

31 January 2018

The Treasury 2018-2019 Pre-Budget Submission

Introduction

[National Legal Aid](#)¹ (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia. The legal aid commissions are commonly known as 'Legal Aid'.

This submission is made with the aim of helping those people in our community who are in the circumstances of greatest disadvantage and vulnerability.

Our services have been identified as “generating net benefits to the community”² although the funding currently provided to LACs is widely acknowledged to be insufficient for the purpose. With additional funding we could help more people and generate further benefit to the community. We ask that Treasury assist us in this Budget.³

We would be happy to answer any questions or provide any further information required.

Executive summary/key points

- There are more people living in poverty (14%) than are eligible for legal aid (8%).⁴
- LACs save money in other areas of social policy and expenditure. The services provided by LACs, particularly early interventions, can ensure that clients' legal and other problems do not escalate further and result in greater future costs to government/s. LACs also contribute to the efficient and effective operation of the justice system. LACs “generate net benefits to the community”⁵.
- LAC clients, particularly those to whom more intensive services are delivered, typically suffer multiple circumstances of disadvantage including e.g. family violence, elder abuse, disability, poor mental health, homelessness, debt and poverty.

¹ NLA website houses resources including national statistics, finances, publications, information about the legal assistance landscape etc.

² Productivity Commission, *Access to Justice Arrangements*, (Inquiry Report No 72, 2014) vol 1, 2.

³ The NLA submissions to the [Australian Treasury Federal Budget 2017-18](#) and [Australian Treasury Federal Budget 2016-17](#) contain further relevant background about the legal assistance landscape in Australia, legal need, funding and client service delivery.

⁴ Productivity Commission, above n 2, Appendix H, 1021-1022.

⁵ Productivity Commission, above n 2.

- Many people are incapable of self-representation, and the interests of victims are often compromised by self-representing parties. Self-representation is occurring including in family law cases involving family violence.
- Independent Children’s Lawyers who provide vital assistance in the most serious cases of abuse and neglect are currently being rationed in ways which could potentially lead to undesirable outcomes for children.
- Equity demands that legal rights which are conferred on everybody should in fact be realisable for all.
- In 2014 the Australian Government Productivity Commission inquiring into Access to Justice Arrangements in Australia identified that an “interim funding injection in the order of \$200m per annum”⁶ was required for legal assistance services to address the more pressing gaps in service delivery and further specified how such funding should be applied including:
 - around \$57m to “relax LAC means tests” estimating that this would “increase the number of people eligible for grants of aid from around 1.4m to 1.9m people.”⁷

“The Australian Government should provide the bulk of this funding (given that the money would be used to assist clients in areas of Commonwealth law under existing guidelines).”⁸
 - \$124m to provide additional grants of aid in civil law matters, estimating that this would provide an additional 40,000 grants of aid.⁹

“State and territory governments should provide the bulk of this funding on the grounds that most of the civil matters (outside of family law matters) relate to state and territory areas of law” .¹⁰
- Since 2014 the increasing cost of providing legal services has further placed LAC budgets under strain. Private legal practitioners providing quality legal representation services on a grant of legal aid are withdrawing from legal aid work because of poor legal aid fee rates.
- NLA would be grateful if the Budget would enable us to address these critical funding and service issues.

⁶ Ibid vol 2 738.

⁷ Ibid Appendix H 1023.

⁸ Ibid.

⁹ Ibid 1025.

¹⁰ Ibid.

About LACs and LAC service delivery

About LACs

LACs are independent statutory authorities established by legislation. They are not for profit. LACs have offices in capital cities and regional and remote locations across the country.

LAC services

LACs are the main providers of legal assistance services in Australia,¹¹ and provide nearly all the legal assistance representation services at courts and tribunals. Many also co-ordinate funding to community legal centres.

In 2016-2017 LACs provided in excess of 2.2 million services (in all law types) to people across the country. These services were delivered from LAC offices and by way of outreach including through health justice partnerships.

LAC services are:

- proportionate to the particular need of the individual
- proportionate to the point along a pathway that the individual's issue/s has reached
- focussed on timely, appropriate, efficient and effective resolution of the issues.

Litigation is a response of last resort for LACs and the inter-governmental National Partnership Agreement on Legal Assistance Services 2015-2020 specifies that "Family or civil law disputes should be resolved through alternative dispute resolution processes rather than through litigation, where appropriate."¹²

LAC client base

LAC clients, particularly those to whom more intensive services are delivered, typically suffer multiple circumstances of disadvantage including e.g. family violence, elder abuse, disability, poor mental health, homelessness, debt and poverty. Family violence exists in around 80% of our Commonwealth family law matters. LACs are also the providers of Independent Children's Lawyers (ICLs) upon order and request from the family law courts.

Many of our clients have mental health and/or intellectual disability issues. Many clients are also functionally/illiterate. Many clients require interpreters.

Many LAC clients also consume a range of other government services. Some of these costs can be avoided or reduced if clients have access to legal assistance. When delivered in a timely and appropriate fashion (including at the early intervention stage), legal assistance can ensure that legal, and other, problems do not escalate at a further cost to government/s, both inside and outside the justice sector.

¹¹ Productivity Commission, above n 2, vol 2 667.

¹² National Partnership Agreement on Legal Assistance Services 2015-2020, Clause B9.

Attachment A to this submission contains case studies which illustrate some of the challenges that our clients can face, and the value of the work that we do in assisting them.

Attachment B to this submission depicts the nature and numbers of the services that LACs provide. It provides a description of the different service types.

LAC funding arrangements

LACs are funded by the Commonwealth and respective State or Territory governments.¹³

The National Partnership Agreement on Legal Assistance Services 2015-2020

Commonwealth Government funding is provided through the inter-governmental National Partnership Agreement on Legal Assistance Services 2015-2020 (NPA).

The NPA provides that Commonwealth funds are only to be used on Commonwealth law matters. There are limited exceptions to this which are where there are Commonwealth law based proceedings connected with state law matters involving the safety of people/the welfare of a child, or work relating to the early prevention/escalation of legal problems.

Funding under the NPA is targeted to ‘priority clients’. “The legal assistance priority client groups recognise people whose capability to resolve legal problems may be compromised by circumstances of vulnerability and/or disadvantage. People who fall within the priority client groups are more likely to experience legal problems, less likely to seek assistance and/or less able to access services for a range of reasons.”¹⁴

LAC eligibility tests

To receive on-going legal representation in a case an application for a grant of legal aid must be made. In determining such applications stringent means, merits, and matter type eligibility tests are applied.

LAC means tests are known to be ‘very mean’. This is a direct result of a combination of funding constraints and demand for services. There are more people living in poverty (14%) than are eligible for legal aid (8%).¹⁵

Competing priorities place additional pressure on the number of applications that can be granted even where they would pass the means test, fall within matter type guidelines, and are meritorious. A general awareness of funding restrictions also means that many applications for a grant of aid are not made at all, although merit exists.

¹³ National Legal Aid <https://www.nationallegalaid.org/resources/finance/>

¹⁴ National Partnership Agreement on Legal Assistance Services 2015-2020, B-1.

¹⁵ Productivity Commission, above n 2, Appendix H 1021-1022.

Funding pressures

In late 2014 the Australian Government Productivity Commission Inquiry into Access to Justice Arrangements in Australia reported that an “interim funding injection in the order of \$200 million per annum”¹⁶ was required for legal assistance services to address the most pressing gaps in service delivery, and further specified how such funding should be applied including:

- “11.4m per year to maintain existing frontline services”¹⁷
- around \$57 million per year to relax the means tests for LACs
- around \$124 million per year to provide additional grants of aid in civil matters.”¹⁸

Since the release of the Productivity Commission’s report further pressure has been placed on eligibility for LAC services and on LAC budgets by reason of inflation and the rising cost of legal service delivery.

