand and access the justice system when necessary to avoid small problems escalating is vital to ensuring a strong community. To that end, the Commonwealth should develop a comprehensive strategy to build resilience in the Australian community and the justice system through:

- mechanisms for ongoing monitoring and reform of the justice system
- improved tertiary legal education that recognises the importance of students gaining an understanding of social inclusion and ADR
- a sharper focus from the legal profession on access to justice
- continuing to explore innovative opportunities for improving general conflict resolution skills, including strategies directed to conflict resolution skills learned through school education, at the workplace and in social, cultural and sporting settings
- recognition of the fundamental importance of social inclusion mechanisms in an effective justice system, and
- supporting access to justice for all Australians, in a way that recognises and accommodates diversity.

One of the most cost effective ways of resolving disputes is where people resolve disputes themselves—or where a dispute can be prevented from occurring at all. This suggests that there is value in increasing the capacity and skills of people to deal with disputes. There is also benefit in increasing the capacity of the justice system to deal with disputes in a way consistent with the strategic framework. This Chapter discusses strategies to improve the way lawyers, the justice system, and the Australian community in general, approach disputes.

## The current picture

One of the principles of the Strategic Framework for Access to Justice is ‘appropriateness’. This is aimed at ensuring that Government intervention in the justice system is structured to create incentives to resolve disputes at the most appropriate level. It recognises that legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues. For example, a tenancy problem may be a ‘legal’ issue, but it is often the result of an underlying issue, such as unemployment. Addressing the legal matter will not address the underlying issues and can often result in multiple encounters with the legal system. One example of this is that an underlying issue of unemployment may result in repeated failures to pay rent and subsequent enforcement actions.

The Framework also includes as part of the methodology ‘resilience’; that is, under the Framework the aim should be on helping to build resilience in individuals, the community and the justice system by reinforcing access to information and supporting the cultural changes necessary to ensure improvements in access to justice are continuing. This includes equipping people with the basic skills necessary to resolve their own issues (including by accessing appropriate information and support services). Access to justice is not only about accessing institutions to enforce rights or resolve disputes but having the means to improve ‘everyday justice’—the quality of people’s social, civic and economic relations. This includes giving people choice and providing an appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved because claims of justice are dealt with as quickly and simply as possible—whether that is personally (everyday justice) informally (such as ADR, internal review) or formally (through courts, EDR, or tribunals).<sup>359</sup> Building resilience in the justice system reinforces these aims.

*“The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.”*

Chapter 2 outlines research undertaken by the Law and Justice Foundation on people’s responses to legal events. The research found that a significant proportion (32.8 per cent) of people surveyed took no action when faced with a legal event.<sup>360</sup> People cited a range of reasons for doing nothing in response to a legal issue.<sup>361</sup> However, the most common reasons were related to lack of knowledge, lack of capacity, disempowerment or exclusion. For example, 26 per cent of people thought action would make no difference or make things worse.<sup>362</sup> The high rate of inaction and pervasive belief that action was (in some form) either not an option or would make no difference suggests there is a need for interventions targeted to increasing the level of awareness and capacity to access information, advice and services. Doing so would address up to 80 per cent of the stated reasons for not taking action in relation to legal issues.

Similar issues appear in international research. For example, of the respondents to the Continuous English and Welsh Civil and Social Justice Survey, 62 per cent reported that they did not know what their legal rights were when a problem arose; and 69 per cent of respondents stated that they did not know what types of formal processes (such as court proceedings or mediation) were used to deal with the sort of problem they were facing. Awareness of rights and options increased in line with education and income levels.<sup>363</sup> These findings underline the need for more education on how to solve disputes and a focus on ensuring that there is a focus on social inclusion when building resilience in the legal system.

People have, and will continue to have, disputes. That cannot be prevented. However, the way in which people deal with disputes can be influenced. A Strategic Framework for Access to Justice should build resilience; it should reinforce and enhance the capacity of people to resolve disputes themselves. More work can be done to increase resilience in the community to improve people’s ability to respond to disputes when they arise. Building resilience in the community should be done

<sup>359</sup> C Parker, *Just Lawyers: regulation and access to justice*, 1999, p 64.

<sup>360</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006, p 93.

<sup>361</sup> See Figure 2.2 in Chapter 2.

<sup>362</sup> See Table 2.1 in Chapter 2.

<sup>363</sup> A Buck, P Pleasence and N Balmer, *Education Implications for the English and Welsh Civil and Social Justice Survey*, 2007, pp 4, 22.

in a comprehensive way, targeted not only to people who are likely to experience legal events, but also to people involved in the justice system, such as law students and legal professionals.

## Building resilience in the justice system

### The Legal Profession

The legal profession is an important mechanism for promoting access to justice, as the profession is often the first point of contact with the justice system for an individual who may be experiencing a legal problem. Reforms to the way the legal profession operates would serve to directly improve access to justice for the users of the civil justice system.

#### *Legal education*

Legal education should equip students with the knowledge and understanding necessary to promote access to justice through their professional lives. Providing a social inclusion perspective in legal education will ensure law students graduate with a more rounded view of the legal system.

Given its increasing importance in contemporary dispute resolution, a thorough understanding of ADR should be a core skill for a practising lawyer. Therefore, ensuring that all legal practitioners have developed ADR skills as part of their degree will mean that clients get more considered advice on the appropriate pathway to resolve their dispute.

The Commonwealth currently supports clinical legal education programs in law schools and funds four CLCs to run them. Providing students with opportunities to participate in clinical legal education and pro bono work while at university further enhances their skills and makes them more ready to meet clients' needs once they begin their professional careers. This initiative should continue and expand if possible.

#### **RECOMMENDATION 12.1**

Lawyers being admitted to practise should be equipped with the skills to guide a client through a dispute resolution process and understand the major ADR processes.

The Attorney-General should write to the Council of Chief Justices and legal professional associations with responsibility for the criteria for admission to ensure that the importance of a practical knowledge of ADR is recognised.

#### **RECOMMENDATION 12.2**

Undergraduate law degrees should include:

- access to clinical legal education opportunities, and
- opportunities to do pro bono work in community and Indigenous legal services or other similar organisations.

The Attorney-General should write to the Council of Australian Law Deans to encourage this as a uniform legal education outcome.

*Action; Triage; Outcomes; Resilience; Inclusion.*

### *Regulating the legal profession*

The legal profession is currently regulated by over 55 bodies across the country. Having different regimes regulating the legal profession in each jurisdiction adds significantly to legal costs incurred by law firms, as firms often have to meet the regulatory requirements of each jurisdiction they operate in separately. Harmonising legal profession regulation would reduce regulatory costs incurred by law firms, reducing the cost of legal services for consumers. It would also mean that the standards expected of lawyers would be the same regardless of which jurisdiction they practise in. Information about the national standards may be more readily made available to the public and consumers of legal services, improving the quality of outcomes as people are more likely to know what they are entitled to expect from lawyers.

Key matters requiring consistent legislation include harmonised rules on costs disclosures and billing practices and avenues of complaint. Establishing national regulation of the legal profession would also clarify the rules on eligibility to practise, making it easier for lawyers to transfer between jurisdictions and to deal with matters spanning multiple jurisdictions.

#### **National Legal Profession Project**

On 30 April 2009, COAG agreed that:

- Draft legislation providing uniform laws regulating the legal profession across Australia be prepared for consideration by COAG within 12 months.
- A specialist Taskforce be appointed by the Attorney-General to make recommendations and prepare the draft legislation.
- A Consultative Group be appointed by the Attorney-General to advise and assist the Taskforce.

On 1 July 2009, the Attorney-General announced the formation of the National Legal Profession Reform Consultative Group. This Group was established to assist and advise the Taskforce, chaired by Roger Wilkins AO, which has responsibility for preparing draft uniform legislation to regulate the legal profession across Australia. Cost disclosure is being considered by the Taskforce. On 1 July 2009, the Attorney-General announced the formation of the National Legal Profession Reform Consultative Group. This Group was established to assist and advise the Taskforce.



### *Enhancing the profession's contribution to access to justice*

The legal profession has a central role in many aspects of access to justice. Several matters that affect the way the legal profession operates are included in other parts of this report. Specifically:

#### *Non-Court dispute resolution – ADR*

Lawyers play a major role in encouraging the use of ADR in resolving disputes, both before matters go to court and during the court process.

#### *Pre-action protocols*

Action prior to commencing proceedings is heavily influenced by a lawyer's actions and attitude to dispute resolution. If the recommendations relating to pre-action protocols are to be successful, lawyers' cooperation is crucial.

#### *Pro-bono*

Lawyers and law firms make a significant contribution to access to justice through participation in pro bono schemes.

#### *Courts*

The way lawyers conduct court cases can have a major impact on access to justice. Reforms to the *Federal Court Act 1975* (Cth) to impose requirements on lawyers to actively manage cases and comply with an overarching purpose of facilitating the just resolution of disputes as quickly, inexpensively and efficiently as possible will ensure that lawyers are actively engaged in improving access to justice in the courts.

#### *Costs*

Lawyers can play an important role in improving the way costs are dealt with in the legal system

### **Post-resolution support**

Many people faced with a legal problem will exit the justice system following resolution of their matter by a court or mediation or after receiving appropriate advice or information. However, this may not necessarily mean that their legal problem is resolved. For some, a failure to understand an outcome may lead to ongoing dissatisfaction, or mean that the actions or omission which lead to the legal issue arising continue. For others, the resolution of an immediate legal problem may have no effect on the underlying cause of the problem. Others may have difficulty in understanding and therefore complying with new obligations created by the court. These persons would benefit significantly from some form of post-resolution support.

The Family Court of Australia has introduced an element of post-order support for cases involving children through its Child Responsive Program. Through this program, at the conclusion of a matter the judge will consider referring the parties to meet with a family consultant who can help the parties understand the orders and how they will be implemented.

In 2008 the Attorney-General's Department introduced a number of Post Separation Cooperative Parenting services to assist separated parents with education and support to focus on the children's needs, instead of on the conflict with the other parent. The introduction of these services follows a successful pilot scheme called 'Building Connections', operated by Interrelate Family Centres in 2006 in regional NSW. An evaluation of this pilot found that nearly two-thirds of participants increased their awareness of the value of child-focused parenting and 57 per cent improved the way their behaviour focused on their children's needs.<sup>364</sup> Recommendation 12.3 supports existing programs such as the Family Court's post-order support program. Options for post-resolution support that could be considered include:

- LACs inviting recipients of legal aid to a short advice session at some stage, perhaps 3–6 months after the conclusion of their matter, to discuss the client's situation since the outcome of the dispute, and any other legal matters that may have arisen
- legal practitioners ensuring that their clients understand the ongoing obligations imposed by court orders or consent agreements, and
- post-order information for self represented litigants from a court officer.

### RECOMMENDATION 12.3

Courts and legal service providers should consider options to increase post-resolution support, particularly for self-represented litigants, to improve understanding of outcomes, compliance with orders and help people move on.

*Information; Resilience; Inclusion.*

## Federal Justice Roundtable

Consistent with the objectives of the Strategic Framework for Access to Justice, an ongoing broadly based Federal Justice Group involving experts and users reflecting all aspects of the civil justice system could ensure that a system wide approach is taken to improving access to justice.

The establishment of a broadly constituted Federal Justice Group would be consistent with recent trends in the US and the UK. In the US, 'access to justice commissions' have been established in a number of states to expand access to, and enhance the quality of, justice in civil legal matters. Membership of these commissions usually consists of judges, senior lawyers, academics and community leaders, recognising that the inclusion of a broader group can increase the profile of commissions and allow them to consider wider issues.

<sup>364</sup> Attorney-General's Department, *Building Connections pilot program Evaluation Report*, March 2007, viewed 3 August 2009, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)~Building+Connections+Evaluation+Report+web.pdf/\\$file/Building+Connections+Evaluation+Report+web.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)~Building+Connections+Evaluation+Report+web.pdf/$file/Building+Connections+Evaluation+Report+web.pdf)>.

In the UK, a Civil Justice Council was established under the *Civil Procedure Act 1997* in order to advise Government on the civil justice system. The Civil Procedure Act requires that its membership include members of the judiciary, members of the legal professions, civil servants concerned with the administration of the courts, persons with experience in and knowledge of the lay advice sector and persons able to represent the interests of particular kinds of litigants (for example businesses or employees). The Council's responsibilities include considering how to make the system more accessible, fair and efficient, making proposals for research, and referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee.

#### RECOMMENDATION 12.4

The Attorney-General's Department should convene a Federal Justice Roundtable comprising representatives from justice institutions including judges and court administrators, representatives from the legal profession, the legal assistance and community legal sectors, the broader community sector and major litigant groups (including social security, human rights and business representatives). The Roundtable would be convened annually. Its functions would include:

- developing and considering reforms to promote a fair, simple, affordable and accessible federal civil justice system. This would include reforms to the federal courts, Commonwealth administrative tribunals, ADR, the legal profession and any other matters that would promote access to justice, and
- considering areas where further research or law reform investigation would provide a basis for future policy decisions (for example, by reference to expert bodies such as the Australian Law Reform Commission, National Alternative Dispute Resolution Advisory Council or the Administrative Review Council).

*Resilience.*

### Recognising diversity

The principles in the Access to Justice Framework support access to justice for all Australians, while recognising the diversity of people who interact with the justice system.

People from CALD backgrounds and their communities, in particular those who recently arrived in Australia or have difficulty with English, may have a low awareness of available legal services or little or no understanding of Australian law. They may also have previously lived in countries with a repressive government, unresponsive justice system or a compromised rule of law. People need information about the law to see the options that are available to them, whether it be making the informed choice to do nothing, or seeking assistance so that the problem does not escalate or trigger broader legal issues.