“Another government funded report has come and gone and we’re left standing where we started. In this climate of chronic underfunding, the role of legal aid has morphed into making conscious and calculated decisions to deny people access to our services, rather than ensuring that legal rights which are conferred on everybody are in fact realisable for all.”¹⁹

Attachment C to this submission is Appendix H of the Productivity Commission report on its Inquiry into Access to Justice Arrangements. It contains the Productivity Commission’s specifications about funding.

Justice gap - family and civil law

Family law - relaxing the means tests for the LACs

The inability to provide enough legal aid representation services in the family law courts, including in matters involving family violence, increases self-representation and accordingly the time it necessarily takes for the court to hear matters. Longer hearing times contribute to delays and backlogs at the courts, which have been widely reported in the media in more recent times.²⁰ LAC representation services contribute to the efficient and effective operation of the courts by reducing hearing times.

¹⁶ Ibid vol 2 738.

¹⁷ Productivity Commission, above n 2, Appendix H 1026. Following funding cuts in the 2013-14 Mid-Year Economic and Fiscal Outlook (MYEFO) and 2014-15 Budget, funding to all four legal assistance providers was reduced by around \$43m over 4 years, and these changes underpinned the recommendation in relation to the need for 11.4m per year to maintain front line services as the Productivity Commission was satisfied that the changes had adversely affected frontline service delivery.

¹⁸ Ibid. An additional amount (\$8m) was identified for addressing sensitivities around the methodology employed.

¹⁹ Bevan Warner, *‘Taking on the Productivity Commission Report’*, Access to Justice and Pro Bono Conference 2017.

²⁰ For example, *Judge vows to tackle family law backlog*, *The Australian* October 27, 2017.

In addition to the financial costs caused by delay there are huge emotional costs to the families involved in proceedings, and delay also protracts and exacerbates these costs.

The Productivity Commission estimated that \$57m per annum would “increase the number of people eligible for grants of aid in civil (including family) matters from around 1.4m to 1.9m people.”²¹

“The Australian Government should provide the bulk of this funding (given that the money would be used to assist clients in areas of Commonwealth law under existing guidelines).”²²

As part of the response to family violence and self-representation NLA gratefully acknowledges the funding of \$18.5m over 3 years to the LACs to establish the Family Advocacy and Support Services (FASS), announced by then Attorney-General Senator George Brandis QC in October 2016. The FASS is currently being evaluated by the Commonwealth Attorney-General’s Department (independent consultants), with early positive indications that the FASS is achieving its aims, and the Standing Committee on Social Policy and Legal Affairs Parliamentary Inquiry into a Better Family Law System recommending that the FASS be expanded.²³

Whilst the FASS is designed as a front line service to support the safety and well-being of families and to alleviate some of the pressure on self-representing litigants, it cannot provide the ongoing representation necessary in defended matters, including where the safety and wellbeing of children is an issue. Such representation requires the ongoing commitment and skill of an experienced advocate who has had the opportunity to undertake careful case preparation and development, including information gathering and evidence from relevant witnesses, including medico-legal/social science expert witnesses.

ICLs

ICLs are ordered by the family law courts on the basis of the *Re K* (1994) FLC 92-461 factors. Once an Order is made, the court provides it to the LAC with a request that the local LAC appoint an ICL. Legal Aid administers the appointments of ICLs .

It is the role of the ICL to ensure that the best interests of the child/ren are represented in family law parenting order matters. The ICL role includes the gathering of all relevant evidence for the Court, and is independent of the parties. The ICL is often referred to as the “honest broker”.

ICLs are currently being rationed to the parenting order matters that involve the most serious risk issues in relation to the safety and well-being of children. The family law courts are aware of the need for careful application of resources by the LACs and make orders for the appointment of ICLs being aware of local funding constraints.

²¹ Productivity Commission, above n 2, Appendix H, 1023.

²² Ibid.

²³ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence* (2017) vi.

In some locations, funding constraints have meant that ICLs are ordered only in circumstances where particular Re K factors are alleged to exist, e.g. factors 1 and 6.

Attachment D is a list of the “Re K factors”.

Family law reforms

NLA refers to the various recently proposed family law reforms, including the Family Law Amendment (Parenting Management Hearings) Bill 2017, the Family Law Amendment (Family Violence and Other Measures) Bill 2017, and the public consultation on the Exposure Draft – Family Law Amendment (Family Violence and Cross-Examination of Parties Bill). The first two Bills are currently subject to Inquiry by the Senate Legal and Constitutional Affairs Committee. The public consultation on the exposure draft legislation has now closed, and NLA participated in that consultation.²⁴

If the Parenting Management Hearings Bill is passed then the parenting management hearings will be piloted in 2 locations. The hearings are generally envisaged to be for parties capable of self-representing. It is suggested that the role of the ICL be extended to such hearings. LACs very much support this in principle but, in current circumstances there are associated funding and resource concerns.

If passed, the Family Law Amendment (Family Violence and Other Measures) Bill, will stream line some court processes. We do not anticipate that it will reduce LAC funding requirements.

Should legislation be introduced in relation to family violence and the cross-examination of parties, NLA anticipates this will create additional funding needs for the LACs.

NLA also notes the important review of the family law system being undertaken by the Australian Law Reform Commission (ALRC).²⁵ NLA is actively participating in this Inquiry with a view to help in identifying ways in which the pressure on the system and the families involved in it can be reduced. The Inquiry is however not due to provide its final report until March 2019. Time will then be required for Government to respond. It is anticipated that that the outcomes will need to be factored into future budgets.

Civil law – additional grants

Additional grants of civil law legal aid (\$124m) would help to assist with a range of matter types including those which, in LAC experience, cluster for people in connection with domestic violence, age and disability. These matter types include responding to elder abuse (physical/ emotional/financial), housing, debt, mortgage stress, financial support, and discrimination.

²⁴ [Submission to the Family Law Amendment \(Family Violence and Cross-examination of Parties\) Bill 2017 - Public Consultation on Cross Examination Amendment](#)

²⁵ <https://www.alrc.gov.au/inquiries/family-law-system/terms-reference>

The Productivity Commission estimated that \$124m would provide an additional 40,000 grants of aid for civil matters, stating that “in practice, however, there are likely to be considerable savings in achieving this goal if LACs were able to use in-house lawyers to provide these grants instead of private practitioners.”²⁶

“State and territory governments should provide the bulk of this funding on the grounds that most of the civil matters (outside of family matters) relate to state and territory areas of law.”²⁷

Legal aid fee rates

Private legal practitioners providing quality legal representation services on a grant of legal aid are withdrawing from legal aid work because of poor legal aid fee rates.

Whilst LAC in-house lawyers and legal practices are vital to ensuring that “scarce public resources are deployed in the most responsible and effective manner possible”²⁸ members of the private legal profession prepared to work at legal aid rates help to ensure coverage of services, address issues of legal professional conflict, and provide expertise in niche areas if required.

A significant increase in funding is required if these members of the private legal profession are to be kept in the legal aid market place. The last time this issue was addressed by Government was in 2006.²⁹

Frontline services

In relation to “frontline services”, NLA gratefully acknowledges each of:

- The Government’s “reversal” of the funding cliff for our legal assistance service partners the Aboriginal and Torres Strait Islander Legal Services and Community Legal Centres,³⁰ announced in April 2017.
- The \$15m over 3 years announced in September 2015 to establish twelve new specialist domestic violence units (DVUs)³¹ and \$3.4m over 2 years in October 2017 for the establishment of six new DVUs and the expansion of one.³²

The DVUs provide legal and social support for victims of family violence, and partner with other service providers to ensure that each client receives the help needed, including

²⁶ Productivity Commission, above n 2, Appendix H 1025.

²⁷ Ibid.

²⁸ Productivity Commission, above n 2, vol 2 725.

²⁹ TNS Social Research *Study of the participation of private legal practitioners in the provision of legal aid services in Australia*, Commonwealth Attorney-General’s Department, Canberra.

³⁰ See NLA submission to [Australian Treasury Federal Budget 2016-17](#).