Access to quality legal assistance and information can help people from CALD backgrounds and their communities by removing misconceptions, reducing fear of victimisation, promoting belonging and building trust in government and the justice system. This also reinforces the resilience of our system, as it encourages respect for the rule of law.

The recommendations and principles in the report help address some of the issues of individual need and diversity that people might face, including through:

- Access to Information:

People from CALD backgrounds are more likely to contact and use Government agencies dealing with immigration and government benefits issues than they are to contact traditional legal services. The no wrong number approach will help ensure they do not fall out of the system and are instead assisted in accessing information and assistance.

Outreach helps CALD communities learn about the law, their rights and the legal pathways available to them. In particular, a focus on community leaders and workers is appropriate given their role in communities as sources of information and potential gateways to legal services.

Face-to-face assistance can give service providers a better sense of people's information needs, gauging comprehension, answering questions and basing the information on the recognition that everyone's information needs are different.

The need for factual, clear and relevant information on the law is shared by all communities across Australia. People from CALD backgrounds may have difficulty with English and so need information in their own language, using interpreters and liaising with people who are sensitive to and respect their culture and the lives people left behind.

- Courts and costs:

People from CALD backgrounds face additional barriers when representing themselves in court due to linguistic and cultural difficulties. A greater focus in legal assistance services on advice, information and education will allow SRLs to be better informed of court processes, and the steps they need to take in representing themselves.

- Administrative Law:

Better primary decision-making and the communication of reasons for decisions will enable people to understand their position when a decision is made.

A commitment to providing a comprehensive statement of reasons will help explain government decisions and consistently inform people of their review rights, helping address fears of being judged, misunderstood or victimised by government.

The strengthened role of the Commonwealth Ombudsman is a discrete element of the administrative law system that will assist agencies accommodate diversity.

Warm referral will help put people in contact with the services that can help them, alleviating the mistrust of government structures that can be found in some CALD communities, particularly among arrivals who may have lived in countries with a repressive government and/or compromised rule of law.

Robust feedback mechanisms help make government more responsive to the needs of people from CALD backgrounds. Feedback is necessary to maintain the quality of service, monitor assumptions and prejudices, ensure respect of cultural practices/experiences/beliefs, and help agencies better understand the needs and complexities within groups.

- Legal Assistance:

Greater collaboration between legal service providers improves service delivery by sharing ‘lessons learned’ about assisting people from CALD backgrounds and engaging with their communities.

## Meeting the justice needs of Indigenous Australians

The Recommendations in this report are consistent with the approach taken by COAG in ‘closing the gap’ between Indigenous and non-Indigenous Australians. They also accord with the vision and goals contained in the National Indigenous Law and Justice Framework 2009–2015 (the NILJ Framework), prepared by the SCAG Working Group on Indigenous Justice. The NILJ framework aims to ‘improve all Australian justice systems so that they comprehensively deliver on the justice needs of Aboriginal peoples and Torres Strait Islanders in a fair and equitable manner’.<sup>365</sup> Strategies to achieve this include:

- building trust between Indigenous Australians and service providers, in particular by promoting good practice among service providers and developing feedback mechanisms, and
- addressing barriers to accessing services, through outreach, exploring options for providing appropriate and accessible information, developing strategies for delivering that information, and establishing protocols to maximise government coordination.

The Access to Justice Recommendations are consistent with these strategies. For example:

The *no wrong number, no wrong door* best practice protocol promotes warm referral and accurate and relevant information, preventing people from falling out of the system – and building trust between the public and service providers.

The Charter of Good Administration encourages agencies to continue to improve government communication and administration practices, including agency-to-agency coordination.

Better collaboration helps service providers disseminate information, share ideas on better service delivery and maximise coordination, improving the quality of interaction and reducing the risk of people falling through the gaps.

<sup>365</sup> NILJ Framework, p 7, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(\(CFD7369FCAE9B8F32F341DBE097801FF\)~NILJF+-+National+Indigenous+Law+and+Justice+Framework+-+20+April+2009.PDF/\\$file/NILJF+-+National+Indigenous+Law+and+Justice+Framework+-+20+April+2009.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/((CFD7369FCAE9B8F32F341DBE097801FF)~NILJF+-+National+Indigenous+Law+and+Justice+Framework+-+20+April+2009.PDF/$file/NILJF+-+National+Indigenous+Law+and+Justice+Framework+-+20+April+2009.PDF)>.

The recommendations for direct engagement recognise that outreach is necessary to address access issues faced by some communities, including Indigenous Australians.

Robust feedback mechanisms in government administration help ensure that information about emerging issues relating to Indigenous communities can reach the relevant decision makers.

## Building resilience in the community

### Conflict resolution

Learning conflict resolution skills early is essential to equip people to navigate life's twists and turns. Such skills are not limited to the legal context, but have the potential to improve enjoyment of the shared benefits of Australian society and economy. These skills can assist in building resilience in people so they can engage in a full and meaningful life.

Conflict resolution can be an important element in promoting understanding, reducing intolerance and discrimination and facilitating participation in society by people who might otherwise experience disadvantage. Promoting these skills early will provide valuable coping skills which will assist them to navigate the justice system and deal with possible legal issues before they escalate out of control.

The Government has worked with State and Territory education authorities to develop the Bullying No Way! website [www.bullyingnoway.com.au](http://www.bullyingnoway.com.au).<sup>366</sup> This interactive website provides valuable information for parents, students and teachers on strategies to address bullying, harassment and violence.

Recognising the links between student wellbeing and safe learning environments, the Government is currently reviewing the National Safe Schools Framework (NSSF) which was endorsed by all Ministers for Education in 2003. The NSSF emphasises the need for teachers to have appropriate training in positive student management, and the need for schools to respond proactively to all incidents of victimisation or abuse. Through the review, linkages will be drawn with other wellbeing and child protection issues including: the emergence of technologies enabling new forms of bullying to develop; social and emotional learning; the explicit teaching of values; and changes in legislation and Government policy. Further information about the current NSSF and the review is available at [www.safeschools.deewr.gov.au](http://www.safeschools.deewr.gov.au).

Review of the Framework also supports the Melbourne Declaration on Educational Goals for Young Australians which sets the direction for Australian schooling for the next 10 years, and was endorsed by all Australian Education Ministers on 5 December 2008 at the Ministerial Council on Education, Employment, Training and Youth Affairs. Included in the Declaration's goals is the commitment that all Australian governments and school sectors must provide all students with access to high quality schooling that is free from discrimination based on gender, language, sexual orientation, pregnancy, culture, ethnicity, religion, health or disability, socioeconomic background or geographic location.

<sup>366</sup> Accessed 20 May 2009, <[www.bullyingnoway.com.au](http://www.bullyingnoway.com.au)>.