³¹ Senator the Hon George Brandis QC, Attorney-General, ‘\$15m for specialist domestic violence legal support’ (Media Release 24 September 2015).

³² Senator the Hon George Brandis QC, Attorney-General, ‘Turnbull Government funds new domestic violence units’ (Media Release 16 October 2017).

financial counselling, crisis support and accommodation, mental health support and other practical assistance. These services are also currently being evaluated by the Commonwealth Attorney-General's Department (independent consultants).

- Funding for LACs to establish the FASS (see above).

Conclusion

We would welcome the further investment of Government in achieving benefits to our community.

If you require any further information or wish to discuss matters raised, please do not hesitate to contact us.

Yours sincerely,



Graham Hill
Chair

Case Studies – Legal Aid Commission

Independent Children’s Lawyers

Reuniting families

An ICL skilfully represented two children whose strict religious views and enmeshment in parental conflict mean that the oldest child was self-harming and threatening suicide. The ICL was able to negotiate with the mother’s solicitor and the self-represented father to bring about the withdrawal of the father’s application. She also assisted, with the parties’ joint consent, the father writing letters to the children that were appropriate and left the door open for the children to contact the father.

By removing the fear of Court Orders the mother was able to then able to reduce the pressure she was placing on the children and within two months of finalising the matter the children began to communicate with the father again.

Focussed on what is in the child’s best interests

The ICL was appointed in a matter involving a very difficult self-represented parent.

Issues in the case included coercive, manipulative and controlling behaviours with the potential that the child would become estranged from one parent.

The parents of the child sought to enter into Final Consent Orders in early 2017 but these Orders were opposed by the ICL who argued that the agreement was contrary to the best interests of the child. As a result the judge declined to make the Orders. Noting that *“it would’ve been easy for the ICL not to stand in the way of settlement”* and be glad that it was *“one more file off her desk”* but instead the ICL was so concerned with the welfare of the child that she opposed the making of those orders.

Special medical procedures

Legal Aid acted for the young person in a significant case that received a large amount of media coverage. The case considered whether the Family Court has a role to play in determining whether a child should receive stage 2 treatment for gender dysphoria. Legal Aid took instructions from the child and made sure he was aware of the court processes. He had the opportunity to attend court and the ICL guides him through the process. He was in court to hear the arguments put forward which lead to the Full Court of the Family Court ultimately removing the requirement for transgender youth to apply for a court order approving access to oestrogen or testosterone treatment ("Stage 2") in treating gender dysphoria.

Helping return a child to Australia

An ICL was appointed to represent a child who had been taken overseas to France by his Mother without the consent of the Father. The father filed an Application in the Federal Circuit court for a Recovery Order. A Publication Order was made and the ICL worked with the court and the Federal Police to have it circulated throughout media outlets. The child was located and returned to the father. As a result of her hard work in this case, the ICL was invited by the AFP to Canberra for the launch of International Missing Children's Day.

Responding to Family Violence and Elder Abuse

Case study:

Elaine and Joe, an elderly married couple sought legal assistance as their adult daughter, Eve, and their son in law, Joseph, had begun to make serious threats of violence including threats to kill them. Eve and Joseph rented their investment property to Elaine and Joe however decided that they wanted to unlawfully evict them because they wanted to rent to new tenants that could pay higher rent.

Elaine and Joe were distressed as both were illiterate and could not read all the documents they were being sent in relation to the eviction proceedings. Elaine and Joe had been reluctant to involve any third party, however felt that they had no other option as they were fearful for their safety and concerned that they would be made homeless. Elaine and Joe both had significant physical health concerns and Eve and Joseph's behaviour was causing them significant distress.

Legal Aid assisted Elaine and Joe to apply for interim domestic violence restraining orders against Eve and Joseph in regards to the threats of violence. Obtaining a domestic violence restraining order made Elaine and Joe feel safe in their own home, whilst further assistance was provided in regards to their tenancy and housing.

Case study:

Sue, an elderly woman sought advice and assistance from a Legal Aid Domestic Violence Unit as she had fears for her safety from her adult son, William. William had a mental illness, lived in Sue's home and Sue was his sole carer. Sue was becoming increasingly frightened for her safety, as William was violent towards her when he became unwell including pushing her against walls, throwing household objects at her and slapping her. Sue had called the Police on several occasions when she could not handle the situation, however was afraid to continue involving the Police as she did not want William to be arrested. Sue was reluctant to apply for a Domestic Violence Order, as William would get angry and she knew he had no one else to care for him.

Legal Aid was able to assist Sue to apply for a Domestic Violence Order against William, modifying the usual terms to suit her situation and reduce the risk of William being placed in breach of the Domestic Violence Order, whilst protecting her safety. Sue was also referred to other social services that could provide her with information about safety planning and provide her with carer and social support to manage caring for William and protecting her own safety.

Case study:

A very elderly person was moving from one supported independent living accommodation to another. The 'landlord' charged the elderly person with a range of costs said to be in association with the end of the arrangement. These included a number of expensive works which were not the legal responsibility of the older person as tenant, however being unaware of her rights she paid them. When a second bill for further work arrived, the older person made contact with a Legal Aid hotline, with staff able to provide legal advice and to then follow up with unbundled legal services to achieve a refund of monies paid. Staff suspected an intended taking of advantage by the 'landlord' by reason of the tenant's age.

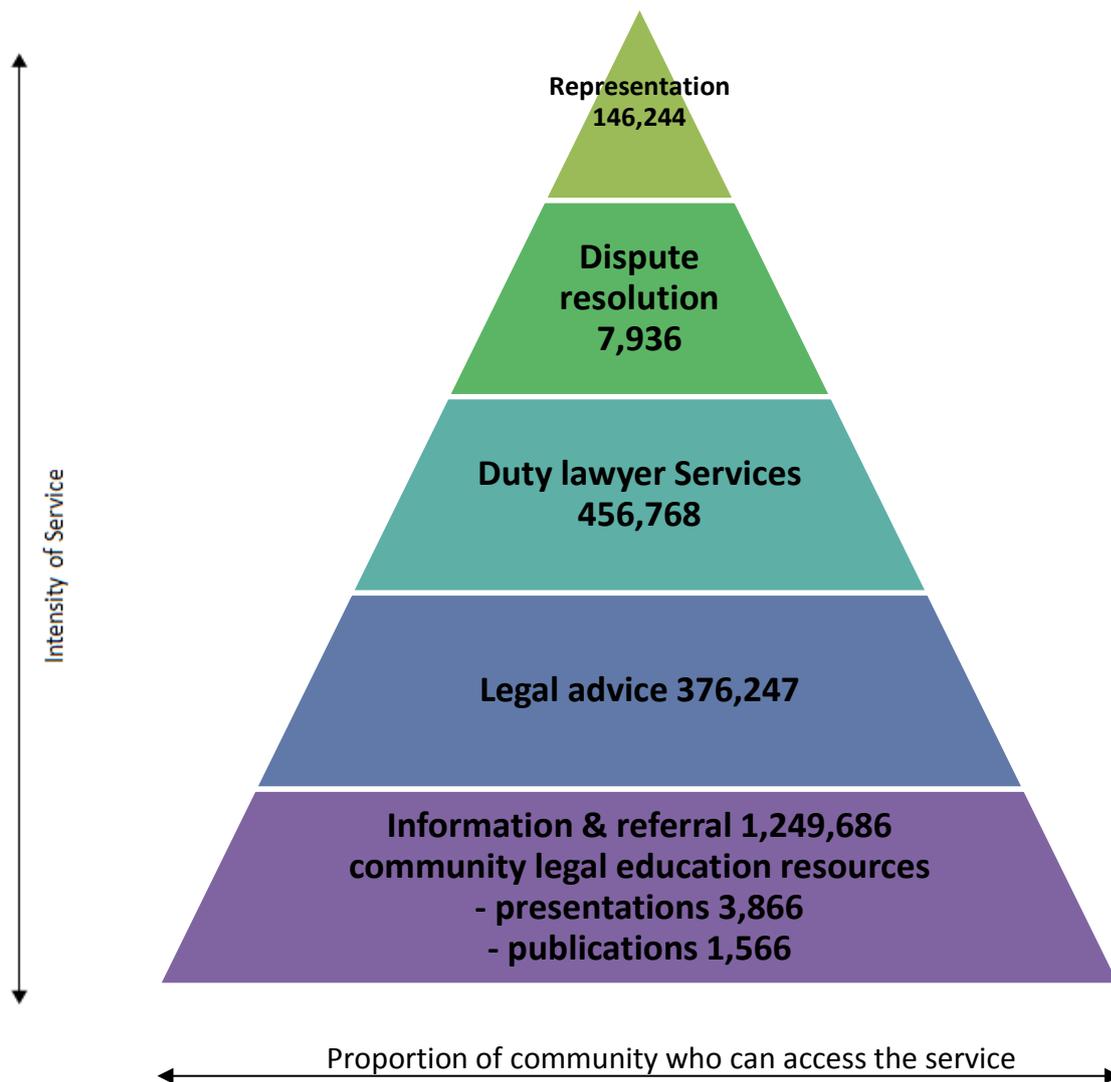
Case study:

Sarah had been separated from her ex-partner for months and no longer lived in the marital home. It was only when she sought help that she began to identify herself as a victim of family violence. She and her ex-partner had often had very heated arguments in front of their children and she had seen him be physically abusive toward them. Because her ex-partner had never hit Sarah, she felt that she had never been abused. But she was frightened of him. This had worsened after they separated. He began **stalking** her and also tried to limit her contact with the children who had remained in his care.

After separating, Sarah's ex-partner controlled the contact arrangements for the children. Sarah went along with this because she was fearful of how he would respond if she disagreed with him. Sarah called the police after her children told her about an incident that had happened while they were in their father's care. Her gut feeling was that they were no longer safe with him. The police referred Sarah to the Family Law Registry to get urgent legal advice.

The new **Family Advocacy and Support Services** now available at the court meant that Sarah got help from a specialist family violence support worker and a lawyer. The lawyer explained to Sarah what family violence was, and recommended that she apply for a **family violence intervention order**. The lawyer also helped Sarah understand her legal options around parenting and

child contact arrangements, and suggested that she contact Police to request a welfare check for the children who remained living with their father. The support worker explained the many forms that family violence can take, contacted the local Magistrates' Court to ensure Sarah would get help to complete an application for a family violence intervention order, and made a follow-up appointment with her. While she hesitated about making an application for a family violence intervention order, she said that she felt a lot better having taken the first step to get advice. Sarah said she would head to the Magistrates' Court to make the application that afternoon.



Source:

National Legal Aid Statistics <http://lacextra.legalaid.nsw.gov.au/NLAREports/Default.aspx>

LAC National Partnership Agreement on Legal Assistance Services 2015-20.

Notes:

¹ Duty lawyer services include the Family Advocacy and Support Service.

² Legal advice includes work accompanying the advice e.g. drafting of legal letters, telephone advocacy on someone's behalf etc.

³ Community Legal Education resources reported here are Commonwealth law related only. More services were provided for state/territory law matters.

Legal aid commission services - background

Legal aid commission (LAC) services are provided consistently with the priorities specified by the inter-governmental National Partnership Agreement on Legal Assistance Services 2015-2020, and with the state and territory enabling legislation of the respective LAC.

Legal representation services

Legal representation services include legal representation in fully contested matters including the provision of Independent Children’s Lawyers and Child Representatives as requested by the family law courts and child protection courts respectively, as well as full legal representation services for parties with matters predominantly in the family law, family violence, child protection, and criminal law courts.

Duty lawyer services and Family Advocacy Support Services

Duty lawyer services are provided in civil law courts and tribunals including the family law courts, the Administrative Appeals Tribunal, and as many local courts as possible including State/Territory family violence courts. “The presence of duty lawyer services on the day at court has been proven to contribute to the effectiveness and efficiency of the court process for both the client and the court or tribunal”.¹

Family Advocacy and Support Services are provided at some registries of the family law courts² to assist families experiencing domestic violence as they move through the family law system. The service integrates duty lawyers with specialist family violence workers to help families navigate between the federal and state court systems and connect people with trauma-informed help such as risk assessments and safety planning.³

Dispute resolution services

Dispute resolution services are provided as a necessary first step in all matters which are appropriate for such service delivery. All LACs operate programs which provide legally assisted models of dispute resolution conferences, and which achieve very high settlement rates, e.g. in 2016-2017 the national average settlement rate was 78%. The LACs organise conferences, including providing the Chairperson for these conferences, and ensure parties who qualify for a grant of legal aid are legally represented.

Whenever settlement is achieved these services avoid the cost of resources associated with court proceedings, including the cost of court administration and hearing time.

¹ *An evaluation of Legal Aid NSW’s Early Intervention Unit Duty Service at Parramatta Family Law Courts*, Law and Justice Foundation, 2012 www.legalaid.nsw.gov.au/_data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf found that the duty service contributed to the efficiency and effectiveness of the court process by: diverting matters that should not have been in court and advising and assisting clients to take the most appropriate course of action; and contributing to the resolution of matters on the day through the drafting of documents, including providing a 'reality check' with clients – while explaining the processes and implications and negotiating with other parties for clients.

² The services in the Northern Territory are primarily delivered from the Darwin Local Court and the Katherine Local Court due to demand for services at these locations.

³ Senator George Brandis (then Attorney-General) ‘*Improving family violence support in family law courts*’ (media release, 17 May 2017).

Legal advice, information and referral services

The legal advice, information and referral services, and community legal education, are non-means tested services designed as prevention and early intervention strategies. These services are provided on-line, by phone, and face to face.

LACs produce information and self-help resources and provide community legal education services to further support self-representing parties with various problem types.

End.

H Eligibility for legal aid and the cost of extending it

This appendix describes the means test applied by legal aid commissions (LACs) to determine eligibility for grants of legal aid. Estimates of the number of households eligible for these services are discussed in section H.1. Section H.2 details the Commission's approach to estimating the additional cost associated with recommendation 21.4.

H.1 Who is eligible for legal aid?

The LACs ration their services by means, merit and matter. The means tests determine a threshold of income and assets above which applicants are denied legal aid, or are required to make a contribution towards the cost of their case. Some types of legal aid services are not means tested, including minor assistance and information services (chapter 20). This appendix focuses on those services that are means tested — specifically the grants of aid that comprise the bulk of LAC expenditure on civil, including family matters.

The means tests vary considerably between LACs, but all comprise an income and assets test component. The LACs typically use a measure of disposable income — that is, one that takes into account tax and welfare transfers — for the purposes of administering the income test, although some jurisdictions assess gross income. Additional allowances are also often made for the number of dependants and household expenses. The income tests imposed by the different LACs for grants of legal aid are summarised in table H.1.

The assets test also varies considerably across legal aid providers, with different allowances for equity in housing, vehicles, businesses and other assets. Where an applicant's total assets exceed the threshold allowed, then they are usually expected to make a contribution towards the cost of their case. The assets test used by the LACs for grants of legal aid are summarised in table H.2.