While the Government plays a collaborative role in developing national priorities for schools, it does not have a direct role in the administration or operation of schools. State and territory government and non-government school authorities bear legal responsibility for the duty of care of their students, including ensuring that appropriate measures are in place so that students can learn in a safe and supportive school environment.

An initiative being run in Western Australian and Northern Territory schools is the Schools Conflict Resolution and Mediation (SCRAM) program.<sup>367</sup> This program is an interactive role play competition for Year 9 and 10 high school students. Students mediate simulated disputes which relate to their everyday lives. The outcome is a mutual agreement which acknowledges the needs of all involved and maintains and develops relationships. The Commonwealth Government should encourage programs such as SCRAM which develop conflict resolution skills early in life. These sorts of skills are equipping students with the tools to deal with the issues they are likely to face in their day to day lives.

#### **RECOMMENDATION 12.5**

The Commonwealth Government should continue to work with State and Territory Governments to encourage all Australian schools to develop strategies for young people that support their social and emotional wellbeing, including skills for avoiding and resolving conflicts.

*Information; Action; Triage; Outcomes; Resilience; Inclusion.*

## **Civics**

Education about social justice, conflict resolution and the legal system, are an important component of civics and citizenship education, and help to strengthen young people's awareness of access to justice issues.

The *Melbourne Declaration on Educational Goals for Young Australians* made by all Australian Education Ministers in December 2008 includes a commitment to support the goal that young Australians become active and informed citizens.<sup>368</sup>

The Melbourne Declaration provides a framework for the development of a national, K–12 curriculum by the Australian Curriculum Assessment and Reporting Authority (ACARA); initially in English, mathematics, science and history, and subsequently in geography, languages and the arts. In addition, the Ministerial Council for Education, Employment, Training and Youth Affairs has asked ACARA to report by October 2009 on the approach that will be taken to other learning areas (including civics and citizenship) in the national curriculum.

<sup>367</sup> Accessed 6 August 2009, <<http://www.scram.business.ecu.edu.au/>>.

<sup>368</sup> Ministerial Council for Education, Early Childhood Development and Youth Affairs, *2008 Melbourne Declaration*, viewed 18 August 2009, <[http://www.mceecdya.edu.au/verve/\\_resources/National\\_Declaration\\_on\\_the\\_Educational\\_Goals\\_for\\_Young\\_Australians.pdf](http://www.mceecdya.edu.au/verve/_resources/National_Declaration_on_the_Educational_Goals_for_Young_Australians.pdf)>.

### THE 2008 MELBOURNE DECLARATION

Active and informed citizens:

- act with moral and ethical integrity
- appreciate Australia's social, cultural, linguistic and religious diversity, and have an understanding of Australia's system of government, history and culture
- understand and acknowledge the value of Indigenous cultures and possess the knowledge, skills and understanding to contribute to, and benefit from, reconciliation between Indigenous and non-Indigenous Australians
- are committed to national values of democracy, equity and justice, and participate in Australia's civic life
- are able to relate to and communicate across cultures, especially the cultures and countries of Asia
- work for the common good, in particular sustaining and improving natural and social environments, and
- are responsible global and local citizens.

### Social inclusion

Improving access to justice is a key means of promoting social inclusion. Many of the issues commonly faced by people, particularly those experiencing multiple disadvantage, such as family breakdown, credit and housing issues, discrimination, and exclusion from services have a legal dimension.

The Australian Government has a strong social inclusion agenda. The Australian Government's social inclusion vision is that Australians should have the resources, opportunities and capabilities to:

- learn by participating in education and training
- work by participating in employment, in voluntary work and in family and caring
- engage by connecting with people and using their local community's resources, and
- have a voice so that they can influence decisions that affect them.

The Government identified six early priority areas in which to focus its work on the social inclusion agenda. New initiatives and programs have already been implemented for these six areas and more are in development. In implementing its social inclusion agenda, the Government is changing the way policies and programs are designed, developed and co-ordinated across government. This is being supported by new partnerships between all levels of government, businesses and third sector groups such as non profit organisations and charities. New ideas or ways of working are encouraged with a greater focus on the needs of disadvantaged groups and places.<sup>369</sup>

<sup>369</sup> Australian Government Social Inclusion, viewed on 7 August 2009, <<http://www.socialinclusion.gov.au/Pages/default.aspx>>.



*“In implementing its social inclusion agenda, the Government is changing the way policies and programs are designed, developed and co-ordinated across government.”*

This is an example of how the Commonwealth Government is promoting social inclusion initiatives within Government and the wider community. The principles in the Access to Justice Framework also promote social inclusion. Their aim is to humanise the justice system, so that people can connect and interact with the justice system and government more easily and effectively.



# Appendices

## Appendix A – List of Recommendations

### Chapter 5

#### CENTRAL RECOMMENDATION

##### A strategic framework for access to justice

Policy makers should take a system wide approach to access to justice issues by applying the strategic framework, as set out in Chapter 5, to all decisions affecting access to justice in the federal civil justice system.

The strategic framework comprises:

- **Principles** for access to justice policy-making, and
- **Methodology** for achieving the principles in practice.

Application of the strategic framework will ensure that new initiatives and reforms to the justice system best target available resources to improving access to justice.

#### RECOMMENDATION 5.1

The Commonwealth should request the Productivity Commission to undertake a review of the efficiency of the civil justice system in Australia. The scope of the review should include identification of relevant measures and data requirements necessary for ongoing monitoring of the justice system.

Based on the outcome of this review, the Attorney-General's Department should work with the federal courts, tribunals, and other justice services to develop an overarching data collection template to inform the necessary collection of data on a comprehensive, consistent basis.

#### RECOMMENDATION 5.2

As a standard practice, implementation of changes to the justice system should include consideration of data collection necessary to enable evaluation of the impact of these changes.

As an immediate measure—to the extent they are not already doing so—federal courts and tribunals should identify key practice or procedural requirements or rules and begin to collect data with a view to assessing the implementation, impact (quality of outcome and cost), and effectiveness of the measure.<sup>370</sup>

<sup>370</sup> For example the Federal Court might consider ways of measuring the impact of Practice Direction 17 *The use of technology in the management of discovery and the conduct of litigation*, (issued 29 January 2009), including capturing and reporting information relating to the best preliminary estimate of the cost associated with Discovery parties are expected to provide in accordance with that Direction.

### RECOMMENDATION 5.3

The Attorney-General should commission a review of the interrelationship between Commonwealth and State/Territory justice systems, including looking at:

- opportunities for the systems to work more seamlessly
- areas of duplication
- inefficiency, and
- obstacles to a more unified system and ways to overcome them, particularly constitutional issues.

The review would ideally be conducted by a small panel, led by an eminent person and comprising representatives from the Federal and State levels, from both court and non-court backgrounds.

## Chapter 6 – Information about the Law

### RECOMMENDATION 6.1

That Commonwealth agencies that provide services and information to the public and Commonwealth-funded service providers adopt a *no wrong number, no wrong door* approach to the provision of information about government services, or queries seeking information about legal issues. This will reduce information barriers to accessing justice, by ensuring that whichever source of assistance people turn to is able to assist, either directly or by taking people to the correct source.

The *no wrong number, no wrong door* approach involves development of a best practice protocol, through consultations with all interested parties led by the Attorney-General's Department, for the provision of legal information, assistance or referral. A referral policy may require that the first agency contacted would not refer on without endeavouring to make some assessment of an appropriate referee, and ensure that referee has the capacity to take the referral.<sup>371</sup>

### RECOMMENDATION 6.2

The *no wrong number, no wrong door* approach can be implemented at a purely Commonwealth level, but would be most effective if it involved the States and Territories. Accordingly, the Attorney-General should consult with State and Territory Attorneys-General for the adoption of the policy by relevant state bodies.

### RECOMMENDATION 6.3

The Attorney-General's Department should develop a consultative process to enable relevant agencies, service providers, courts and tribunals to consolidate existing information about the type and location of services on a common referral database.

<sup>371</sup> This practice is commonly described as 'warm referral'. It involves contacting another service on the client's behalf (whether by phone, email, or some other means, and may also involve writing a report or case history on the client for the legal service, or attending the service with the client. Importantly, a move towards warm referrals will counteract the effect of 'referral fatigue', the trend whereby users of the justice system become less likely to follow their issue through to resolution the longer it takes or the harder it is to obtain the information needed. Warm referral is especially effective for clients who may not have the means or are hesitant to contact other services.

**RECOMMENDATION 6.4**

The Attorney-General's Department should develop strategies to increase the accessibility of legal information and services among groups that may not be reached by more general programs. This may include targeted advertising, technological solutions, and outreach programs.

**RECOMMENDATION 6.5**

The Attorney-General's Department should work with Indigenous legal assistance providers, relevant non-legal services and communities to improve the provision of information to Indigenous Australians, including through direct contact, and building outreach services to connect existing services.

**RECOMMENDATION 6.6**

In line with the Commonwealth Ombudsman's recommendations to enhance access to interpreters as a 'lifeline' for access to government information and services for culturally and linguistically diverse communities, Commonwealth agencies should explore ways to improve access to interpreters, including through direct links to interpreter services on website homepages.<sup>372</sup>

**RECOMMENDATION 6.7**

Legal assistance providers and relevant Commonwealth-funded service providers (such as family relationship services) should increase collaboration to develop joined-up solutions to service delivery. Strategies could include the collaborative delivery of services, increasing the use of warm referral between providers and more uniform data collection. The new national coordination group for legal assistance (Recommendation 11.1) could be one mechanism to facilitate this Recommendation.

**RECOMMENDATION 6.8**

Greater emphasis should be placed on the opportunities that using new technologies can afford to improve the efficiency and scope of service delivery on a cost-effective basis. Measures to achieve this include:

- The Attorney-General's Department should initiate discussions with courts, tribunals, Government agencies, service providers and the legal assistance sector to undertake a 'stocktake' of the use of technology to identify opportunities to increase collaboration and expand availability of services, particularly for regional, rural and remote Australia.
- The Attorney-General's Department should work with legal assistance service providers, desirably through the proposed national coordination group (see Recommendation 11.1), to explore options for improving service delivery through new technology.

**RECOMMENDATION 6.9**

To ensure that legislation is relevant, clear, effective and not redundant, the Government should introduce a flexible scheme for the regular review of primary legislation. This would involve:

- For new legislation, ministers should consider the inclusion of appropriate review periods and mechanisms when the legislation is introduced.

<sup>372</sup> Commonwealth Ombudsman, *Use of Interpreters*, Report No. 03/2009, March 2009

- At regular intervals, a schedule of primary legislation<sup>373</sup> which was passed 10 years previously, or had not been reviewed in the last 10 years be published.<sup>374</sup> Relevant ministers would consider whether it was necessary to review the legislation to ensure that it is relevant, clear, effective and not redundant.

While ministers would be accountable for their decisions, the conduct and form of a review would be for ministers to determine, and review would not be mandatory.

#### **RECOMMENDATION 6.10**

The Attorney-General's Department, the Office of Parliamentary Counsel and the Department of the Prime Minister and Cabinet work to improve the clarity of legislative drafting by:

- developing a scheme so that when primary legislation is released for public consultation as an exposure draft specific consideration is given to assessing its clarity and readability, and opportunities for that to be tested are included in the consultation process, and
- amending the Legislation Handbook to reinforce the need for instructing officers to provide clear drafting instructions so that legislation can be as simple as possible.

## **Chapter 7 – Alternative Dispute Resolution**

#### **RECOMMENDATION 7.1**

The Attorney-General should work with responsible ministers to examine options to increase the range of consumer disputes which have access to an industry ombudsman or external dispute resolution service. This could be done by identifying industries with the need and capacity for an external dispute resolution scheme, with a view to potentially extending the use of the external dispute resolution model in the future. In particular, this would include industries where there is a significant imbalance in power and resources between the service provider and customer, and as such where traditional dispute resolution mechanisms and litigation are not feasible for the vast majority of customers.

#### **RECOMMENDATION 7.2**

External dispute resolution schemes should be available to deal with disputes involving small businesses, and not just complaints between customers and businesses.

#### **RECOMMENDATION 7.3**

To further improve the quality of dispute resolution, the Government should encourage business associations and businesses to consider ways to:

- help businesses understand their obligations in resolving disputes
- encourage businesses to address systemic issues to avoid disputes arising
- where a dispute occurs, ensure that the first step is internal dispute resolution

<sup>373</sup> Relevant primary legislation would be substantive new Act or a major amendment to existing legislation – minor amending bills would not be relevant, as they would be considered in the context of the parent Act.

<sup>374</sup> There would be an initial transition period to ensure that reviews of existing legislation commenced in an orderly manner after an initial period such as two years after the commencement of the scheme.

- support the use of external dispute resolution mechanisms, where appropriate
- ensure that businesses are aware of national standards for dispute resolution—and that their mechanisms adhere to the standards of administrative review such as accessibility, independence, fairness, accountability, efficiency and effectiveness,<sup>375</sup> and
- provide a choice between court (for those matters of a higher monetary value or complex legal issues) and alternative, enforceable means of seeking redress.

#### **RECOMMENDATION 7.4**

The Attorney-General's Department should work with relevant departments and agencies to ensure that opportunities to expand ADR services are considered for a diverse range of disputants, including for Indigenous disputes and for self-represented litigants.

#### **RECOMMENDATION 7.5**

All Commonwealth agencies should put in place strategies to maximise the use of ADR in resolving disputes. Drawing on event-based costs information collected as a consequence on Recommendation 9.5, the report of Commonwealth Legal Services Expenditure should include details of expenditure on dispute resolution by agencies by reference to the particular dispute resolution mechanisms employed.