Table H.1 Summary of income test thresholds for which no further contribution is required^a

<i>Legal aid commission</i>	<i>Threshold of income, above which a contribution is required (net of allowances)</i>	<i>Allowance for children and dependants</i>	<i>Allowances for rental assistance and other household costs</i>	<i>Other allowances, notes</i>
Legal Aid New South Wales	\$213 per week	\$120 per week per dependant	\$320-\$455 per week	Net of income tax and Medicare levy, family tax benefits, carer allowance, rent assistance, NDIS amounts; up to \$250 per week in childcare costs; up to \$120 per week per child in child support payments
Victoria Legal Aid	\$255 per week	\$130 per week for first dependant, \$125 per week for each dependant thereafter	\$240 per week	Income tax, the Medicare levy, business expenses; up to \$240 per week in childcare costs; up to \$125-130 per week in child support payments
Legal Aid Qld	\$370-\$1 370 per week			Gross income measure that depends on number of children
Legal Services Commission of South Australia	\$342 per week	\$128 per week for first dependant, \$120 per week for each dependant thereafter	See note ^b	Allows a range of deductions for expenses such as tax, childcare and household expenses, but only up to a maximum level linked to the Henderson poverty line
Legal Aid WA	\$264 per week	\$99 for first dependant, \$93 for each dependant thereafter	\$260-\$390 per week	Net of income tax and the Medicare levy; \$148 per week in childcare costs; child support payments using the same scale as the allowance for children and dependants
Legal Aid Commission of Tasmania	\$450-\$1 005 per week			Gross income measure that depends on number of children
NT Legal Aid Commission	\$271 per week	\$101 for first dependant, \$96 for each dependant thereafter	Equal to rental 'cost of 2 bedroom flat in Darwin'	Net of income tax and Medicare levy; \$140.50 per week in childcare costs
ACT Legal Aid Commission	\$396 per week	\$185 for the first dependant, around \$174 for each dependant thereafter	\$450 per week	Net of income tax and Medicare levy; childcare costs up to \$208 per week

^a In practice, most LACs require an initial contribution from clients for a grant of aid. This initial cost ranges from \$20 to \$110 depending on the jurisdiction and matter. ^b Equal to the 'childcare relief figure' set by the Commonwealth Department of Human Services for up to 50 hours (Legal Services Commission of South Australia 2014a).

Sources: Commission research based on Legal Aid NSW (2010a, 2010b); Victoria Legal Aid (2010a, 2010b, 2010c, 2010d); Legal Aid Queensland (2014); Legal Services Commission of South Australia (2014a, 2014b); Legal Aid WA (2010a, 2010b, 2010c); Legal Aid Commission of Tasmania (2003, 2010, 2014); Northern Territory Legal Aid Commission (2005); Legal Aid ACT (2013); Melbourne Institute of Applied Economics and Social Research (2014).

Table H.2 Summary of assets test thresholds for which no further contribution is required

<i>Legal aid commission</i>	Threshold of assets, above which a contribution is required (net of allowances)	<i>Home equity allowed^a</i>	<i>Vehicle equity allowed^b</i>	<i>Other allowances, notes</i>
Legal Aid New South Wales	\$100-\$1 500 depending on the matter	\$260 550 to \$521 000	\$15 100	Allowance is made for the reasonable value of household furniture, clothing and tools of trade; baby bonus and NDIS are exempt, as are lump sum compensation payments if the applicant and family members are not working; allowance of up to \$287 750 is allowed for farm or business equity
Victoria Legal Aid	\$865	\$300 000	\$11 280	Household furniture, clothing and tools of trade are excluded from assessable assets; allowance for farm/business equity between \$161 500 and \$336 500 depending on number of dependents; lump sum payments are excluded unless they affect the receipt of a Commonwealth benefit
Legal Aid Qld	\$930-\$1 880 ^c	\$146 000 ^d	\$16 000	Household furniture and tools of trade are exempt unless they are of 'exceptional value'
Legal Services Commission of South Australia	See note ^e	See note ^f	See note ^g	Household furniture, clothing, and tools of trade; equity in a farm or business up to assets limit under various Centrelink benefit tests
Legal Aid WA	\$950-\$1 900 ^c	\$299 614 to \$355 051	\$14 600	Household furniture, clothing, and tools of trade; equity in a farm or business between \$161 500 and \$346 000 depending on home ownership and partner status.
Legal Aid Commission of Tasmania	\$740-\$1 490 ^c	\$169 000 to \$215 750	\$11 500	Equity in a farm or business between \$118 000 and \$251 000 depending on home ownership and partner status
NT Legal Aid Commission	\$950-\$1 950 ^c	\$310 000	\$13 500	Household furniture, clothing, and tools of trade; some lump sum payments if the applicant and family members are not working
ACT Legal Aid Commission	\$1 100-\$2 200 ^c	\$507 250 ^h	\$16 315 ^g	Household furniture and effects that are not of exceptionally high value, clothing, tools of trade, lump sum compensation payments if the applicant and dependants are not working, lump sum child or spouse maintenance where the applicant is receiving a pension/benefit at a reduced rate. Between \$196 750 and \$421 500 in farm or business equity depending on home ownership and partner status

^a Typically, these allowances are made for the principal home of the person applying for assistance, with any other real estate being counted against the net assessable assets allowed. Those aged over 60 years are often provided with more leeway in several jurisdictions. ^b Equity allowed is usually up to two vehicles, with any equity in additional vehicles being assessed as assets. ^c Varies by number of dependants. ^d Also allows for savings of up to this amount for the purpose of buying a home, provided that contracts were exchanged prior to knowledge of the legal problem. ^e The figure is set and updated in accordance with the weighted average of the Consumer Price Index and Average Weekly Earnings, with an allowance for dependants. ^f Up to the amount equal to the median value of an established home in Adelaide. ^g Equity allowed up to the published re-sale value for a 5 year old 6 cylinder family car. ^h Equity allowed up to a maximum equal to the median price of an established house in the ACT.

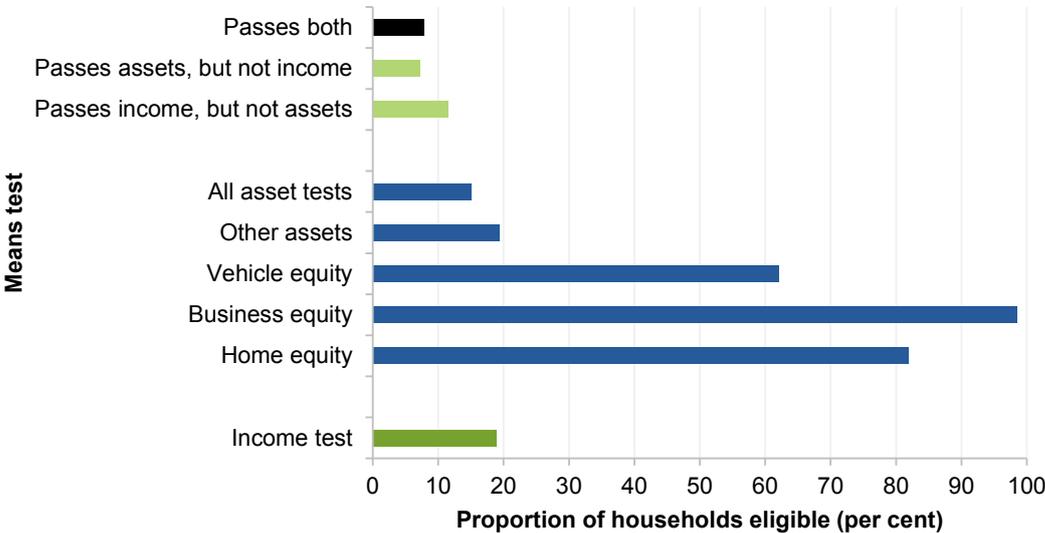
Source: As per table H.1.

Few are eligible for legal aid

It is difficult to determine a ‘notional’ national means test given the way that eligibility requirements vary considerably between jurisdictions. That said, the Commission has derived such a notional national means test, in an effort to understand the proportion of households that would be eligible for legal aid without having to make a contribution. To do so, the Commission has used the ABS 2009-10 Household Expenditure Survey (HES), as this data source provides consistent information on a range of different income measures and assets. It does not, however, provide detail down to the level that LACs frequently consider — such as the value of tools and household furniture.

The Commission estimates that around 8 per cent of households across Australia are eligible for legal aid without having to make a contribution towards their costs. Based on the income test alone, around 19 per cent of households meet the ‘average’ LAC criteria, while 15 per cent of households meet the assets criteria alone. Figure H.1 summarises the results of the Commission’s estimates, and the assumptions used to derive it. It should be noted that the calculations are indicative only and rely on a number of assumptions, which, if incorrect, could significantly change the estimated proportion of eligible households.