#### **RECOMMENDATION 7.6**

Before preparing to litigate, disputants and their legal advisers should attempt to resolve the matter through an ADR process or direct negotiation where appropriate. The Attorney-General should work with federal courts and professional bodies to ensure that procedural and professional requirements reflect the expectation that parties have considered resolving the matter outside the court process prior to commencing litigation.

The expectation that parties will have attempted to resolve matters through ADR and negotiation should apply to self represented litigants.

## **Chapter 8 – The Courts**

#### **RECOMMENDATION 8.1**

The Attorney-General's Department should work with the federal courts to determine types of matters suitable for pre-action protocols. Pre-action protocols should set out requirements for action prior to commencing proceedings, particularly exchange of information between the parties, and should be supplemented by effective sanction or enforcement mechanisms.

To ensure costs of compliance with a protocol do not exceed the benefits, the obligations of a protocol should be reasonable and proportionate, and directed to identifying the real issues in dispute and appropriate pathways for resolution.

<sup>375</sup> ARC, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, Report No. 49, November 2008, p 39.

**RECOMMENDATION 8.2**

The cost of discovery continues to be very high, and often disproportionate to the role played by discovered documents in resolving disputes. The Attorney-General should ask the ALRC to conduct an assessment of the effectiveness (including the impact on the length and cost of proceedings) of different discovery orders (general, by category or more limited). This would include an appraisal of the extent to which discovered documents are actually used and are influential in proceedings.

**RECOMMENDATION 8.3**

The Attorney-General's Department should develop options by which courts may order that the estimated cost of discovery requests would be paid for in advance by the requesting party.

**RECOMMENDATION 8.4**

The Attorney-General's Department should explore the feasibility of amending relevant federal court legislation and rules to provide legislative guidance to the effect that the expression by a judge of a preliminary view on an issue does not amount to apprehended bias unless couched in such emphatic terms that it is clear that the judge is irresistibly drawn to that view.

**RECOMMENDATION 8.5**

Case management and dispute resolution should be considered central judicial functions and crucial to ensuring fair, cheap and effective access to justice. The Attorney-General should work with the courts and the National Judicial College of Australia to ensure that judicial education includes measures aimed at enhancing the understanding and use of ADR, dispute resolution and case management techniques.

**RECOMMENDATION 8.6**

In considering possible candidates for judicial appointments, the Attorney-General should have regard to the importance of case management and the use of ADR in achieving just, fair and equitable outcomes.

**RECOMMENDATION 8.7**

The Attorney-General, acknowledging the positive contribution to efficiency and proportionality made by the Federal Court's Fast Track, should collaborate with the Federal Court to identify further scope to encourage parties to use the Fast Track, or specific Fast Track processes.

**RECOMMENDATION 8.8**

Disputes should be resolved at the lowest appropriate level. The Government should confer jurisdiction for specific types of disputes on the lowest level of court available and appropriate to hear the matter. This jurisdiction will usually be in addition to jurisdiction conferred on higher courts.



**RECOMMENDATION 8.9**

The courts should develop means by which self represented litigants' claims could be listed for early evaluation of the merits, and considering whether parties should be referred for external assistance. Courts should be flexible in allowing the filing of revised claims where an applicant is self-represented.

**RECOMMENDATION 8.10**

The Government should consider amending federal court legislation to provide a discretion for the court to make a public interest costs order, at any stage of the proceeding, where the court is satisfied that the proceedings concerned will be of benefit to the public because the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant section of the community, or affect the development of the law generally and reduce the need for further litigation.

The Government should consider amendments to allow representative and advocacy groups to bring actions based on claims of discriminatory conduct under the *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth), *Age Discrimination Act 2004* (Cth) and *Racial Discrimination Act 1975* (Cth) before the federal courts (where conciliation in the Australian Human Rights Commission has failed). Action would be constrained by the requirement that there be a justiciable issue, and that actions may only be taken by established groups with a demonstrated connection to the subject matter of the dispute.<sup>376</sup> Consideration should also be given to whether any remedies that are available to individuals would be inappropriate where action is taken by representative bodies.

**RECOMMENDATION 8.11**

The Attorney-General should commission a review of the *Federal Court of Australia Act 1976* (Cth) Part IVA class action provisions to ensure they are operating in a manner consistent with the objectives of improving access to justice, improving judicial economy; and contributing to behaviour modification. Among issues the review should consider are:

- means to limit interlocutory proceedings in class actions
- whether the ability for the Federal Court to terminate a class action under s33N should be limited or removed, and whether it should be replaced with any specific criteria
- whether the legislation appropriately takes account of the behaviour modification aspects of class actions, including whether there is scope for the greater involvement of regulatory agencies in class actions and whether the Court should be allowed to award cy-pres remedies, and
- whether the current opt-in arrangements for class actions funded by litigation funders are appropriate or should be amended.

**RECOMMENDATION 8.12**

The Government should consider implementing vexatious litigants legislation based on the Standing Committee of the Attorneys-General model Vexatious Proceedings Bill.

<sup>376</sup> The requirements for a demonstrated connection to the subject matter might be similar to those required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

## Chapter 9 – Costs

### RECOMMENDATION 9.1

The Attorney-General should initiate a thorough examination by the Standing Committee of Attorneys-General of issues and options for funding aspects of the justice system on a cost recovery basis. The purpose of the examination would be to ensure that resourcing of the justice system maximises access to justice.

### RECOMMENDATION 9.2

Given the significant public costs of court hearings, and the opportunities parties have to resolve matters without hearing, or minimise the length of hearings by identifying the real issues in dispute, full cost pricing for long hearings is generally appropriate. The Government should adopt a model of full cost pricing for long hearings which would:

- commence after a certain number of hearing days, or adopt a sliding scale, rather than be imposed as an exercise of judicial discretion, and
- be subject to a comprehensive system of exemptions and waivers (excluding, for example, human rights and native title matters) to protect access to justice.

### RECOMMENDATION 9.3

The Attorney-General's Department should work with the Federal Court to develop options to require parties to litigation in the Federal Court to exchange with each other and the court a litigation budget which includes an estimate of the costs identified by reference to the stages and activities the party proposes are necessary to progress to resolution.

As an initial step this Recommendation could be implemented as a pilot, with a judicial discretion to order the preparation of such a budget.

### RECOMMENDATION 9.4

Commonwealth agencies should negotiate with legal service providers for the provision of legal services associated with litigation on an event basis—not time billing. For example, the Commonwealth could negotiate payment stages such as initial advice, pre-filing, filing, discovery, interlocutory, ADR, and final hearing stages. Agencies should provide a report to the Office of Legal Services Coordination on the outcome of such negotiations. This Recommendation could be implemented initially as a pilot.

Where the Commonwealth is already engaged in cost saving billing practices such as a fixed fee arrangement, this should continue.