Figure H.1 **Estimated proportion of households eligible for legal aid^a**



^a Based on an income test that allows for \$300 per week base income, \$150 per week per dependant under 15 years of age, \$300 per week per household in rental assistance, and \$100 per week per household for other household expenses; and an assets test that allows for \$500 000 in home equity for the place of residence, \$250 000 in business equity, \$15 000 in vehicle equity, and \$1000 for other assets. Other assets includes the value of accounts in financial institutions, private trusts, shares, debentures and bonds, residential property besides the place of residence, non-residential property, and ‘other assets not elsewhere classified’ by the Household Expenditure Survey.

Data source: Commission estimates based on ABS (*Household Expenditure Survey, 2009-10*, Cat. no. 6503.0, Confidentialised Unit Record File).

Very different proportions of households are eligible for the different criteria of the assets test. Most households are not constrained by the allowances made for business and home equity — possibly because many households do not own businesses and rent their principal place of residence. The vehicle constraint is more binding, but still not applicable for most households. However, the low threshold for assessable assets means that the constraint on other assets — predominantly liquid assets — renders about 80 per cent of households ineligible for aid without making a contribution.

H.2 How much would it cost to provide more legal aid services?

The Commission, in recommendation 21.4, proposes more funding be provided to legal assistance services for three purposes:

- to maintain existing frontline services that have a demonstrated benefit to the community
- to relax the means tests applied by the LACs and allow more households to be eligible to receive their grants of legal aid
- to provide grants of legal aid in areas of law where there is little assistance being currently provided, by either LACs or other legal assistance services.

The Commission estimates that the collective cost of this recommendation is around \$200 million per annum, and should continue as an interim arrangement until sufficient data can be collected to better inform funding of legal assistance services (chapters 21 and 25). This section describes in detail how these estimates were derived.

Providing funding to maintain existing frontline services

Recent decisions taken in the 2013-14 Mid-Year Economic and Fiscal Outlook (MYEFO) Statement and 2014-15 Budget reduced funding to all four legal assistance providers (Australian Government 2013). The announced reductions in funding from MYEFO totalled around \$43 million over four years, and were designed to limit policy reform and advocacy activities:

The Government will achieve savings of \$43.1 million over four years by removing funding support for policy reform and advocacy activities provided to four legal assistance programmes. Funding for the provision of frontline legal services will not be affected. (Australian Government 2013, p. 119)

The distribution of these changes in funding, over four years (2013-14 to 2016-17), comprised:

- a \$6.5 million reduction to the LACs
- a \$19.6 million reduction to the Community Legal Services Program (CLSP), directed to the community legal centres (CLCs)
- a \$13.3 million reduction to the Aboriginal and Torres Strait Islander Legal Services (ATSILS)
- a \$3.7 million reduction to the Family Violence Prevention and Legal Services (FVPLS) — however, this change in funding did not eventuate (table 20.4).

A further reduction of \$15 million to LACs was made in the 2014-15 Budget for that financial year.

However, these adjustments to funding should be considered against the wider context of additional funding that was provided in the 2013-14 Budget. In that budget, additional funds of \$30 million were provided to LACs over two years to undertake work in civil areas of law. (The subsequent \$15 million reduction in the 2014-15 Budget represented an early end to the provision of those funds.) An additional \$10.4 million for four years was also provided through the CLSP (table 20.4).

That said, many legal assistance services have stated that the changes to funding as part of the 2013-14 MYEFO and 2014-15 Budget have affected frontline services. For example, the National Aboriginal and Torres Strait Islander Legal Services stated in respect to the changes outlined in the MYEFO:

[I]mplementing the announced funding cuts cannot simply be done by removing dedicated law reform and advocacy positions. Given how law reform and advocacy work is shared amongst multiple people with responsibility in areas of frontline services, the implementation of the announced funding cuts will mean that cuts to frontline service delivery will have to be made. Furthermore, ATSILS allocate very few resources to law reform and advocacy work, and the size of the announced funding cuts far exceed what is spent in this area meaning that in order to implement such, other frontline services are going to have to be withdrawn. (sub. DR327, p. 2)

The Commission is satisfied that the changes to funding as part of the 2013-14 MYEFO and 2014-15 Budget have affected frontline legal services (chapter 21). The Commission considers that these adjustments to funding be altered, and funding restored to the LACs and ATSILS. The resulting total cost to the Commonwealth would be around \$34.8 million over four years (or around \$8.7 million per year). Consistent with recommendation 21.6, more information around appropriate funding levels should then be available to make a comprehensive assessment of what funding is needed for each legal assistance provider.

The case for returning CLSP funding back to the level of the 2013-14 Budget is not as strong. The additional funding provided in that budget comprised of new, additional funds as well as a transfer of funds previously allocated to other government programs (summarised in table 20.4). In practice, it appears that Environmental Defenders Offices

(EDOs) benefited from the additional funding in the 2013-14 Budget, but then lost these gains, as well as funding for their operating budgets, as part of the 2013-14 MYEFO decisions.

Consequently, the Commission considers that the Commonwealth should provide funding for the operating costs of the EDOs (of around \$1 million per year, over four years), but does not see merit in restoring to the EDOs those additional funds that they received in the 2013-14 Budget. This adjustment, in conjunction with returning the other CLSP funding that was withdrawn in the 2013-14 MYEFO, would cost the Commonwealth a total of \$10.6 million over four years (or around \$2.6 million per year).

In total, the cost of these proposals is \$45.4 million over four years (or around \$11.4 million per year).

Providing additional funding to the LACs to relax their means tests

The Commission has used a variety of data sources in order to cost the recommendation about relaxing the means tests applied by the LACs for civil (including family) matters. These include:

- unpublished administrative data from Victoria Legal Aid (VLA) on the number and average costs of services provided, by matter and method (grants of aid, duty lawyer services, minor assistance services, and information services)
- unpublished administrative data from Legal Aid New South Wales (LANSW) on the number of services provided by matter and method, along with the average cost of grants of aid fulfilled by private practitioners
- published data from the National Legal Aid (NLA) website, which shows the total expenses for each legal aid commission
- the ABS 2009-10 Household Expenditure Survey (HES), which provides information around the distribution of income and assets of households.

However, these data have some limitations. The data provided by the LACs contains some gaps. For example, the data from VLA only contains a sampling of costs for grants of legal aid (which make up the largest proportion of LAC expenditure) at private practitioner rates. Similarly, LANSW was only able to provide the average cost of grants of legal aid for private practitioner rates. This means that there are no data on the cost of providing ‘in-house’ grants of legal aid. To account for this, the Commission has calculated the total cost of grants of aid at private practitioner rates, then ‘scaled down’ the result by a factor equal to the number of grants of aid provided in-house as a share of total grants of aid. Such a method implicitly assumes the same ratio of in-house grants of aid to private practitioner grants in any costing calculation.

Another limitation is that LANSW was unable to provide cost estimates for providing duty lawyer services, minor assistance, and information services (but were able to provide the

number of each). To cost these services, the VLA costs have been applied to the LANSW figure as they represent the closest substitute for which detailed data are available. Such a process is not ideal, but is consistent with cost-benefit analysis methods (Department of Finance and Administration 2006).

The data provided by VLA and LANSW have been used to derive the total costs of providing legal services for civil (including family) law matters in those jurisdictions for 2012-13. The resulting estimates, combined with the NLA data, allow for the proportion of costs associated with providing legal aid in those areas of law. This proportion was then applied nationally to determine an imputed total national cost for civil (including family) law services — around 35 per cent of total expenses.

The HES data have been used to plot a distribution of income and assets that, depending on where thresholds are drawn, define how many people are in scope for legal aid. A baseline case is first set by picking a representative income and assets test based on those estimated by the Commission to be eligible for a grant of legal aid (section H.1) — around 8 per cent of households. Changes to the means test allow for a new proportion of households eligible for legal aid to be estimated, and it is the proportionate change between this and the baseline case that determines the additional funding required (by applying it to the national total for civil, including family, law matters).

Choosing a ‘baseline’ set of eligibility requirements

The Commission has used a simplified approach that considers equivalised household disposable income (box H.1) and a single, combined measure of net assets to determine changes in eligibility. This is a simpler approach than the means tests commonly employed by the LACs as it does not make different allowances for different assets. The choice of this approach has been made on the grounds that it is the limits on ‘other assets’ that are the main binding constraint, rather than the specific asset types commonly considered (figure H.1).¹

An initial, or ‘baseline’ set of income and assets parameters is necessary in order to determine proportional changes in the number of households eligible for legal aid. This baseline set of income and net assets is chosen by examining the distribution of income and assets for those households found to be eligible under the ‘notional’ national parameters discussed in section H.1. This indicates that:

- a median equivalised disposable household income of approximately \$400 per week (or around \$20 000 per year)
- most households had net assets of less than \$150 000.²

¹ In practice, moving towards a ‘pooled’ assets test is effectively equivalent to relaxing the most restrictive assets test first, and then the next most restrictive, and so forth.

² While there could be concerns that such a baseline would omit those that are ‘asset-rich’ and ‘income-poor’, such as some Age Pension recipients, it should be noted that those older than 65 comprise less than 3 per cent of VLA and LANSW clients, and so do not materially affect the costing estimates.

These parameters were used to calculate the baseline case, which in turn indicate that around 8 per cent of households are eligible for grants of legal aid.

Box H.1 Equivalised disposable household income

Comparing the relative wellbeing and economic resources of households is difficult because different households can have different compositions. Comparing the income of a single-person household to that of a couple, who are both employed, with several dependants can be misleading. Some adjustment is necessary to take account of different compositions of households for meaningful analysis.

One established method to do this is to use ‘equivalence scales’ — factors that control for different compositions of households — to weight income in order to make meaningful comparisons. Applying these equivalence scales means that the resulting ‘equivalised’ income can be viewed as an indicator of the economic resources available to a standardised household. This enables more accurate comparisons across households to be made.

The ABS HES contains equivalence scales based on a ‘modified OECD’ approach, and these scales are used by the Commission for its analysis.

Source: ABS (Household Expenditure Survey, 2009-10, Cat no. 6305.0, Household Expenditure Survey User Guide, pp. 132–137).

Increasing the number of households eligible for legal aid in civil including family matters

As discussed in chapters 21 and 25, the Commission has recommended that, once further work has been done to improve the evidence base, further analysis and consideration should be given to the quantum of funds necessary to provide legal aid services for those where there is a net benefit from doing so.

At present, however, based on limited data, the number of households eligible for legal aid appears to be very low. Indeed, some means tests are below some common measures of poverty — such as the Henderson Poverty Line and the OECD Relative Poverty Line (described in box H.2). The Commission is not proposing to increase the means test to these levels, although notes that VLA has indicated that the latter benchmark may be an ‘appropriate starting point’ when determining future means tests:

We’ve acknowledged ... the OECD as a starting point, it’s not an end point, and we recognise that there would be different ways to approach the question of financial eligibility or someone’s lack of capacity to meet the full cost of their own legal representation for very severe life-affecting issues. (trans., p. 741)

There are many measures of disadvantage that consider factors beyond relative income, such as including combinations of assets, income and consumption, length of time in poverty, and broader measures of social exclusion (McLachlan, Gilfillan and Gordon 2013). Each of these has benefits and drawbacks when considered as a measure to determine eligibility for legal aid. For example, measures of deprivation — which look at

going without or being unable to afford particular goods and services — may be a poor measure to use to determine eligibility for legal aid as the deprivation in question may not be related to legal need.

Box H.2 Measures of relative poverty

Two commonly used poverty lines are the Henderson Poverty Line and the OECD Relative Poverty Line.

- The Henderson Poverty Line defines benchmarks of poverty on the basis of equivalised disposable income for different household types. A recent estimate found that around 12.4 per cent of Australians were below this poverty line (Melbourne Institute of Applied Economics and Social Research 2013).
- The OECD Relative Poverty Line is defined as household income below 50 per cent of median equivalised household disposable income. Statistics from the OECD indicate that about 13.8 per cent of Australians were below this poverty line (OECD 2014). Another estimate, which used a different measure of equivalised disposable income and other assumptions, found that around 10.3 per cent of Australians were impoverished (McLachlan, Gilfillan and Gordon 2013).

However, these measures do not consider assets in their calculation. One measure that does — a measure of financial poverty (Headey, Krause and Wagner 2009) — considers both equivalised household income as well as a household's net worth. Households with less than \$200 000 or little in the way of liquid assets are considered to be poor. It was estimated in 2008 that around 13.7 per cent of the population was classified as poor under this measure.

Regardless of the relative poverty measure used, the proportion of the population considered poor is higher than the proportion of the population eligible for grants of legal aid from LACs under their means tests. This indicates that many households, despite being financially disadvantaged, may still fail the means tests for grants of legal assistance, or be required to make a contribution towards the cost of their case from a position of meagre resources.

An even smaller proportion would be likely to receive a grant of legal aid once the other methods of rationing are considered (chapter 21).

The choice of a measure of disadvantage to determine eligibility for legal assistance services should also be judged against the costs and benefits of providing services for different matters to those with other dimensions of disadvantage. While legal aid could be used to solve various legal needs, it may be the case that it is more cost effective to resolve those needs through, or in conjunction with, other services (which in turn may have their own means tests). Accordingly, more information is needed to best identify the measure or measures that should best be used to determine eligibility for legal aid. The recommendations in chapter 25 outline the best way to improve the evidence base in order to achieve this.

That said, there is clear evidence at present to suggest that legal assistance services are not fully meeting the legal needs of either the impoverished or the disadvantaged as intended, due to a lack of resources (chapters 21 and 22). A review of the National Partnership Agreement governing legal assistance services by the Allen Consulting Group found that

present funding arrangements for LACs mean that legal aid is failing to provide services to the disadvantaged clients that need them:

Current arrangements do not equip legal aid commissions to provide grants of legal aid to all disadvantaged clients in all matters within stated service priorities, nor do the eligibility principles and service priorities draw a clear line between the types of matters and clients that should attract Commonwealth funded legal assistance services, and those where services should not be provided, or should be provided through other mechanisms. (2014, p. 113)

Given the low number of households eligible for grants of legal aid, and evidence to suggest that financially disadvantaged households may be ineligible, the Commission has calculated the cost of relaxing the means test, relative to the ‘notional’ national case described above. Because there is a lack of data at present to indicate what proportion of households should be eligible for assistance, the Commission has calculated the cost of increasing the means test (both income and assets) by 10 per cent, relative to the baseline case described above,³ on the grounds that such a policy represents a reasonable interim arrangement. Such an increase would lead to around 10 per cent of households (or about 9 per cent of the population) being eligible for legal aid services in civil and family matters — a proportion that more closely matches the share of households experiencing relative poverty. Such a shift would also move the eligibility requirements closer towards means tests applied to some other government benefits.

The Commission estimates that increasing the means test by 10 per cent for civil (including family) matters would cost an additional \$57 million per year. The Australian Government should provide the bulk of this funding (given that this money would be used to assist clients in areas of Commonwealth law under existing guidelines). The Commission estimates that such a proposal would increase the number of people eligible for grants of aid in civil (including family) matters from around 1.4 million to 1.9 million.

Sensitivity testing the relaxing of the means test

The accuracy of this additional cost can be tested for sensitivity by considering the estimated costs for different changes to the baseline case (table H.3). The sensitivity testing estimates a range of costs from \$38 million to \$122 million. The higher estimates represent cases where the baseline considered often comprises a very small number of households, which in turn leads to large proportional increases when the means test is increased. Conversely, the lower estimates result from smaller proportional changes in the number of households considered eligible.