### RECOMMENDATION 9.5

Commonwealth agencies should include details of the cost of the litigation event stages in information provided to the Office of Legal Services Coordination in the Attorney-General's Department for the report of Commonwealth Legal Services Expenditure. The Office of Legal Services Coordination should include in the report an aggregate figure on the costs of litigation events to the Commonwealth.

## Chapter 10 – Administrative Law

### RECOMMENDATION 10.1

Improving the quality of primary decision-making, the level of communication between agencies and applicants, and the mechanisms agencies develop to monitor and improve the performance of their statutory functions will improve access to justice outcomes and reduce costs associated with unnecessary or prolonged disputes. These improvements should be systemic and not dependent on individuals exercising review rights. To this end, the Department of the Prime Minister and Cabinet and the Attorney-General's Department, in consultation with the Commonwealth Ombudsman should develop a Charter of Good Administration. In particular, the charter would:

- promote best practice administration by agencies<sup>377</sup>
- reflect the *no wrong number, no wrong door* policy (see Recommendation 6.1)
- clarify the general obligation on agencies to provide a clear statement of reasons (Recommendation 10.3)
- require decision makers to make an appropriate record of the reasons for adverse decision at the time the decision is made (Recommendation 10.4)
- require agencies to have in place appropriate mechanisms for resolving disputes without recourse to statutory review rights, including internal review and/or ADR processes
- require agencies to have processes in place to adapt to decisions by external scrutiny (Recommendation 10.6), and
- require agencies to have quality assurance methods in place (Recommendation 10.7).

### RECOMMENDATION 10.2

That the proposed Charter of Good Administration (Recommendation 10.1) clarify the general obligation on agencies to provide a comprehensive statement of reasons to individuals for decisions affecting them, independent of the merits review context.

### RECOMMENDATION 10.3

Commonwealth agencies should review their methods of notifying clients of adverse decisions.

At a minimum, notification of adverse decisions should include information and be sufficient to enable the affected person to discuss the decision and the reasons with an experienced officer.

### RECOMMENDATION 10.4

Commonwealth agencies should ensure that internal processes require decision makers to make an appropriate record of the reasons for adverse decision at the time the decision is made. The record should provide a sufficient basis for the reasons for the specific decision to be communicated if sought.

---

<sup>377</sup> The charter would be informed by the Commonwealth Ombudsman's *Ten Principles for Good Administration*, April 2009

**RECOMMENDATION 10.5**

The Government should consider imposing a filing fee, set at a level that takes into account the costs of a Tribunal hearing, for agencies that unsuccessfully appeal or defend decisions before the Administrative Appeals Tribunal. The purpose would be to provide a fiscal incentive to promote better primary decision-making and early resolution of issues where possible. The Administrative Appeals Tribunal would have a discretion to authorise repayment of the fee to the agency if satisfied that there were compelling reasons.

**RECOMMENDATION 10.6**

Agencies should ensure transparent mechanisms are in place to make appropriate changes in response to tribunal decisions and Ombudsman's recommendations, and to ensure that those changes are fully understood by primary decision makers.

**RECOMMENDATION 10.7**

As an element of good administration, agencies should ensure that they have quality assurance mechanisms, including regular client surveys, to continuously identify and address systemic issues relating to primary decision-making, internal review and related processes.

**RECOMMENDATION 10.8**

The Attorney-General should write to relevant Ministers to consider whether particular features of the decision-making structure in their jurisdictions impose barriers to justice or might be streamlined. The Administrative Review Council and the Attorney-General's Department would be available to provide advice and assistance to agencies in conducting any assessment.

**RECOMMENDATION 10.9**

The Attorney-General's Department and the Administrative Appeals Tribunal should develop options for more proactive case management to reduce unnecessary delays in resolving matters.

## **Chapter 11 – Legal Assistance**

**RECOMMENDATION 11.1**

The Attorney-General establish a national coordination group to facilitate strategic decision-making across the legal assistance system, chaired by the Commonwealth and comprising representatives from legal assistance peak bodies. The group should identify priorities and opportunities for coordination and collaboration, particularly in driving reforms aimed at promoting prevention and early intervention strategies, and implementing relevant Recommendations of this report. The group should develop a National Action Plan for the provision of legal assistance services and report regularly to the Attorney-General on progress in implementing the National Action Plan.

**RECOMMENDATION 11.2**

The national coordination group should play an overarching role in promoting joined up services for clients by strengthening linkages and cooperation between the legal assistance sector and other service sectors including the courts, family relationship services and child protection services.

**RECOMMENDATION 11.3**

The Commonwealth should seek to negotiate a National Partnership Agreement for legal aid that gives greater priority to intervening early to help prevent legal problems from escalating, building knowledge and respect for the law and resilience in dealing with legal issues.

**RECOMMENDATION 11.4**

The Commonwealth should consider options for improving access to culturally appropriate legal assistance services for family and civil law matters for Indigenous Australians.

**RECOMMENDATION 11.5**

The Commonwealth should continue to support Legal Aid Centres as providers of family dispute resolution services and where possible expand the provision of these services.

The Attorney-General's Department should work with legal assistance providers to explore options for the development of ADR services in other areas, such as civil law.

**RECOMMENDATION 11.6**

The Attorney-General's Department should work with Legal Aid Centres to consider the benefits of locating duty lawyer/advice type services at courts and tribunals where appropriate.

**RECOMMENDATION 11.7**

The Attorney-General's Department should work with legal assistance service providers, desirably through the proposed national coordination group, to explore options for improving access to legal assistance in regional, rural and remote Australia.

## **Chapter 12 – Building Resilience**

**RECOMMENDATION 12.1**

Lawyers being admitted to practise should be equipped with the skills to guide a client through a dispute resolution process and understand the major ADR processes.

The Attorney-General should write to the Council of Chief Justices and legal professional associations with responsibility for the criteria for admission to ensure that the importance of a practical knowledge of ADR is recognised.

**RECOMMENDATION 12.2**

Undergraduate law degrees should include:

- access to clinical legal education opportunities, and
- opportunities to do pro bono work in community and Indigenous legal services or other similar organisations.

The Attorney-General should write to the Council of Australian Law Deans to encourage this as a uniform legal education outcome.

**RECOMMENDATION 12.3**

Courts and legal service providers should consider options to increase post-resolution support, particularly for self represented litigants, to improve understanding of outcomes, compliance with orders and help people move on.

**RECOMMENDATION 12.4**

The Attorney-General's Department should convene a Federal Justice Roundtable comprising representatives from justice institutions including judges and court administrators, representatives from the legal profession, the legal assistance and community legal sectors, the broader community sector and major litigant groups (including social security, human rights and business representatives). The Roundtable would be convened annually. Its functions would include:

- developing and considering reforms to promote a fair, simple, affordable and accessible federal civil justice system. This would include reforms to the federal courts, Commonwealth administrative tribunals, ADR, the legal profession and any other matters that would promote access to justice, and
- considering areas where further research or law reform investigation would provide a basis for future policy decisions (for example, by reference to expert bodies such as the Australian Law Reform Commission, National Alternative Dispute Resolution Advisory Council or the Administrative Review Council).

**RECOMMENDATION 12.5**

The Commonwealth Government should continue to work with State and Territory Governments to encourage all Australian schools to develop strategies for young people that support their social and emotional wellbeing, including skills for avoiding and resolving conflicts.

## Appendix B – List of Acronyms

| ACRONYM        | MEANING                                                                    |
|----------------|----------------------------------------------------------------------------|
| AAT            | Administrative Appeals Tribunal                                            |
| ACCC           | Australian Consumer and Competition Commission                             |
| ADR            | Alternative Dispute Resolution                                             |
| ALRC           | Australian Law Reform Commission                                           |
| ARC            | Administrative Review Council                                              |
| ASIC           | Australian Securities and Investment Commission                            |
| ATO            | Australian Taxation Office                                                 |
| ATSILS         | Aboriginal and Torres Strait Islander Legal Service                        |
| CALD           | Culturally and linguistically diverse                                      |
| CLC            | Community Legal Centre                                                     |
| COAG           | Council of Australian Governments                                          |
| DIAC           | Department of Immigration and Citizenship                                  |
| EDR            | External Dispute Resolution                                                |
| FDR            | Family Dispute Resolution                                                  |
| FMA Act        | <i>Financial Management And Accountability Act 1997</i> (Cth)              |
| FMC            | Federal Magistrates Court of Australia                                     |
| FRC            | Family Relationship Centre                                                 |
| FRSP           | Family Relationship Service Provider                                       |
| FRO            | Family Relationships Online                                                |
| FVPL           | Family Violence Prevention Legal Service                                   |
| HRC            | Human Rights Commission                                                    |
| ICL            | Independent children's lawyer                                              |
| ITSA           | Insolvency & Trustee Service Australia                                     |
| LAC            | Legal Aid Commission                                                       |
| LARI           | Legal Aid Reporting Initiative                                             |
| MRT            | Migration Review Tribunal                                                  |
| NADRAC         | National Alternative Dispute Resolution Advisory Council                   |
| NACLC          | National Association of Community Legal Centres                            |
| NILJ Framework | National Indigenous Law and Justice Framework                              |
| NLA            | National Legal Aid                                                         |
| NNTT           | National Native Title Tribunal                                             |
| OLSC           | Office of Legal Services Coordination in the Attorney-General's Department |



|       |                                                                                                     |
|-------|-----------------------------------------------------------------------------------------------------|
| OPC   | Office of Parliamentary Counsel                                                                     |
| PDR   | Primary dispute resolution                                                                          |
| RRT   | Refugee Review Tribunal                                                                             |
| SCAG  | Standing Committee of the Attorneys-General                                                         |
| SCRAM | Schools Conflict Resolution and Mediation program of West Australian and Northern Territory schools |
| SRL   | Self-represented litigant                                                                           |
| SSAT  | Social Security Appeals Tribunal                                                                    |
| TIO   | Telecommunications Industry Ombudsman                                                               |
| TPA   | <i>Trade Practices Act 1974</i> (Cth)                                                               |
| UK    | United Kingdom                                                                                      |
| US    | United States of America                                                                            |
| VLRC  | Victorian Law Reform Commission                                                                     |
| VoIP  | Voice over internet protocol                                                                        |
| VRB   | Veterans' Review Board                                                                              |
| WA    | Western Australia                                                                                   |
| WPI   | Wage Price Index                                                                                    |



## Appendix C – Service Descriptions relevant to Table 3.3, and Figures 3.3 & 3.6

| SERVICE TYPE                             | DESCRIPTION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Courts &amp; Tribunals</b>            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>Matters Finalised</b>                 | Matters completed by the relevant court or tribunal. Matters may be finalised by adjudication, transfer, or by another non-adjudicated matter including withdrawal of the matter by the applicant, or settlement being achieved by the parties.                                                                                                                                                                                                                                                               |
| <b>Legal Aid</b>                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>Legal education &amp; information</b> | Includes: <ul style="list-style-type: none"> <li>• Provision of information to people of general application, including advice regarding legal rights and responsibilities, ADR processes, and legal court and tribunal processes, and the availability of a Grant of Legal assistance.</li> <li>• Community legal education services designed to meet the needs of a group of people in the community in relation to legal issues, and include classes, forums, seminars and workshops.</li> </ul>           |
| <b>Legal advice and advocacy</b>         | Includes: <ul style="list-style-type: none"> <li>• specific legal advice in relation to a person's individual circumstances, and analysis of options available to that person to resolve his/her legal matter; and</li> <li>• assistance greater than that provided under legal advice services (but short of direct representation) intended to enable people to progress resolution of legal problems, including oral advocacy and preparation of formal court or other relevant documentations.</li> </ul> |
| <b>Duty Lawyer Services</b>              | Basic legal help provided by a legal practitioner (located at court) for people self-representing before the Family Court and FMCs including free legal advice. In some circumstances, a duty lawyer can represent people in court for adjournments, short procedural mentions or assist with negotiations about consent orders for children or property matters.                                                                                                                                             |
| <b>PDR services</b>                      | PDR services are provided under a Grant of Legal Assistance and involve participation by parties to a family law dispute in a process facilitated by a neutral third party for the purposes of resolving the dispute via agreement and consent as an alternative to litigation.                                                                                                                                                                                                                               |
| <b>Client litigation funding</b>         | Litigation services are those provided under a Grant of Legal Assistance and provide access to a suitably qualified legal practitioner to represent them and assist them in resolving a legal matter before a court or tribunal.                                                                                                                                                                                                                                                                              |



| SERVICE TYPE                                    | DESCRIPTION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Family Relationship Services</b>             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <b>Family Counselling</b>                       | Family counselling services involve helping people with relationship difficulties better manage issues relating to children and family during marriage, separation and divorce.                                                                                                                                                                                                                                                                                                                                                      |
| <b>Dispute resolution</b>                       | FDR services involve mediation and conciliation processes, conducted by an independent practitioner. FDR services can help separating families resolve disputes as an alternative to going to court. FRCs provide up to three hours of FDR for free.                                                                                                                                                                                                                                                                                 |
| <b>Commonwealth Ombudsman</b>                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <b>Complaints addressed within jurisdiction</b> | <p>Reflects the finalisation of complaints made in relation to Commonwealth agencies. The majority of complaints (81 per cent in 2007–08) relate to the correctness, propriety or timeliness of a decision or action of an agency.</p> <p>While some complaints can be resolved quickly (including through referral to agency internal dispute resolution processes), more complex cases involve formal investigation. In 2007–08, the ombudsman finalised 19,126 complaints, including investigating 4,700 separate complaints.</p> |

## **Appendix D – The Access to Justice Taskforce**

Matt Minogue

Sara Samios

Cameron Rapmund

James O'Toole

Lisa O'Connell

Jennifer Cavenagh

Imran Church

Danica Yanchenko

Lisa Smith