One factor that should be noted is the small range of changes in estimates of cost within the income bands (the columns of table H.3). This indicates that once the ‘other assets’ test is relaxed, the binding variable that controls eligibility is primarily income. This highlights

³ That is, to an equivalised disposable household income of \$22 000 per year and total net assets of \$165 000.

the importance of relaxing the means test on other assets (or raising the general assessable asset limit) when increasing eligibility.

Table H.3 Sensitivity testing of the cost of raising the means tests by around 10 per cent for civil and family matters^{a,b}

Change in net household assets	Change in equivalised net disposable household income				
	\$18 000 to \$20 000	\$19 000 to \$21 000	\$20 000 to \$22 000	\$21 000 to \$23 000	\$22 000 to \$24 000
	\$m	\$m	\$m	\$m	\$m
\$130 000 to \$142 500	116	84	56	38	39
\$140 000 to \$155 000	122	89	61	42	43
\$150 000 to \$165 000	113	84	57	39	40
\$160 000 to \$175 000	113	84	57	39	41
\$170 000 to \$187 500	112	85	59	40	42

^a **Bold** denotes the Commission's preferred estimate. ^b The discreteness of the data does not always allow for an exact 10 per cent increase in income and assets measures, and so the proportional change in some categories may be greater than others.

Sources: Commission estimates based on unpublished VLA and LANSW data; ABS (*Household Expenditure Survey, 2009-10*, Cat. no. 6503.0, Confidentialised Unit Record File).

Providing additional funding for grants of aid in civil matters

Increasing the means test for the present range of services offered would still leave considerable gaps in coverage because LACs do not offer grants of aid in many civil matters. Some areas of civil law are covered by the other legal assistance services, but the Commission has heard many instances where coverage has been 'wound back' or where LACs have suggested that there is unmet legal need in particular areas, but do not have the resources to cover it (chapter 21). For example:

Then there's looking at areas of law in which we're not adequately meeting unmet need. Particularly in the civil law space we accept that we will never be able to cover the field, but in running effective niche civil law practices which can spotlight systemic problems and tackle issues at their source ... we can contribute to the avoidance of legal problems for other people who will never actually be a client. (VLA, trans., p. 744)

However, when pressed on the extent of unmet legal need for civil (as well as family matters), no LAC was able to provide a concrete figure on the level of unmet need, or how much additional funding would be necessary to close the perceived 'gap' in legal services. The inquiry process revealed a number of anecdotes relating to unmet need in the civil

space, but quantifying the costs of resolving that need and the benefits from doing so is not possible to do accurately on such evidence.

The observation that problems tend to be associated, or ‘cluster’, with family law matters suggests that more assistance is needed for other civil law matters. The *Legal Australia-Wide Survey* found that family problems often clustered with ‘credit and debt’ problems, and that those with family law problems also frequently had disputes in areas of consumer, criminal, government (including benefits), housing and rights (Coumarelos et al. 2012, pp. 88–89). Given that LACs have identified and provide services to those with family law matters, these data indicate that assistance is needed for other civil matters as well.

On this basis, the Commission has examined the option of increasing the number of (non-family) civil grants of aid to match the number of grants presently provided for family matters — an increase of around 40 000 grants, annually. This represents a substantial increase in the total grants of legal aid, given that (non-family) civil matters are not well covered by LACs at present.

The present lack of coverage in (non-family) civil matters makes it difficult to cost such a proposal with accuracy. Because the LACs do relatively little casework for civil (other than family) matters, the cost information provided by VLA and LANSW may not be a good indicator of the funding they would require if they were to increase their caseload in this area of law. Another issue is the relatively skewed nature of the other civil casework at present — some areas of civil law (besides family) receive a much greater number of grants of legal aid than others. However, while such data may be imperfect, it is the most reliable source that the Commission has had access to at this particular level of disaggregation.

The data about grants of legal aid undertaken by private practitioners provided to the Commission indicated that the cost of a grant of aid for a civil matter ranged from \$1923 (for matters relating to mental health in New South Wales) to \$24 988 (for consumer matters, including consumer credit, in New South Wales).⁴ The weighted cost of a civil grant of aid currently undertaken by VLA and LANSW — based on their cost weighted by their incidence — is around \$3100.

Accordingly, the cost of providing an additional 40 000 grants of aid for civil matters is in the order of \$124 million. In practice, however, there are likely to be considerable savings in achieving this goal if LACs were able to use in-house lawyers to provide these grants instead of private practitioners. Governments should give consideration to recommendation 21.3 (relaxing the constraints around the use of in-house lawyers by the LACs) to allow such potential savings to be fully realised. State and territory governments should provide the bulk of this funding on the grounds that most of the civil matters (outside of family matters) relate to state and territory areas of law.

⁴ The number of grants of aid for consumer matters is relatively low in New South Wales, and the high average cost reported here reflects the effect of a few complex cases.

Sensitivity testing the provision of additional grants of civil aid

A lack of comprehensive cost data for grants of aid in civil matters means that it is difficult to provide an exact figure or confidence interval around the cost of providing these additional grants of aid. One method of sensitivity testing these additional grants of aid is to cost them at the private practitioner rates in the areas of civil law most commonly provided by VLA and LANSW. Two areas of law — financial matters and government matters — are currently provided more often than other civil matters (although they themselves are far less common than areas of family law). Costing an additional 40 000 grants of civil aid at those rates yields an estimate between \$80 million and \$130 million, respectively.

The Commission estimate of \$124 million is towards the higher end of this estimate, reflecting the relatively high cost of grants of aid in civil areas of law (outside of family law) where there are currently fewer cases undertaken by VLA and LANSW — such as migration, housing and human rights. An estimate towards the higher end of the band is considered credible as costs may rise if LACs expand into providing more services in these areas of law.

Summary

The combined cost of these proposals is around \$192 million per year, comprising:

- \$11.4 million per year to maintain existing frontline services
- around \$57 million per year to relax the means tests for LACs
- around \$124 million per year to provide additional grants of aid in civil matters.

However, the Commission has recommended a funding increase of around \$200 million (recommendation 21.4), due to a number of sensitivities around the methodology employed. These include:

- the potential for a higher cost of providing private practitioner services than what is currently being paid at present (as an increase in the demand for the services has the scope to raise prices)
- concerns that increasing the means test could alter the ‘mix’ of problems faced by those seeking legal aid, and so alter the costs of grants of aid
- uncertainties around how the intensity, or number of problems per household, changes as the means tests are relaxed.

These factors highlight the need for greater data collection to better understand the cost drivers and legal problems facing those who need legal assistance services. The challenges of building such an evidence base are discussed in chapter 25.

There is also a question as to which level of government should bear the cost of recommendation 21.4. Based on the present principle used under the current National Partnership Agreement — that ‘Commonwealth money should be attached to Commonwealth matters’ — the Commission estimates that around 60 per cent of the cost associated with recommendation 21.4 should be borne by the Commonwealth. This reflects the cost of changes in funding from MYEFO and the Budget, and the cost of additional family law matters from relaxing the means tests, which are largely Commonwealth responsibilities. The cost of providing grants of aid for these additional non-family civil matters would be more evenly shared between the Commonwealth and the states.

Re K Factors

- (i) Cases involving allegations of child abuse, physical, sexual, psychological;
- (ii) Cases where there is apparently intractable conflict between parents;
- (iii) Cases where the child is apparently alienated from one/both parents;
- (iv) Where there are real issues of cultural/religious difference affecting the child;
- (v) Where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare;
- (vi) Where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare;
- (vii) Where there are issues of significant medical, psychiatric, or psychological illness or personality disorder in relation to either party or a child or other person having significant contact with the child;
- (viii) Any case in which, on the material filed by the parents, neither seems a suitable custodian;
- (ix) Any case in which a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent;
- (x) Where one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child;
- (xi) Cases where it is proposed to separate siblings;
- (xii) Custody cases where none of the parties is legally represented;
- (xiii) Applications in the Court's welfare jurisdiction relating to the medical treatment of children where the child's are not adequately represented by one of the parties.

End.